BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No.308(V) of 2016-17

&

S.A. No.118(ET) of 2016-17

(Arising out of the order of the learned JCST, Balasore Range, Balasore in Appeal Case No. AA-65/BA-2014-15 (VAT)& AA-66/BA-2014-15(ET) disposed of on 08.12.2016 & 30.08.2016)

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

M/s. KVR Steel Orissa Limited,
Biruan Sergarh, Dist-Balasore,
TIN-21271511498. ..... Appellant.

-Versus –

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

For the Appellant : : None
For the Respondent : : Mr. D. Behura, S.C. (C.T.)

Date of Hearing : 07.11.2023 * Date of Order : 06.12.2023**

O R D E R

The dealer is in appeals against the orders dated 08.12.2016 & 30.08.2016 of the Joint Commissioner of Sales Tax, Balasore Range, Balasore (in short, 'ld. FAA') passed in Appeal Case No. AA-65/BA-2014-15 (VAT) and Appeal Case No.66/BA-2014-15(ET)

remanding the assessment passed under Section 43 of the OVAT Act for fresh assessment and confirming the assessment passed under Section 10 of the OET Act by the learned Sales Tax Officer, Balasore Circle, Balasore (in short, 'ld. STO'). Since both the second appeals involve common question of facts and law, they are heard together and disposed of in a composite order for the sake of convenience.

2. The brief facts of the case are that M/s. KVR Steel Orissa Ltd., Sergarh, Balasore carries on business in manufacture and sale of PSC Poles. Basing on the adverse findings contained in the Tax Evasion Report submitted by the Sales Tax Officer, Vigilance, Balasore Division, Balasore, the ld. STO completed the assessments under Section 43 of the OVAT Act and under Section10 of the OET Act raising demand of ₹1,07,36,772.00 including penalty of ₹71,57,848.00 and ₹17,42,340.00 including penalty of ₹11,61,560.00 respectively for the tax period from 01.04.2009 to 31.03.2012. On being aggrieved against the aforesaid demands, the dealer-assessee filed first appeals. The ld. FAA was not inclined to interfere as to the extra demand raised by the ld. STO under Section 43 of the OVAT Act except pointing out irregularity in levy of tax on purchase of sand and stone chips that gone into production of PSC Poles and sold outside the state of Odisha being not in consonance

with the provisions of Section 12 of the OVAT Act. The ld. FAA remitted the case back to the ld. STO for fresh assessment on this issue. The ld.FAA confirmed the demand of ₹17,42,340.00 raised under Section 10 of the OET Act by the learned STO. The dealer-assessee being not satisfied with the orders of the ld. FAA passed under both the Acts approached this forum for relief filing grounds of appeal. Hence, these second appeals.

3. In the grounds of appeal, the dealer-appellant clarifies that it manufactures only PSC Poles for sale to the Power Grid Corporation (India) Limited approved companies for use in execution of rural electrification projects under Rajiv Gandhi Gramina Vidyutakaran Yojana utilizing raw materials like cement, steel, chips and sand etc. It is submitted that the findings of the Inspecting Officials are based on an unauthenticated tasting register which has been mechanically adopted by the forums below without verifying the facts furnished in the reconciliation statement. It is contended that levy of purchase tax on ₹68,64,580.00 under Section 12 of the OVAT Act is illegal and arbitrary. The dealer-appellant has also protested levy of penalty. Besides, as per Finance Department Notification dated 23.12.2008 (SRO No.628/2008), levy of entry tax on raw materials for production of PSO Poles against projects

executed under Rajiv Gandhi Gramina Vidyutakaran Yojana is illegal and unwarranted.

4. For hearing of these second appeals, the dealer-appellant was noticed to appear. Neither the dealer-appellant nor the learned Counsel representing him appeared despite several intimations. There is no alternative but to adjudicate the cases ex-parte on the basis of the materials available on record.

The State has filed cross objection supporting the orders of the forums below.

