BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 273 (VAT) of 2018
&
S.A. No. 171 (ET) of 2018

(Arising out of orders of the learned Addl. Commissioner of Sales Tax (Appeal), Rourkela in Appeal Nos. AA 46(V) RL-I/ 2018-19 & AA 60 (ET) RL-I/ 2018-19, disposed of on 20.07.2018)

Present: **Shri G.C. Behera, Chairman**

M/s. Fee Grade & Co. (P) Ltd.,
At/PO- Main Road, Barbil,
Dist. Keonjhar ... Appellant

-Versus-

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

For the Appellant : Sri K. Kurmi, Advocate &
Miss R. Kurmi, Advocate
For the Respondent : Sri M.L. Agarwal, S.C. (CT)

Date of hearing : 23.02.2023 *** Date of order : 21.03.2023

O R D E R

Both these appeals relate to the same party and for the same period, but under different Acts. Therefore, they are taken up for disposal in this composite order for the sake of convenience.

S.A. No. 273 (VAT) of 2018 :

2. Dealer is in appeal against the order dated 20.07.2018 of the Addl. Commissioner of Sales Tax (Appeal), Rourkela (hereinafter called as 'First Appellate Authority') in F A No. AA 46(V) RL-I/ 2018-19 confirming the

assessment order of the Deputy Commissioner of Sales Tax, Rourkela I Circle, Uditnagar (in short, 'Assessing Authority').

S.A. No. 171 (ET) of 2018 :

The Dealer also assails the order dated 20.07.2018 of the First Appellate Authority in F.A. No. AA 60 (ET) RL-I/ 2018-19 confirming the order of the Assessing Authority.

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

M/s. Fee Grade & Co. (P) Ltd. is a mines owner and trades in iron ore and iron ore fines. The assessments relate to the period 01.04.2010 to 31.03.2013. The audit assessment u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') of the Dealer was completed earlier. The Assessing Authority raised tax and penalty of ₹2,57,844.00 in assessment proceeding u/s. 43 of the OVAT Act basing on the report of the Vigilance Officials. Likewise, the Assessing Authority raised tax and penalty of ₹64,461.00 in assessment u/s. 10 of the Odisha Entry Tax Act, 1999 (in short, 'OET Act').

Dealer preferred first appeals against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority confirmed the assessment orders and dismissed the appeals. Being aggrieved with the orders of the First Appellate Authority, the Dealer prefers these appeals. Hence, these appeals.

The State files cross-objections supporting the impugned orders of the First Appellate Authority confirming the orders of assessment to be just and proper in the facts and circumstances of the case.

4. The learned Counsel for the Dealer submits that the multiple proceedings u/r. 12(4) of the CST (O) Rules, OVAT Act and OET Act are pending besides the provisional assessment. He further submits that both the forums went wrong by recording a finding that the subject matter is intra-state sale instead of export sale as per the documents filed. He further

submits that the record of CST assessment is not available to record a finding that same has been closed and in absence of closure CST proceeding, the proceeding under the OVAT Act and OET Act are not tenable in law due to double taxation. So, he submits that the orders of the Assessing Authority and the First Appellate Authority are liable to be set aside in the interest of justice. He relies on the decision of Hon'ble Apex Court in the case of ***State of Karnataka v. Azad Coach Builders Pvt. Ltd. & Another***, reported in **[2010] 12 SCR 895** and the order dated 04.04.2019 of this Tribunal passed in **S.A. No. 136 of 2010-11** (M/s. Reliance Energy Ltd. v. State of Orissa).

5. On the other hand, learned Standing Counsel (CT) for the State submits that the First Appellate Authority already closed the 12(4) proceeding under the CST Act. He further submits that the alleged sale transaction between the Dealer and Ma/s. RML is intra-state sale but not penultimate sale. So, he submits that the orders of the First Appellate Authority and Assessing Authority are absolutely correct in its perspective and the same require no interference. He relies on the decision of the Hon'ble Court in the case of ***M/s. Dr. Sarojini Pradhan v. State of Odisha*** (**STREVE No. 39 of 2016**, decided on 04.11.2016) and the order dated 22.02.2016 of the Tribunal passed in **S.A. No. 117 (C) of 2013-14**.

6. Having heard the rival submissions and on careful scrutiny of the record, the record transpires that the Assessing Authority disallowed the claim of the Dealer with regard to penultimate sale u/s. 5(3) of the CST Act and held that the sale is intra-State sale and computed tax @ 4% on the sale turnover of ₹21,48,692.00 under the OVAT Act. The Assessing Authority raised tax of ₹2,57,844.00 along with penalty for the period under assessment. The First Appellate Authority dismissed the appeal and confirmed the order of assessment.

The learned Counsel for the Dealer has raised the point of maintainability of the proceeding u/s. 43 of the OVAT Act on the ground of prohibition of double taxation. The learned Standing Counsel (CT) for the State submits that the proceeding u/r. 12(4) of the CST (O) Rules has been closed, so the proceeding u/s. 43 is maintainable.

