BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 57 of 2015-16
S.A. No. 63 of 2015-16
S.A. No. 64 of 2015-16
&
S.A. No. 65 of 2015-16

(Arising out of orders of the learned JCST, Cuttack-II Range, Cuttack in Appeal Nos. AA/698/CUII/2002-03, disposed of on 12.08.2015; and AA/280/CUII/2007-08, AA/281/CUII/2007-08 & AA/CUII/95/2008-09, disposed of on 26.10.2015)

Present: **Shri G.C. Behera, Chairman**
Shri S.K. Rout, 2nd Judicial Member &
Mr. J. Khan, Accounts Member-III

M/s. SMV Beverages Pvt. Ltd.,
Formerly – M/s. Tripty Drinks Pvt. Ltd.,
New Industrial Estate, Jagatpur, Cuttack ... Appellant

-Versus-

State of Odisha, represented by the
Commissioner of Sales Tax, Odisha,
Cuttack ... Respondent

For the Appellant : Sri S.K. Mishra, Advocate
Sri S.V. Ramana, C.A. &
Sri B.B. Mohanti, A/R
For the Respondent : Sri S.K. Pradhan, Addl. SC (CT)

Date of hearing : 27.12.2023 *** Date of order : 25.01.2024

O R D E R

All these four second appeals relate to the same party and for the different periods involving common question facts and law. Therefore, they are taken up for disposal by this composite order for the sake of convenience.

S.A. No. 57 of 2015-16 :

2. Dealer assails the order dated 12.08.2015 of the Joint Commissioner of Sales Tax, Cuttack II Range, Cuttack (hereinafter called as 'First Appellate Authority') in F A No. AA/698/CUII/2002-03 enhancing the demand raised in assessment order of the Sales Tax Officer, Cuttack II Circle, Cuttack (in short, 'Assessing Authority') for the year *2000-01*.

S.A. Nos. 63 to 65 of 2015-16 :

3. Dealer is also in appeal against the orders dated 26.10.2015 of the First Appellate Authority in F A Nos. AA/280/CUII/2007-08, AA/281/CUII/2007-08 & AA/CUII/95/2008-09 confirming the assessment orders of the Assessing Authority for the *Q.E. 30.06.2004, Q.E. 30.09.2004 & for the period 01.10.2004 to 31.03.2005*.

4. The facts of the cases, in brief, are that –

M/s. SMV Beverages Pvt. Ltd. is a medium scale industry engaged in manufacture and sale of soft drinks, fruit based beverages under the franchise of Pepsi Foods Ltd. The assessments relate to the year 2000-01; Q.E. 30.06.2004, Q.E. 30.09.2004 & for the period 01.10.2004 to 31.03.2005. The Assessing Authority raised tax and surcharge of ₹57,39,607.00 for the year 2000-01 u/s. 12(4) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act'); ₹1,25,57,145.00 for the Q.E. 30.06.2004; ₹74,42,349.00 for the Q.E. 30.09.2004; and ₹24,15,150.00 for the period 01.10.2004 to 31.03.2005 u/s. 12(6) of the OST Act.

Dealer preferred first appeals against the orders of the Assessing Authority before the First Appellate Authority. The First Appellate Authority enhanced the tax demand to ₹1,39,95,151.00 for the year 2000-01 in *ex parte* and confirmed the assessment orders for the Q.E. 30.06.2004, Q.E. 30.09.2004 & for the period 01.10.2004 to 31.03.2005. Being aggrieved with the orders of the First Appellate Authority, the Dealer prefers these appeals. Hence, these appeals.

The State files cross-objections in all these second appeals.

5. The learned Counsel for the Dealer submits that the incentives under IPR'1996 is guided by Resolution of IPR, 2001 and the same cannot be curtailed by SRO No. 622/1999 dated 30.07.1999 as the same is not applicable to the present fact and circumstances of the case. He further submits that the soft drinks cannot be taxed @ 12% by treating the same in the taxable group of aerated water. He urges that the Assessing Authority and First Appellate Authority wrongly disallowed the incremental exemption on the EMD unit. He also contends that the learned Assessing Authority and First Appellate Authority went wrong in levying 12% tax instead of 8% and curtailing the incentives granted under IPR, 1996, which is otherwise bad in law and needs interference in appeal.