5. The orders of the forums below along with the materials on records are gone through. The grounds taken in the second appeal are also looked into. We could observe on perusal of the records that the Sales Tax authorities of Balasore Vigilance Division led by the Sales Tax Officer during the course of their inspection to the business premises of the dealer-appellant verified the physical stock of 8 metres and 9 metres long PSC Poles vis-à-vis the books of account (RG-1 Register and returns filed under the Central Excise Act) and detected excess stock of 35 nos and 17 nos PSC Poles respectively. Further the Sales Tax Authorities recovered inter alia one PGCIL Pole testing and production register from the business premises which on verification was found to be containing

production of 8 metres and 9 metres long PSC Poles on account of Power Grid Corporation of India Limited (PGCIL), one of the executants of Rural Electrification Project under RGGVY, during 03.06.2009 to 30.05.2010 and 18.05.2009 to 22.06.2010 respectively. This register depicts date wise number of Poles casted, quantity of cement and HT wire utilized, serial number of Poles etc. Upon verification of this production register vis-à-vis the stock account/RG-1 register under Central Excise Act, the inspecting authorities noticed that during the year 2009-10 and 2010-11, production of 5260 nos. of 8 metres Pole and 5298 nos. of 9 metres Pole as per the PGCIL Pole testing register have not been taken into account in the regular books of account and were not available in the business premises on the date of inspection. The detection of excess stock and unaccounted production of PSC Poles led the Sales Tax Officer, Vigilance to reasonably conclude that the same were sold out of account and the total sales suppression has been estimated at ₹2,44,76,600/- (8 metre Pole 5295 nos. @ ₹1809/-+9 metre Pole 5315 nos. @ ₹2803/-). The inspecting officials also noticed purchases of raw materials i.e. sand and chips amounting to ₹1,15,27,831/- by the dealer from un-registered dealers during the material period and held him liable to pay purchase tax under

Section 12 of the OVAT Act as the finished product i.e. PSC Pole used under RGGVY Scheme is exempt from tax. On the basis of the above information contained in a Tax Evasion Report received from the Sales Tax Officer, Vigilance, the ld. Assessing Authority being satisfied with the prima facie case of suppression of a part of the turnover of the dealer-assessee during the period 01.04.2009 to 31.03.2012 resulting in escaped assessment, initiated assessment proceeding u/s. 43 of the OVAT Act. The reconciliation statement furnished by the dealer-assessee at the assessment stage was not accepted on account of failure on the part of the dealer-assessee to produce the original register. It is observed by the ld.STO that the dealer does not maintain manufacturing account in violation of its statutory obligation. The STO also found that the dealer-assessee is liable to pay tax u/s. 12 of the OVAT Act on purchases of sand and stone chips from unregistered dealers as the finished product i.e. PSC Poles sold under RGVY Scheme is exempt from tax by virtue of Notification No.55067-CTA-7/2008 dated 23.12.2008 of the Finance Department. However, the ld.STO made the dealer-assessee liable to pay tax u/s.12 of the OVAT Act on purchases amounting to ₹68,64,580.00 after noticing that purchases of sand and stone chips amounting to ₹46,63,251.00 have already been subjected to tax

earlier in the assessment for the period 02.03.2009 to 30.06.2010 u/s. 42 of the OVAT Act. The ld. STO determined the total tax payable by the dealer-assessee on the basis of the suppressions/escaped turnover as detailed below.

Tax on ₹68,64,580/- @4% - ₹2,74,583.00
Tax on ₹2,44,76,600/-@13.5% -₹33,04,341.00
Total Tax payable - ₹35,78,924.00

