

which the learned STO is not justified to allow deduction of Rs.14,01,270.30 for sale of gauze and bandage of tax free goods vide Entry-16 of the tax free schedule. Further, relying on the decision of the Hon'ble Gujjurat High Court in case of State of Gujjurat Vrs. C.K. Gauze and Bandage Manufacturing co. reported in 84 STC page 571, they observed that since cotton rolled bandage manufactured from bandage cloth by first bleaching and cutting into different sizes and are used for the purpose of healing cuts and wounds falls under the meaning of drugs and medicines and not under handloom cloth fabrics of all varieties, so the amount of Rs.14,01,27.30 should be taxed @4% as per Entry 37 of the Rate Chart and surcharge should be calculated. Similarly, for the year 1993-94, it was observed by the A.G. Audit that an amount of Rs.13,28,069.55 allowed as tax free sale under Entry-16 of the rate chart in the 12(4) proceeding should be taxed @4% as per Entry-37 of the rate chart and suggested for reopening the cases under Section 12(8) of the OST Act.

On these materials, learned STO initiated proceeding under Section 12(8) of the OST Act for both the years and observing the audit objection, the dealer assessee was assessed under Section 12(8) of the OST Act by taxing sale of bandage cloth @4% and calculated the surcharge for the year 1992-93 and 1993-94 and created demands of Rs.61,656.00 for the year 1992-93 and Rs.58,435.00 for the year 1993-94.

3. Being aggrieved with such tax demand, the dealer assessee preferred first appeal before the learned ACST, Cuttack I Range, Cuttack who allowed the appeals and annulled the assessment completed under Section 12(8) of the OST Act.

4. Being dis-satisfied with the orders of the learned ACST, Cuttack I Range, Cuttack passed in first appeal case nos. AA.210-211 (CUIC) of 1997-98 on dated 19.08.1997, State preferred second appeal Nos.1629-1630 of 1997-98 before the Sales Tax Tribunal and after

hearing, a Division Bench of the Tribunal on dated 28.02.2004 allowed the appeals of State and vacated the orders of the learned ACST and restored the order of the learned STO.

5. Again the dealer assessee M/s.Chemie India Ltd. challenged the order of the Division Bench before the Hon'ble High Court of Orissa by preferring STREV No.99-100 of 2004 placing reliance on a decision of two Judge Bench of the Tribunal in State of Orissa Vrs. M/s. Venus Surgical, Mangalabag, Cuttack (decision dated 25th October, 1978 in S.A.No.176 of 1978-79) and the Full Bench decision of the Tribunal in State of Orissa V. Orissa State Handloom Weavers Cooperative Society (decision dated 27th November, 1989 in S.A.No.366-369 of 1986-87). Another contention of the dealer assessee before the Hon'ble Court was that the Tribunal differed from the view of the Full Bench and concluded that bandage cloth and gauze cloths sold by the dealer in the present case "do come under the broad category of drug and medicine subject to levy of tax under the OST Act". So the Hon'ble Court expressed the view that two Judge bench of the Tribunal could not simply 'differ' from the decision of the Full Bench. It could differ from an opinion of a coordinate Bench and not from that of a Full Bench since the decision of the Full Bench was binding on it. With this view, the Hon'ble Court considered it appropriate to set aside the impugned order of the Tribunal and remanded the appeal in S.A.Nos.1629-1630 of 1997-98 filed by the State to the Tribunal for a fresh decision in accordance with law. The Hon'ble Court directed the Tribunal to discuss in detail the decisions of the coordinate Bench in M/s.Venus Surgical (supra) and the Full Bench in M/s. Orissa State Handloom Weavers Cooperative Society (supra). The Hon'ble Court framed the question- **"Whether bandage and gauze cloth are taxable as 'Drugs and Medicines' with reference to Entry-37 of List-C of the Orissa Sales Tax Act or is it exempt from sales tax as 'Handloom Fabrics' with reference to Entry-16 of List-A of the Tax Free Goods under the Orissa Sales Tax Rate Chart"** to be answered by this

