BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 124 (C) of 2012-13
&
S.A. No. 1 (C) of 2013-14

(Arising out of order of the learned JCST, Jajpur Range, Jajpur Road in Appeal No. AA – 102 KJB (C) 2010-11, disposed of on 15.09.2012)

Present: **Shri G.C. Behera, Chairman**
Shri S.K. Rout, 2nd Judicial Member &
Shri B. Bhoi, Accounts Member-II

S.A. No. 124 (C) of 2012-13

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

-Versus-

M/s. Thakur Prasad Sao & Sons P. Ltd., Guali Iron Ore Mines, 334, Kamarjoda, Near TV Tower, Joda, Keonjhar ... Respondent

S.A. No. 1 (C) of 2013-14

M/s. Thakur Prasad Sao & Sons P. Ltd., Guali Iron Ore Mines, 334, Kamarjoda, Near TV Tower, Joda, Keonjhar ... Appellant

-Versus-

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

For the State : Sri D. Behura, S.C. (CT)
For the Dealer : Sri J.K. Das, Advocate &
Miss S. Mohanty, Advocate

Date of hearing : 09.03.2023 *** Date of order : 06.04.2023

O R D E R

Both State and the Dealer prefer these appeals against the same impugned order dated 15.09.2012 involving common question of facts and law. Therefore, they are taken up for disposal in this composite order for the sake of convenience.

S.A. No. 124 (C) of 2012-13 :

2. State assails the order dated 15.09.2012 of the Joint Commissioner of Sales Tax, Jajpur Range, Jajpur Road (hereinafter called as 'First Appellate Authority') in F A No. AA – 102 KJB (C) 2010-11 reducing the assessment order of the Asst. Commissioner of Sales Tax, Barbil Circle, Barbil (in short, 'Assessing Authority').

S.A. No. 1 (C) of 2013-14 :

Dealer is in appeal against the same order dated 15.09.2012 of the First Appellate Authority in F A No. AA – 102 KJB (C) 2010-11 reducing the assessment order of the Assessing Authority.

3. Briefly stated, the facts of the cases are that –

M/s. Thakur Prasad Sao & Sons P. Ltd. carries on business in mining of iron ore at Barbil and manufactures of sponge iron and MS ingots in the plant located at Rourkela. The assessment relates to the period 01.04.2007 to 31.03.2009. The Assessing Authority raised tax and penalty of ₹8,29,91,631.00 in the assessment proceeding u/s. 12(4) of the Central Sales Tax (Odisha) Rules, 1957 (in short, 'CST (O) Rules') basing on Fraud Case Reports (FCR).

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority reduced the tax demand to ₹3,27,64,542.00 and allowed the

appeal in part. Being aggrieved with the order of the First Appellate Authority, both State and Dealer prefer these appeals. Hence, these appeals.

Cross-objections are filed by both parties against each appeal.

4. The learned Standing Counsel (CT) for the State submits that the finding of the First Appellate Authority on export sales u/s. 5(1) and u/s. 5(3) of the CST Act are contrary to the law and facts available on record. He further submits that in absence of any fact regarding inextricable link between purchase order by the foreign buyer and the export sales, the same cannot be treated as export sales. He further submits that 'H' forms were incomplete and effective and the same should have been filed within stipulated time. So, he submits that the findings of the First Appellate Authority on such score are not sustainable in law and the same require interference in appeal.

In cross-appeal of the Dealer, learned Standing Counsel (CT) for the State supports the finding of the First Appellate Authority regarding disallowing export sales, imposition of penalty and adjustment of ITC and submits the order of the First Appellate Authority is proper in its perspective and the same warrants no interference.

5. Per contra, the learned Counsel for the Dealer in its appeal submits that the Dealer has no control over the purchasing dealer and levy of tax and penalty on account of contravention by the purchasing dealer, if any, is illegal and arbitrary. He further submits that the adjustment of ITC in the VAT assessment is contrary to the law and facts involved. He further submits that the said VAT appeal has already been set aside by this Tribunal on maintainability ground. So, he submits that the ITC amount should be adjusted against the CST due. He further submits that the finding of the First Appellate Authority regarding disallowing the benefit of export sales u/s. 5(3) of the CST Act without giving any reasonable opportunity to the Dealer to produce the statutory declaration is contrary to law. He further submits

that the imposition of penalty is not sustainable in law. So, he submits that the finding of the First Appellate Authority on this score requires interference in appeal.