The ld. STO imposed penalty of ₹71,57,848.00 under Section 43(2) of the OVAT Act on the tax additionally assessed. The dealer-assessee has been made liable to pay tax and penalty amounting to ₹1,07,36,772.00. The ld. FAA examined the rough testing register, re-reconciliation statement and sale register carefully. The ld. FAA inferred that the discrepancy in stock of 8 metre and 9 metre PSC Poles has been confronted to the dealer-appellant by the Inspecting Authorities. It was also admitted by the dealer-assessee that the production of 8 metre and 9 metre PSC Poles reflected in the PGCIL Pole testing and production register is the actual production undertaken on different dates. Accordingly, the excess production of PSC Poles as per the testing register recovered from the business premises have not been taken into account in the regular books of account and were not available on the date of Inspection. Logically it follows that the PSC Poles manufactured out of account were also

sold out of account. The contention of the dealer-assessee asserting not a single PSC Poles to have been sold to any other party except the PGCIL approved parties under the RGGVY Scheme turned out to be on falsehood, since the dealer-assessee apart from sales to the Power Grid approved Companies is seen to have made sale to outside State parties namely ICCOM Tele Ltd., Hyderabad and CEEBUILD Company Pvt. Ltd., Kolkatta. The ld. FAA found no reasons to interfere in the order of assessment in establishing the sale of PSC Poles out of account.

The contention of the dealer-appellant as to non levy of tax on purchase of sand and stone chips used in manufacturing of PSC Poles under section 12 of the OVAT Act for reason of availing exemption as per FD Notification dated 23.12.2008 (SRO No.628/2008), the ld.FAA observed citing the provision of section 12 of the OVAT Act that every dealer who in the course of his business purchases or receives any taxable goods within the state from a person not registered as a dealer or from a VAT dealer in circumstances in which no tax is payable by the selling VAT dealer shall be liable to pay tax on the purchase price or prevailing market price of such goods if after such purchase or receipt, the goods are not sold within the state or in the course of interstate trade or

commerce or in the course of export out of the territory of India but are (a) disposed of otherwise or (b) consumed or used in the manufacture of goods declared to be exempt from tax under this Act or (c) after their use and consumption in the manufacture of goods, such manufactured goods are disposed of otherwise than by way of sale in the state or in the course of interstate trade or export out of the territory of India. In the case at hand, sand and chips were admittedly purchased from unregistered dealers and have not suffered tax at the time of purchase/sale. The same were utilized in manufacturing of PSC Poles, a chunk of which was sold by the dealer-assessee for rural electrification project in the State of Odisha under RGGVY Scheme and exempt from tax by virtue of the notification dated 23.12.2008. Since the finished product is not available for taxation, the dealer-assessee is liable for tax as per the provision of Section 12 of the OVAT Act. The ld. FAA further observed that certain PSC Poles have been sold in course of interstate trade or commerce during the material period. Accordingly, levy of tax on the total purchases of sand and stone chips in assessment is not in consonance in provision of Section 12 of the OVAT Act. The ld. FAA has remanded the case back to the ld. STO to examine on this issue.

6. On going through the observation of the ld. FAA, it appears that the grounds taken by the dealer-assessee in the instant second appeal has been minutely examined by the ld. FAA. The first appeal order seems to be a reasoned order. We, therefore, find no justification to poke nose in the first appeal order in so far as the OVAT Act is concerned.

7. The ld. FAA finds no infirmity in the order of assessment passed under Section 10 of the OET Act carrying demand of ₹17,42,340.00 and has confirmed it. To enunciate in nutshell, the dealer-assessee has been assessed under section 9C of the OET Act for the tax period 02.03.2009 to 30.06.2010 vide order dated 28.11.2011. Based on the Tax Evasion Report (supra) alleging escapement of assessment on the turnover of scheduled goods i.e. HTS wire, cement, chemicals, plants and machineries amounting to ₹10,32,24,943.00 (Raw materials-₹9,71,66,950.00+plant and machineries-₹60,57,993.00), the ld.STO levied tax @ 0.5% on ₹9,71,66,950.00 (Raw materials) and @ 2% on ₹47,47,244.00 (Plant and machineries) after excluding an amount of ₹13,10,749.00 already assessed in the original assessment order dated 28.11.2008. The ld.STO made the dealer-assessee liable to tax and penalty of ₹17,42,340.00.