He relies on the decision in case of ***M/s. C.d. Kali v. State of Karnataka***, reported in **ILR 1997 Kar. 592**.

6. Per contra, the learned Addl. Standing Counsel (CT) for the State submits that the Assessing Authority rightly levied 12% instead of 8% as claimed by the Dealer since the soft drinks cannot be treated as fruit juice and fruit pulp. He further submits that the State has withdrawn the incentives granted to the industries taking into consideration the financial constraint of the State. The Assessing Authority and First Appellate Authority rightly disallowed the benefit claimed for EMD unit as the same is over and above the existing capacity from the date of commercial production and the Dealer has already availed the ceiling limit. So, he submits that the orders of the Assessing Authority and the First Appellate Authority are reasoned one and the same need no interference in appeal.

7. Heard the rival submissions of the party, gone through the orders of the First Appellate Authority and Assessing Authority vis-a-vis the materials available on record.

In S.A. No. 57 of 2015-16, the Dealer challenges the impugned order on the ground that order of withdrawal of incentives under SRO No. 622/1999 dated 30.07.1999 is not applicable to the Dealer's Unit as the same was set up under IPR, 1996.

In assessment, the Assessing Authority found that the Dealer has availed sales tax exemption of ₹71,78,734.32 (@ 12% of ₹5,98,22,786.00) during the year 2000-01 out of the ceiling limit of ₹612.30 lakhs. The Assessing Authority determined the GTO at ₹28,98,43,409.00 by enhancing ₹4,14,40,192.00 towards container charges. After allowing deductions towards sales to registered dealers against declaration Form-XXXIV, sale of tax exempted goods to the dealers under IPR, 1996, sale of first point tax paid goods and collection of sales tax, determined the TTO at ₹17,08,23,141.75 and levied tax and surcharge thereof.

In appeal, the First Appellate Authority enhanced the TTO from ₹17,08,23,141.75 to ₹23,06,45,927.75 thereby enhanced the tax liability.

The Assessing Authority had allowed sales tax exemption on sale of beverages and cold drinks worth ₹5,98,22,786.00 as per SRO Nos. 475/96 & 476/96 dated 26.07.1996. After allowing due opportunity, the First Appellate Authority observed that the Assessing Authority had wrongly allowed the exemption to the Dealer in contrary to the Finance Department Notification No. 33558/F., dated 30.07.1999 wherein 12 nos. of items were omitted from tax free schedule by enlisting the list of ineligible units w.e.f. 01.08.1999.

The record reveals that the Dealer was dealing in soft drinks and fruit based beverages under the franchise of Pepsi Foods and business of trading soft drinks purchasing from M/s. SMV Beverages, Jagatpur as first point tax paid goods. The Dealer was availing tax exemption under IPR, 1996 for a period of five years till 09.05.2001 from the date of commercial production i.e. w.e.f. 10.05.1996, subject to other restrictions as per the DIC

certificate and Finance Department Notification Nos. 475/96 and 476/96 dated 26.07.1996.

The Dealer has disclosed the GTO at ₹24,84,03,217.00 and TTO at ₹12,92,14,340.00 and paid tax & surcharge of ₹1,78,31,572.00 as per return. The Dealer has availed first point tax paid sales to the tune of ₹4,35,46,887.00, tax exempted sales of ₹5,98,22,786.00, sales to registered dealer amounting to ₹3,13,483.00 and collection of ST to the tune of ₹1,55,05,715.00.