In the cross-appeal of the State, the learned Counsel for the Dealer supports the finding of the First Appellate Authority and submits that the First Appellate Authority rightly arrived at a conclusion that the movement of goods is not required to record a finding that the export sales shall be treated as intra-State sales. He further submits that the Dealer has produced the relevant documents before the First Appellate Authority as an extended forum of assessment and the First Appellate Authority accepted the claim of export sales and the same requires no interference in appeal.

6. Heard the rival submissions and on going through the materials on record, it transpires from the assessment order that the Assessing Authority determined the GTO at ₹559,74,92,578.18 and NTO at ₹385,46,07,372.70 after adjusting the deduction of CST paid and export sales. The Assessing Authority calculated the tax of ₹12,17,76,383.88 at the appropriate rates. The Assessing Authority raised tax and penalty of ₹8,29,91,631.00 after adjusting the payment of admitted tax.

The First Appellate Authority disallowed the adjustment of ITC of ₹18,91,264.00 as the Dealer had no excess remaining ITC after adjustment against output tax under VAT. He allowed the turnover of export sale to the tune of ₹52,45,28,705.45 out of ₹55,51,84,270.00 as claimed by the Dealer and added to the rest turnover towards inter-State sale and levied tax @ 4%. The First Appellate Authority after deducting ₹19,10,85,241.00 from the GTO of the OVAT Act and added the same to the GTO of the CST Act. The turnover of ₹8,46,17,084.00 out of ₹19,10,85,241.00 was allowed as exempted sale u/s. 5(1) of the CST Act and disallowed the rest amount. Accordingly, the First Appellate Authority confirmed tax and penalty of

₹3,27,64,542.00 on the ground of non-submission of declaration form. Finally, the First Appellate Authority reduced the tax and penalty to ₹2,57,31,766.42 after adjustment of the payment of admitted tax and payment as per stay order.

7. The learned Standing Counsel (CT) for the State challenged the finding of the First Appellate Authority in its appeal regarding the claim of penultimate sale u/s. 5(3) of the CST Act to the extent of ₹52,45,28,705.45 and rest amount of ₹13,61,23,821.55 which was treated as inter-State sale. He further challenged the finding of export sale u/s. 5(1) of the CST Act to the tune of ₹6,70,65,056.00 of M/s. Sara International Ltd. and ₹1,75,52,028.00 of M/s. Devi Trading Co. Ltd.

On the contrary, the Dealer also challenged the finding of the First Appellate Authority confirming the tax demand of ₹1,09,21,514.14 and penalty of ₹2,18,43,028.28; export sale of ₹10,64,68,157.00 having tax effect of ₹42,58,726.28; penultimate export sale of ₹3,06,55,564.55 and disallowance of ITC of ₹18,91,264.00 in its appeal.

8. As regards the claim of penultimate export sale u/s. 5(3) of the CST Act to the tune of ₹52,45,28,705.45 and the rest amount of ₹13,71,23,721,55 treating as inter-State sale, the First Appellate Authority has to examine the fact that (i) there must be a sale, (ii) goods must actually be exported, (iii) and sale must be a part and parcel of the export.

The order of the Assessing Authority reveals that the Dealer had claimed to have effected export sale to the tune of ₹183,79,96,410.33 u/s. 5(1) of the CST Act and sale in course of export of ₹55,51,84,270.00 u/s. 5(3) of the said Act. It further reveals that the Dealer fails to produce supporting documents in respect of transaction of ₹19,10,85,241.00. So, the Assessing Authority treated the same as intra-State transaction and dealt separately in the assessment order passed under the OVAT Act.

In course of first appeal, the First Appellate Authority verified the bill landing and contract of sale produced by the Dealer in respect of ₹6,70,65,056.00 relating to Sara International Ltd. and ₹1,75,52,028.00 relating to Devi Trading Co. Ltd.. So, the First Appellate Authority allowed direct export sales to the tune of ₹8,46,17,084.00 out of ₹19,10,85,241.00 whereas the Dealer fails to produce any document in respect of the sales of ₹10,64,68,157.00. It shows that the First Appellate Authority rightly allowed the direct export sales of ₹8,46,17,084.00. So, the appeal of the State fails on such score.

