

**BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL:
CUTTACK**

S.A. No. 176 (VAT) of 2013-14

(Arising out of order of the learned Addl. CST(Appeal), Central Zone, Odisha, Cuttack in Appeal No. AA – CUI-307/JCST/2011-12, disposed of on 18.03.2013)

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

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

-Versus-

M/s. Adikanta Associates,
Link Road, Cuttack ... Respondent

For the Appellant : Sri M.L. Agarwal, S.C. (CT)
For the Respondent : Sri B.B. Panda, Advocate

Date of hearing : 13.02.2023 *** Date of order : 28.02.2023

ORDER

State assails the order dated 18.03.2013 of the Addl. Commissioner of Sales Tax, Central Zone, Odisha, Cuttack (hereinafter called as ‘First Appellate Authority’) in F A No. AA – CUI-307/JCST/2011-12 reducing the assessment order of the Joint Commissioner of Sales Tax, Cuttack I Range, Cuttack (in short, ‘Assessing Authority’) to return figure.

2. The facts of the case, in short, are that –

M/s. Adikanta Associates carries on business in H.L. medicines, vitamins, food supplements and contraceptive pills as well as Hindustan Unilever Products like pureit on wholesale basis in the State as a

Consignment Agent, C&F Agent and super stockist. The assessment period relates to 01.02.2008 to 31.03.2010. The Assessing Authority raised tax and penalty of ₹19,61,862.00 u/s. 42(4) of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') on the basis of Audit Visit Report (AVR).

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 return figure and allowed the appeal in full. Being aggrieved with the order of the First Appellate Authority, the State prefers this appeal. Hence, this appeal.

The Dealer files cross-objection supporting the impugned order of the First Appellate Authority as just and proper in the facts and circumstances of the case.

3. The learned Standing Counsel (CT) for the State submits that the order of the First Appellate Authority is unjust and improper in law and facts involved. He further submits that the Assessing Authority has duly confronted the AVR to the Dealer and established the discrepancies of ₹82,88,044.21, whereas the First Appellate Authority has reduced the demand to return figure without any cogent reason. So, he submits that the order of the Assessing Authority be restored by setting aside the order of the First Appellate Authority.

4. On the other hand, the learned Counsel for the Dealer submits that submits that the First Appellate Authority has passed a reasoned order. He further submits that bonus medicines are not included in the sale transaction, so the vital ingredients is lacking for levy of tax. He also submits that commission is received towards the charges for labour and services and the same does not come under the purview of levy of sales tax. He further submits that the cost of packing materials is included in the expenditure statement and there was an error in the figure of 'C' and 'F' forms statement. So, he submits that the First Appellate Authority rightly passed

the order and the same requires no interference in appeal. He relies on the decision in case of *Mapra Laboratories Pvt. Ltd. v. State of Bihar and others*, reported in [2004] 135 STC 157 (Patna) and *Southern Motors v. State of Karnataka and others*, reported in [2017] 98 VST 207 (SC).

5. Having heard the rival submissions and on going through the materials on record, it transpires from the assessment order that the AVR pointed out twelve allegations against the Dealer, i.e. (i) non-payment of VAT on bonus quantity of food supplement; (ii) non-payment of VAT on sale of packing and plastic materials; (iii) non-payment of VAT on promotional item received; (iv) non-payment of VAT on medicines received under guise of sample medicines; (v) stock discrepancies for the year 2009-10; (vi) stock discrepancy for the period 2007-08; (vii) unaccounted for sale of ₹27,936.00; (viii) stock discrepancy in case of HL medicines; (ix) stock discrepancy in case of Hindustan Uni Lever product; (x) profit as disclosed by the Dealer in the Statement in case of HUL product do not tally with CA Audit report; (xi) purchase/receipt and sale disclosed do not tally with the CA Audit report; and (xii) transfer of stock amounting to ₹6,45,26,238.70.