It is not in dispute that the Dealer had started its commercial production w.e.f. 10.05.1996 and it was entitled to avail ST exemption for five years on incremental sales. It is also not in dispute that the Dealer has availed exemption on net value of ₹5,98,22,786.00 @ 12% out of ceiling amount of ₹612.30 lakhs. The Assessing Authority had allowed the same. The First Appellate Authority found that 12 items were omitted from tax free schedule by enlisting the list of ineligible units w.e.f. 01.08.1999 under Finance Department Notification No. 33558/F, dt. 30.07.1999. He further observed that the items of Sl. Nos. 48 to 52 were inserted in the list of ineligible units. On such finding, the First Appellate Authority disallowed the sales of tax exempted goods to the dealers under IPR, 1996 as allowed by the Assessing Authority.

The Dealer challenges such disallowance of exempted sales in this forum relying on the resolution of IPR, 2001. Clause 15.3 of IPR, 2001 is reproduced herein below for better appreciation :-

> "15.3 The industrial units enjoying or eligible for the benefits under IPR'89 and pre-89 IPRs will not get sales tax incentives after 31.7.99 as per F.D., S.R.O. No. 622/99 dated 30.7.99, S.R.O. No. 623/99 dated 30.7.99, S.R.O. No. 624/99 dated 30.7.99 and S.R.O. No. 625/99 dated 30.7.99. However, industrial units enjoying benefits under IPR'92 and IPR'96 as on 1.1.2000 will continue to get sales tax incentives for the period they are entitled under the respective policies."

Bare perusal of the aforesaid guideline which reveals that the industrial units enjoying or eligible for the benefit under IPR'89 and pre-89 IPRs will not get sales tax incentives after 31.07.1999 as per SRO Nos. 622/99 to 625/99 dated 30.07.1999. But, the industrial units enjoying benefits under IPR'92 and IPR'96 as on 01.01.2000 will continue to get sales tax incentives for the period they are entitled under the respective policies. It is not in dispute that the present Unit was not enjoying IPR'96 benefit as on 01.01.2000. Therefore, the First Appellate Authority wrongly appreciated the material fact and disallowed the exemption, whereas the Assessing Authority has rightly allowed such exemption to the Dealer.

8. In S.A. Nos. 63 to 65 of 2015-16, the Assessing Authority levied 12% tax instead of 8%. The First Appellate Authority confirmed the said finding of the Assessing Authority.

Though the learned Counsel for the Dealer has taken several grounds from A to J, but it revolves around the issues that –

(i) whether the Dealer is entitled to the exemption under IPR'96; and

(ii) whether the sale of slice can be taxed @ 12% treating as soft drinks instead of 8%.

9. As regards issue No. (i), the record reveals that the Certificate is valid from 10.05.1996 to 09.05.2001. The record further reveals that the Dealer is eligible for exemption of sales tax on sale of its finished products to the extent of incremental sale over and above that existed prior to the commencement of EMD for a period of five years from the date of commercial production under IPR'1996 subject to such restrictions and conditions laid in Finance Department Notification Nos. 475/1996 & 476/1996 dated 26.07.1996.

The assessment order also reveals that the Unit has undertaken expansion/modernisation/diversification on 10.05.1995 under IPR'1996 and

the eligibility certificate was communicated vide Memo No. 7210(3) dated 29.06.1998. It is not in dispute that the exemption is to the extent of incremental sale over and above the existing capacity. As the commercial production started on 10.05.1996, the Dealer is entitled to the benefit from 10.05.1996 to 09.05.2001. So, the Assessing Authority and First Appellate Authority committed no illegality in disallowing the exemption claimed for the periods under dispute.

10. As regards issue No. (2), the assessment order reveals that the Dealer carries on business of manufacturing, soft drinks and fruit based beverages under the franchise of Pepsi Food Ltd. and also carries on business of soft drinks purchasing from M/s. SMV Beverages, Jagatpur as first point tax paid goods. It further reveals that the Dealer consumes main raw materials like sugar, chemical, gasses, fruit pulps, etc. for production of finished products like Pepsi, Mirinda, Lemon (Appeal), Orange, Slice, Teem 7 Up. The Dealer used to purchase packing materials like paper box, empty bottles, crates and cooling equipments for trading his finished products in addition to other machineries and spare parts as required for the plant. The Assessing Authority observed that collection of tax @8% on slice is not justified and added the same to 12% taxable group.