The dealer-assessee protests levy of entry tax on raw materials exclusively used in manufacturing of PSC Poles which were supplied to Power-grid approved companies for use in execution of rural electrification projects under RGGVY Scheme as per FD Notification dated 23.12.2008 (SRO No.628/2008). The ld.FAA observed that it is not in dispute that the appellant has procured scheduled goods such as HT wire, cement, chemicals and plant and machinery worth ₹10,32,24,94.00 from outside the state and brought the said scheduled goods into local area for use or consumption therein for production of PSC Poles. The dealer-assessee is neither exempted from payment of entry tax nor have the scheduled goods in question brought by him been exempted from levy of tax under Section 6 of the OET Act. Since the dealer-appellant has brought the scheduled goods as aforesaid into the local area, he is liable to pay entry tax on such goods under the provision of the Act. The ld. FAA felt pertinent to consider whether the claim of exemption from tax on raw materials and machineries used in manufacturing of PSC Poles is tenable in terms of the aforesaid FD Notification. The ld. FAA has gone through the FD Notification in question and observed that it permits exemption from levy of entry tax on the scheduled goods brought into the local area

for exclusive use as material/equipments in the construction/installation of rural electrification projects under RGGVY scheme. The proviso in the notification provides that such exemption from levy of tax shall be available on the basis of a certificate furnished by the executants i.e. NTPC, NHPC and PGVIL to the effect that the goods/ equipments purchased by them will be used in the execution of rural electrification projects in Odisha under RGGVY scheme. In the case at hand, admittedly the raw materials and machinery as aforesaid brought into the local area by the appellant have not been supplied/sold as it is to the executants i.e. central public sector undertakings for use in the execution of rural electrification project and no certificate as prescribed in the notification have been furnished by the executants to that effect. It is the PSC Poles, produced on utilisation of such raw materials/plant and machinery, that have been supplied to the executants for use in the rural electrification project and not the raw materials as such. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. It is held by the Hon'ble Apex Court in Tata Iron and Steel Co. Ltd. v. State of Jharkhand, (2005) 4 SCC 272 that "Eligibility clause, it is well settled, in relation to exemption

notification must be given a strict meaning." The aforesaid principle is summed up by the Hon'ble Apex Court in G.P. ceramics Pvt. Ltd. V. Commissioner, Trade Tax, UP., (2009) 2 SCC 90 as under:

> "It is now a well established principle of law that whereas eligibility criteria laid down in an exemption notification are required to be construed strictly, once it is found that the applicant satisfied the same, the exemption notification should be construed liberally."

Under the above deliberations, the ld. FAA derived that it was in the knowledge of the dealer-assessee that the exemption benefits under the said FD Notification does not extend to the raw material procured by the since such raw material as such were not supplied to the executants for use in rural electrification works under RGGVY Scheme. It was also in the knowledge of the appellant that neither the scheduled goods i.e. cement, HT wire, chemicals, plant & machineries are exempt from tax nor any exemption has been granted to the assessee-appellant by the Govt. under Section 6 of the OET Act. For these reasons, non-payment of entry tax on such goods was deliberate and intentional. Therefore, the imposition of penalty twice the amount of tax additionally assessed by the assessing officer is justified and need no interference. With the above

observations, the ld.FAA confirmed the order of assessment passed under Section 10 of the OET Act.

On going through the observation of the ld.FAA, it appears that the grounds taken by the dealer-assessee in the second appeal are identical to that of the first appeal. The ld.FAA has minutely looked into all the issues agitated by the dealer-assessee and affirmed the order of assessment passed under Section 10 of the OET Act. We find no justification to interfere in this regard.

8. Under the above facts and in the circumstances, we are of the view that the second appeals filed by the dealer-assessee both under the OVAT Act and OET Act are dismissed and the orders of the ld.FAA are upheld. Cross objections are hereby disposed of accordingly.

Dictated & Corrected by me

Sd/-
Bibekananda Bhoi)
Accounts Member-I

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

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