Similarly, the First Appellate Authority rightly disallowed the turnover of ₹10,64,68,157.00 towards export sale due to want of documentary evidence. Therefore, the appeal of the Dealer also fails on this score.

9. As regards the penultimate sale of ₹55,51,84,270.00, the Dealer produced supporting 'H' form, copies of bills of lading and agreement for ₹49,20,60,253.00, but the Dealer fails to produce the documents relating to movement from the mining point to different siding/ports. So, the Assessing Authority disallowed the entire claim of penultimate sale. The First Appellate Authority verified the required documents and allowed a sum of ₹52,45,28,705.45 u/s. 5(3) of the CST Act. The State does not dispute that the First Appellate Authority has not verified the required documents to allow such exemption. So, the First Appellate Authority rightly allowed the 5(3) sale to the extent of ₹52,45,28,705.45 and the appeal of the State fails on this score. The Dealer has taken a ground in the appeal that the First Appellate Authority did not allow sufficient time to produce the documents. The Dealer did not produce any such document before this forum. So, the Dealer is not entitled to any relief on such score and the First Appellate Authority rightly disallowed the same.

The State claimed that the rest amount of ₹13,71,23,721.55 (₹3,06,55,564.55 + ₹10,64,68,157.00) should be treated as intra-State sale. The claim of penultimate export sale is for a sum of ₹55,51,84,270.00 and the First Appellate Authority allowed a sum of ₹52,45,28,705.45 towards 5(3) sales. So, the rest amount must be ₹3,06,55,564.55. The order of the First Appellate Authority reveals that the Dealer could not submit the 'H' form and supporting documents. So, the First Appellate Authority also disallowed ₹10,64,68,157.00 with a finding that the same is neither export sale u/s. 5(1) nor penultimate export sale falls u/s. 5(3) of the CST Act. Therefore, we do not find any illegality in the said order.

10. The Dealer claims that the First Appellate Authority rejected penultimate sale of ₹10,64,68,157.00 involving tax of ₹42,58,726.28. On perusal of the order of the First Appellate Authority, it reveals that the First Appellate Authority disallowed ₹10,64,68,157.00 out of ₹19,10,85,241.00 with a finding that the same is neither export sale u/s. 5(1) nor penultimate export sale falls u/s. 5(3) of the CST Act. The Dealer did not produce any document before this forum to substantiate aforesaid claim of export sale. So, the Dealer's appeal also fails on such score.

11. The Dealer also challenged the levy of penalty on the grounds i.e. (i) disallowance of ITC of ₹18,91,264.00 as the same was adjusted in VAT assessment; and (ii) on differential tax for non-submission of proof of export, Form 'H' and Form 'C'. As regards disallowance of ITC of ₹18,91,264.00 on the ground of adjustment in VAT assessment, the record shows that the Dealer has also come up in appeal in **S.A. No. 337 (VAT) 2012-13** relating to the period 01.04.2007 to 31.03.2009 against the VAT assessment u/s. 43 of the OVAT Act. The said appeal has already been allowed by quashing the assessment on the ground of maintainability of proceeding u/s. 43 of the OVAT Act. So, the claim of adjustment of ITC is

to be dealt in as per law. Further, as regards the penalty for non-submission of 'H' & 'C' forms, Hon'ble Court have been pleased to delete the penalty for the similar issue raised in **STREVE No. 64 of 2017** (***M/s. General Traders, Berhampur v. State of Odisha***) decided on 08.12.2022. So, in view of the decision cited supra, no penalty can be imposed for such non-submission of statutory declaration forms.

However, the Assessing Authority is at liberty to examine the materials on record to record a finding if interest can be levied for such default in submission of statutory forms as per law. So, at this stage, it is expedient to remit the matter to the Assessing Authority for assessment afresh keeping in mind the observations made above. Hence, it is ordered.

12. Resultantly, the appeal of the State (S.A. No. 124 (C) of 2012-13 is dismissed and the appeal of the Dealer (S.A. No. 1(C) of 2013-14 is allowed in part. The impugned order of the First Appellate Authority stands modified to the extent indicated above. The matter is remanded to the Assessing Authority for assessment afresh as per law keeping in view the observations made above within a period of three months from the date of receipt of this order. 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/-
(B. Bhoi)
Accounts Member-II