Entry No. 4 of List-C of the OST Rate Chart prescribes tax @ 12% for aerated or mineral water sold in bottles or in sealed containers. Entry No. 66 prescribes tax @8% for fruit juice and fruit pulp. The Dealer claims that the soft drinks will come within the Entry No. 66 instead of Entry No.4. Hence, such submission of the Dealer is devoid of any merit.

Dealer relies on the decision in case of ***M/s. C.d. Kali*** cited supra, wherein Hon'ble Karnataka High Court were pleased to observe as follows:-

> "8. In view of the judgment of the High Court, it is therefore stated that the analytical report of the Central Food Technological Research Institute, Mysore indicating that maaza is a mango juice product and not an aerated RTS Beverage will

> not help to exclude the commodity from Entry 8(iii) of Part F of II Schedule to the Karnataka Sales Tax Act, 1957. It is liable to be categorised under that entry only. Consequently, the turnover of the goods is liable to tax on its last sale point. We find no reasons to interfere with the order of the First Appellate Authority."

The decision of the above cited case relied on the Dealer is based on the entry of Karnataka Sales Tax Act, i.e., the relevant entry reads "Aerated water including soft drinks whether or not favoured or sweetened and whether or not containing vegetables or fruit juice or fruit pulp were sold in bottles, tins, canes or in any kind of sealed containers but excluding soft drink concentrates". The Entry No. 66 of List-C of the OST Rate Chart provides for fruit juice and fruit pulp. Entry No. 4 of List-C of the OST Rate Chart prescribes for aerated or mineral water sold in bottles or in sealed containers. Thus, the soft drink is prepared by utilizing fruit pulp as raw materials. Therefore, the soft drinks will neither come under Entry No. 4 nor 66. The same will come under the residuary entry of List-C, i.e. all other goods. Hence, the decision relied on by the Dealer is of no assistance to the present facts and circumstances of the case.

Bare reading of the assessment orders reveal that the Assessing Authority has not categorically observed that the soft drinks will come under the purview of Entry No. 4, i.e. aerated water, though levied tax @ 12%. The residuary entry of List-C of the OST Rate Chart prescribes for 12% tax. Fruit pulp and fruit juice are coming under the Entry No. 66 of List-C taxable @8%. The Dealer was not exclusively dealing with raw fruit pulp and fruit juice, but he is using the same as raw materials for manufacturing of soft drinks by adding other ingredients. So, the same will not come under Entry No.66 as claimed by the Dealer. Entry No. 4 of List-C deals with aerated water and mineral water sold in bottles or in sealed container. Therefore, the soft drinks will also not come under Entry No.4. Thus, the

soft drinks will certainly come in the residuary entry of List-C of the OST Rat Chart taxable @12%. As such, the Assessing Authority has rightly treated the soft drinks in the taxable group of 12% instead of 8% as claimed by the Dealer. So, we do not find any illegality or impropriety in the finding of the Assessing Authority and First Appellate Authority.

11. So, for the foregoing discussions, the First Appellate Authority went wrong in curtailing the incentives of IPR, 1996 in the aid of SRO No. 622/1999 dated 30.07.1999 for the year 2000-01, but the finding regarding levy of 12% tax is justified instead of 8% as the soft drinks do not come under the ambit of fruit juice and fruit pulp since the fruit pulp is only used as raw material to make the finished products and the same will come in the ambit of residuary entry, which is taxable @ 12%. So, we do not find any infirmity in the order of levy of 12% tax instead of 8%. Hence, it is ordered.

12. Resultantly, S.A. No. 57 of 2015-16 is allowed, the impugned order of the First Appellate Authority is set aside and that of assessment order is restored. S.A. Nos. 63-65 of 2015-16 are dismissed and the impugned orders of the First Appellate Authority are hereby confirmed. Cross-objections are disposed of accordingly.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member

I agree,

Sd/-
(J. Khan)
Accounts Member-III