The First Appellate Authority in the impugned order observed that the 12(4) proceeding under CST (O) Rules has been closed on dated 04.02.2015, so on that ground, the First Appellate Authority did not accept the contention of the Dealer that proceeding u/s. 43 of the OVAT Act is not maintainable for the sake of double taxation in multiplicity proceeding for the self-same issue.

7. The assessment order reveals that the Assessing Authority turned down the export sale u/s. 5(3) of the CST Act and treated the same as intra-State sale on the ground that the seller and purchaser are stationed inside the State of Odisha and the agreement produced by the Dealer is a subsequent agreement which has been prepared in connivance with M/s. RML in order to escape from the charges of unlawful export sale.

The Dealer has produced an agreement executed on 25.03.2010 in between M/s. RML and the foreign buyer, i.e. China National Building Material & Equipments Import for supply of Indian Iron Ore Fines of 5,50,000 MT in between April, 2010 to March, 2011. The copy of agreement reveals that the port of loading is at Haldia and/or Paradeep and/or Vizag and/or Gangaveram. Form 'H' issued by M/s. RML reveals issuance for export of Iron Ore Fines for 1534.780 MT for a sum of ₹21,48,692.00 against the purchase order placed by M/s. RML to the Dealer on dated 30.07.2010. The Dealer has also filed a copy of purchase order dated 30.07.2010 placed by M/s. RML for export sale to the foreign buyer.

In case of ***Azad Coach Builders Pvt. Ltd.*** cited supra, Hon'ble Apex Court formulated the emerging principles for export sale u/s. 5(3) of the CST Act, the same are reproduced herein below for better appreciation :-

> "To constitute a sale in the course of export, there must be an intention on the part of both the buyer and the seller to export;
> There must be obligation to export, and there must be an actual export.
> The obligation may arise by reason of a statute, the contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export.
> To occasion export, there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it, without which a transaction sale cannot be called a sale in the course of export of goods out of territory of India."

Hon'ble Apex Court were further pleased to observe that the burden is entirely on the assessee to establish the link in transaction relating to sale or purchase of goods and to establish that the penultimate sale is inextricably connected with the export goods by the exporter to the foreign buyers. In the instant case, the Dealer has produced the inter se agreement between the exporter and foreign buyer dated 25.03.2010. In pursuance to such agreement, the exporter placed order with the Dealer on 30.07.2010 for sale of Indian Ore Fines for export. The 'H' form produced by the Dealer reveals the purchase details dated 30.07.2010 for export sale. It transpires that the Dealer has discharged its burden by establishing the link in transaction relating to penultimate sale of Indian Iron Ore Fines is connected with the export sale of goods by the exporter to the foreign buyer. So, in view of the decision cited supra, the Dealer has proved that the penultimate sale relate to sale in course of export. The Assessing Authority and the First Appellate Authority lost sight of it and fail to appreciate the materials

available on record. So, the same requires interference in the appeal for fresh adjudication on remand.

8. Now, coming to the dispute relating to the OET Act for the self-same period, the Assessing Authority observed that the sale transaction between the Dealer and M/s. RML for ₹21,48,692.00 is intra-State sale. He determined the same as GTO as well as TTO and levied entry tax @1%, which resulted in tax demand of ₹64,461.00 including penalty. The First Appellate Authority confirmed the same.

The Dealer has challenged the maintainability of proceeding u/s. 10 of the OET Act on the ground of double taxation in multiple proceeding for the self-same cause. The order of the First Appellate Authority under the OVAT Act reveals that proceeding u/r. 12(4) of the CST (O) Rules has been closed on 04.02.2015. The CST record is not available before us to verify the same. It is best known to the First Appellate Authority to record such finding in the impugned order. So, at this stage, this Tribunal is unable to record any finding on such score.

The decision in ***M/s. Dr. Sarojini Pradhan's*** case cited supra as relied on by the learned Standing Counsel (CT) for the State is not applicable to the present facts and circumstances of the case as in that case, the Dealer fails to produce 'H' form for export sale. So, this Tribunal finds no justification to discuss the same in the present case.

9. I have already observed in the OVAT proceeding that it is a sale in course of export and the finding the First Appellate Authority and the Assessing Authority are not correct. As the matter has remitted to the Assessing Authority for fresh adjudication in the proceeding under the OVAT Act and the CST record is not available before this Tribunal and the multiple proceedings are pending, on such circumstances, this Tribunal feels it proper to remit the present proceeding under the OET Act to the Assessing

Authority for fresh disposal along with the proceeding under the OVAT Act in accordance with law.

10. For the foregoing discussions, this Tribunal is of the considered view that the both the proceedings require fresh adjudication by the Assessing Authority, so this forum feels it proper to remand the matters to the Assessing Authority for disposal as per law after allowing due opportunity to the Dealer. Hence, it is ordered.

11. In the result, the appeals under the OVAT Act and OET Act are allowed and the orders of the First Appellate Authority are set aside. The matters are remanded to the Assessing Authority for disposal afresh as per law keeping in view the observations made herein 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

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(G.C. Behera)
Chairman