Tribunal being the same left unanswered. In view of such scenario, now the sole question to be adjudicated upon by this Tribunal is “Whether bandage and gauze cloth are taxable as ‘Drugs and Medicines’ with reference to Entry-37 of List-C of the Orissa Sales Tax Act or is it exempt from sales tax as ‘Handloom Fabrics’ with reference to Entry-16 of List-A of the Tax Free Goods under the Orissa Sales Tax Rate Chart after a thorough discussion of two decisions of this Tribunal. One is the decision of coordinating bench of M/s.Venus Surgical (supra) and other is the Full Bench in M/s. Orissa State Handloom Weavers Cooperative Society.

6. Cross objection is not filed in this case by the dealer respondent.

7. Heard both the parties. During course of argument, learned Standing Counsel for Revenue Mr. M.L. Agarwal gave emphasis stating that the disputed goods fall under “Drugs and Medicines” and are manufactured specifically in accordance to the specification for hospital use and to be sold across medical and surgical stores. So it is taxable under Entry-37 of the taxable list –C under the category of drugs and medicines. Learned Standing Counsel for Revenue relying the decision of Hon’ble Apex Court decided in the case of Chimanlal Jagjivandas Sheth V. State of Maharashtra AIR 1963 SC 665 and the decision of Hon’ble Gujarat High Court in State of Gujarat V. C.K. Gauze Bandage Manufacturing Company claimed that bandages and gauze are coming under the definition of drugs. The learned Assessing Officer has rightly taxed the disputed products @4%, keeping in mind entry-37 which is in accordance with law. Mr. Agarwal also contended that reliance placed on the notification dated 8.2.1999 by the dealer respondent is mis-conceived.

8. Per contra, learned Counsel for the dealer respondent submitted that the Hon’ble High Court of Odisha has directed the Tribunal to discuss in detail the decision of the coordinate bench in

M/s.Venus Surgical and the Full Bench in M/s.Orissa State Handloom Weavers Cooperative Society. Further submission on behalf of the dealer respondent is that the Division Bench of this Tribunal has also in the case of M/s.Vijay Surgical in the same set of facts decided in favour of assessee and against the State. Learned Counsel for the dealer respondent forcefully argued that the perusal of record clearly shows that the Orissa State Handloom Cooperative Society and M/s. Vijay Surgical are both rate contract holder of the State Government for the relevant period and have supplied the self same items to various hospitals of the State Government. There being no difference in the nature of the goods sold and buyers being same the items sold by the assessee cannot be exigible to tax under the same entry. Further, claim of the dealer respondent is that the appellant being well aware that the bandage and gauze cloth are exempted from sales tax as handloom fabrics under Entry-16 of List-A of the tax free goods under Orissa Sales Tax Rate chart made it exigible to tax by notification dated 18th Feb, 1999 without retrospective effect. The dealer respondent also contended that the assessment for the year 1992-93 and 1993-94 were reopened under Section 12(8) of the OST Act, 1947 on the basis of A.G. Audit Objection without application of mind and without recording reasons and by an exparte order arbitrarily imposed tax on sale of bandage cloth and gauze cloth. The blind initiation of reassessment as per audit objection without any independent application of mind is not sustainable in law as has been held in the decision reported in 2006(11) OLR 154. Learned Counsel for the dealer respondent contended stating that the decision reported in 84 STC page 571 relied upon by the Stae is not applicable in the instant case because it distinguishable on facts in as much as the said decision it has been held that cotton rolled bandage are distinct from cotton bandage cloth and is not covered under the handloom fabrics. In the instant case the dealer assessee collected and paid tax on the sale of rolled bandage and gauze but claimed exemption on bandage and gauze cloth sold in thanna. Further,

the decision reported in 84 STC page 571 has been rendered basing upon Entry 26(1) of schedule I of part-A of the Gujarat Sales Tax which refer to Drug and Medicine and it is completely different from Entry-37 of List C of OST Act. So the learned ACST at the first appeal rightly interpreted the sale of bandage and gauze cloth to be exempted from OST Act.