Out of the aforesaid allegations, the Assessing Authority did not find any substantial material in point nos. (ii), (iii), (iv), (v), (vi), (vii), (viii) and (xii). The Assessing Authority issued a corrigendum order revising the tax liability of the Dealer and dropped the charge No. (vi) i.e. stock discrepancy for the period 2007-08.

But, the allegations levelled in the AVR in respect of point nos. (i) non-payment of VAT on the bonus quantity of food supplement; (ix) stock discrepancy in case of HUL product; (x) profit disclosed by the Dealer in the statement in case of HUL product do not tally with the CA Audit report; and (xi) purchase/receipt and sales disclosed do not tally with CA Audit report, are established.

Accordingly, the Assessing Authority added an amount of ₹82,88,044.21 towards suppression detected on the aforesaid allegations and determined the GTO at ₹212,41,34,698.92 and TTO at ₹202,95,36,333.49 after allowing deductions towards exempted goods, VAT paid goods and OVAT collected. He allowed ITC of ₹60,18,740.21 as set off against the output tax. Accordingly, he computed the tax liability of the Dealer at ₹19,61,862.00 including penalty.

6. The impugned order of the First Appellate Authority reveals that the Assessing Authority had detected discrepancies of ₹19,24,289.02 towards the profit disclosed by the Dealer, ₹44,94,449.82 towards discrepancy in purchase/receipt and sale disclosed by the Dealer, which does not tally with the CA Audit report and ₹18,69,305.37 towards non-payment of VAT on the bonus quantity of food supplement.

But, the order of the First Appellate Authority is silent regarding charge of stock discrepancy in case of Hindustan Uni Lever product relating to reverse ITC of ₹5,058.00. During hearing of appeal, neither party pressed the said charge for adjudication. So, the same is not required for consideration by this Tribunal.

The First Appellate Authority deleted ₹18,69,305.37 towards non-payment of VAT on the bonus quantity of food supplement on the ground the bonus offer medicines passed from the hands of the Dealer (C&F Agent) to the subsequent purchaser free of cost. He observed that as there was no sale, no tax can be levied.

The First Appellate Authority also deleted addition of ₹19,24,289.02 towards the profit disclosed by the Dealer on the ground that the Dealer has received gross commission to the tune of ₹1,68,17,128.83 for the period 2009-10 + the commission which is included in the category of other income at ₹4,32,89,856.99. He observed that the CA Audit report includes commission, but excludes the profit.

The First Appellate Authority found that ₹44,94,440.00 includes ₹2,00,322.71 receipt of goods on account of stock transfer within the State of Odisha from Subash Kumar and Sanjay Kumar on account of appointment of the instant Dealer as C&F agency of M/s. Pharama Link instead of Subash Kumar and Sanjay Kumar with TIN and packing materials of ₹31,681.27. As such, he deleted ₹2,00,322.71 as the stock received by the stock transfer note, which do not form part of CA Audit report as per procedure and the packing materials is a part of expenditure account and duly accounted for therein. He further observed that the Assessing Authority had included ₹37,99,612.10 which includes inside purchase with VAT at ₹3,41,96,495.69 and inside purchase without VAT as ₹3,03,96,883.59. The First Appellate Authority observed that the difference is only the tax amount on which no further tax can be levied. He further found that the Dealer has purchased the goods on Form-C for ₹4,94,515.00.

The First Appellate Authority considered the explanation of the Dealer regarding ₹3,42,372.00 towards receipt of goods against Form-F, i.e. OGPAY 167839 for ₹1,97,658.00 and OGPAY 167840 for ₹1,44,714.00 by the Dealer was inadvertently included in the 'C' form statement. Goods purchased for ₹3,49,495.00 against 'C' form No. PQ/Y 158393 has been inadvertently shown by the Dealer in 'F' form statement.