9. Pursuant to the direction of the Hon'ble Court, let me have a glance to the decision of the Division Bench of this Tribunal decided earlier in the case of M/s.Venus Surgical. In this case, learned ACST, Cuttack Range, Cuttack found that bandage and gauze are covered by Entry No.19 of the tax free list and as such were not exgible to tax. The Division Bench also opined that Entry No.19 of the tax free schedule provides that handloom of power loom woven cloth of all kinds excepting cloth made from power silk of handloom are tax free. So there can be no manner of doubt that bandage and gauze are handloom cloths. Therefore, these goods are prima facie not liable to tax. The Division bench also further refers to the bill found that the respondent purchase bandage cloth and gauze as they were from the weavers and supplied the same without effecting any change therein. Therefore, it cannot be said that bandage and gauze are different from handloom cloth. So, the division bench held that the ACST was right in holding that the bandage and gauze are tax free goods. Then let me have a glance to the decision of Full Bench of this Tribunal decided in the case of M/s. Orissa State Handloom Weavers Cooperative Society Limited. In this case the only point for consideration was whether the gauze and bandage would come under the category of handloom cloth of all varieties or being used in surgical dressing would cease to be a handloom cloth. In this case it was contended by the learned Counsel for the assessee that the substances intended to be used for the purpose of mitigation or prevention of diseases means substance in the nature or skin of medicines. According to him such cloth and bandages never come under the definition of medicine or medicinal preparations. Such

contention of the learned Counsel for the assessee was accepted by the Full Bench to be more reasonable because gauze and bandage itself have no medicinal value unless some medicines are applied to the wounds. The dressing gauze and bandage itself never cures any wounds it only helps in dressing the wound and as such gauze and bandage cannot be held to be drug. So the argument of the learned counsel for the State was of no substance before the Full Bench. In this case, the Full Bench held that serial No.16 of the exempted list includes handloom or power loom weaves cloth of all kinds excepting cloth made from pure silk of handloom origin. So handloom cloth of all varieties are exempted from tax. In the said case, the dealer assessee, the cooperative society had furnished a document i.e. certificate granted by the Director of Textiles, Orissa that gauze, bandage, and plaster bandage sold by the Orissa State Handloom Weavers Cooperative Society Ltd. are handloom cloths as treated by the Directorate of Textile, Orissa. Moreover, in the said case the full bench also held that gauze and bandage are not prepared under control of "Indian Pharmacopeia" so as to attract the definition of drug as enumerated in Section 3(b) of the Drugs and Cosmetics Act, 1940. So in view of the above two decisions of this Tribunal, it is quite clear that the bandage and gauze cloths are not taxable as "drugs and Medicines" with reference to Entry-37 of List -C of the OST Act, rather it is exempted from sales tax as Handloom fabrics with reference to Entry-16 of List-A of the tax free goods under the Odisha Sales Tax rate chart. In view of such, the decision of Hon'ble Apex Court decided in the case of Chimanlal Jagjivandas Seth and the decision of Hon'ble Gujrat High Court in the case of State of Gujrat Vrs. C.K. Gauze Bandage Manufacturing Company relied upon by the revenue are not befitting to the instant case in view of it's peculiar facts and circumstance.

10. In the result, we are of the unanimous view that the bandage and gauze cloths are exempted from sales tax as handloom fabrics with reference to Entry-16 of List-A of the tax free goods in the

Orissa Sales Tax Rate chart. So we have no hesitation to dismiss the appeal filed by the State. As a corollary, the orders passed by the learned ACST in first appeal case No.AA.210 & 211-CUIC-97-98 are hereby confirmed.

Dictated and Corrected by me,

(Shri S.K.Rout)
Judicial Member-II

(Shri S.K.Rout)
Judicial Member-II

I agree,

(Shri M.Harichandan)
Accounts Member-I