₹1,96,352.00 relates to purchase of packing materials against 'C' form has been the part of difference, which has been taxed by the Assessing Authority. As regards the purchase against Form-C and actual submission of Form-C is for ₹4,94,515.00. The Dealer admitted the same, but explained that the goods being packing materials have not been included in the Statement of the Dealer relating to the goods for sale as the same has been included in the expenditure in course of business as per procedure. So, the First Appellate Authority deleted the same.

7. The State assails the findings of the First Appellate Authority in dropping the charges only on the ground that the order of the First Appellate Authority is unjust and improper. The State has not challenged the issues on any specific point. So, at this stage, we shall proceed to decide the issues on merit.

7.1. As regards the issue of bonus medicines, it is required to examine if the same can be added to the turnover of the Dealer. Generally, the tax is required to be paid on the sale of taxable goods by the Dealer. Section 2(45) of the OVAT Act defines the word 'sale'. One of the basic ingredients, i.e. payment of money is an essential element in a transaction of sale. In the case of *Mapra Laboratories Pvt. Ltd.* cited supra, the Hon'ble Patna High Court have been pleased to observe as follows :-

“24. The quantitative discount formed integral part of the agreement between the parties affecting the price and, thus, the price of the said quantitative discount will qualify for the deduction. There is another reason also to come to the aforesaid conclusion. If the total quantity including the quantity given free in terms of the scheme is treated as sale, in that case on payment of price for lesser quantity (vials and strips), more quantity is being supplied and, thus, **the aforesaid price includes the price of the medicines supplied free and as such the price of the medicines supplied free cannot be added in the taxable turnover.**”

In the case of *Southern Motors* cited supra, the Hon'ble Apex Court have been pleased to observe that the post sale discount allowed to customer by credit notes were eligible for deduction from the total turnover. In view of the decisions cited supra and the provisions of Section 2(45), the bonus medicines shall not come within the purview of 'sale' and bonus medicines shall not be included in the taxable turnover of the Dealer. So, the First Appellate Authority rightly deleted the charge of bonus medicines from the taxable turnover of the Dealer.

7.2. As regards the issue relating to the commission arising out of the goods, the Dealer is receiving commission for rendering labour and service charges towards disposal of goods to other dealers being C&F Agent. As the main ingredient, i.e. sale of goods, is lacking, the same cannot be termed as 'sale' and 'sale price' as per Section 2(45) and 2(46) of the OVAT Act and as such, the same cannot be added to the taxable turnover of the Dealer. So, the finding of the First Appellate Authority calls for no interference in appeal.

7.3. The order of the First Appellate Authority reveals that ₹3,42,372.00 relates to the goods receipt against Form-F of C&F Agencies and the same are under the 'F' forms, i.e. OGPAY 167839 for ₹1,97,658.00 and OGPAY 167840 for ₹1,44,714.00. The Dealer explains that the same was included in the 'C' form inadvertently, but the same were against Form-F. As regards goods purchased for ₹3,49,495.00, the First Appellate Authority found that the goods purchased against 'C' form No. PQ/Y 158393. The Dealer explains that the same was inadvertently included in 'F' form statement. The First Appellate Authority accepted the explanations after verifying the relevant 'C' and 'F' forms, which does not suffer from any infirmity.

As regards purchase of packing materials for ₹1,96,352.00, the First Appellate Authority found that the same relates to purchase of packing materials against 'C' form which is a part of the difference amount of ₹4,94,515.00. The order of the First Appellate Authority further shows that the Dealer admits the same, but explained the same that the same relates purchase amount of packing materials and the same has been shown in the expenditure statement, which was accepted by the First Appellate Authority. So, we do not find any illegality or impropriety on such finding and as such, calls for no interference in appeal. Hence, it is ordered.

8. Resultantly, the appeal stands dismissed and the impugned order of the First Appellate Authority is hereby confirmed. Cross-objection is 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/-
(M. Harichandan)
Accounts Member-I**