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

S.A. No. 80 (C)/1999-2000

(Arising out of the order of the learned ACST, Appellate Unit, Bhubaneswar in first appeal Case No. AAC.14/BH-II/96-97 disposed of 30.11.99.)

Present :- Shri A.K. Das, Chairman Smt. Sweta Mishra, 2nd Judicial Member & Shri S. Mishra, Accounts Member-II.

M/s. National Aluminium Company Limited.,
Nalco Bhavan, Nayapalli, Bhubaneswar. ..... Appellant.

-Vrs.-

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

For the Appellant: :Mr. Ch. S. Mishra, Advocate.
For the Respondent: :Mr. D. Behura, SC (C.T.)
:Mr. M.S. Raman, Addl.SC(C.T.)

Date of Hearing : 07.09.2021 * Date of Order :05.10.2021**

O R D E R

This present appeal has been filed by the dealer against the impugned order of learned Assistant Commissioner of Sales Tax, Appellate Unit, Bhubaneswar (hereinafter referred to as ld. FAA) passed on 30.11.99 in Appeal Case No. AAC.14/BH-II/96-97 allowing appeal in part, partly dismissing the appeal and remanded the case to the learned Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar (hereinafter referred to as LAO) who raised a total demand of Rs.43,10,13,059.00 including surcharge U/r.12(4) of Central Sales Tax(O) Rules (in short, CST (O) Rules) relating to the period 1994-95.

2. Being aggrieved by the impugned order of the ld. FAA, the dealer has preferred second appeal before the Tribunal as per appeal memorandum with grounds of appeal.

3. The brief fact of the case is that the instant dealer appellant is a Govt. of India Undertaking that carries on business in production & sale of aluminium ingots, wire rods, alumina both in its intra-state & inter-state trade or commerce.

After a lengthy & minute examination of books of account with relevant documents & different statutory forms submitted in different sittings at assessment stage, the LAO finally observed as follows:

(i) Out of total sale made U/s.5(1) of CST Act valued at Rs.429,43,61,903.00, he observed that a sum of Rs.248,70,45,806/- do not qualify for claiming exemption of tax U/s.5(1) of said Act. Out of above disqualified amount, he further observed that sale of goods worth of Rs.68,11,62,267/- has been made to different foreign buyers with whom the appellant had at no point of time executed any purchase or sale contract for effecting such export sale & such foreign buyers are quite distinct and different from those with whom the appellant had actually executed sale or purchase contracts.

Secondly, on scrutiny of export documents, he observed that goods worth of Rs.180,58,83,539/- were exported to foreign destinations for effecting delivery to unidentified foreign buyers by initially raising invoices in favour of different foreign buyers as per contracts available with the appellant and subsequently endorsing the concerned bills of lading, invoices etc. in favour of unidentified foreign buyers. Accordingly, he concluded that on both the above two occasions, two distinct sales were involved, one, with foreign buyers placing

orders and second, by the said foreign buyers with some other different foreign buyers & both the sales having been completed before the goods have crossed the Customs frontier of India as evidenced from the shipping documents & the invoices raised by the appellant, the said transactions do not qualify for tax exemption U/s. 5(1) of CST Act. In rejecting such claim, the LAO cited many case laws as in his order & taxed him accordingly.

(ii) Out of total sale of goods valued Rs.56,20,47,756/- claimed to have been made U/s.5(3) of CST Act as tax exempted, the LAO disallowed sale of calcined alumina of Rs.26,76,22,749.00 to Indian Exporter M/s. Phoenix Overseas Ltd., New Delhi. He observed that these goods were actually exported to some other foreign buyers rather than the buyers executed purchase contract with this Indian Exporter. However, the appellant averred before him that these happened as per instruction of Indian Exporter. However, applying the ratio of judgment of Hon'ble Apex Court in case of M/s. Consolidated Coffee Ltd. Vs. Coffee Board, Bangalore reported in 46 STC 164, the LAO discarded above claim made U/s. 5(3) of CST Act and taxed it accordingly.

(iii) On scrutiny of 'C' and 'D' Forms on different sittings at assessment stage, the LAO found 173 nos of defective 'C' forms and one 'D' form for transactions involving an amount of Rs.213,99,68,375.55 in spite of reasonable opportunities availed by the appellant for rectification of errors occurred therein and hence taxed it accordingly.

(iv) The LAO also confronted the appellant with the fraud report bearing No.189/28.02.1996 submitted by the Sales Tax Wing of Vigilance, Central Division in which it is alleged that during the impugned period, the appellant has made inter-state sale of 'Exim Scrips', subsequently

renamed as 'REP Licence' valued at Rs.3,87,07,000.00 unaccounted for and not disclosed in the returns filed. On the above allegation, the appellant stated that as per different circulars issued by Central Government, he has surrendered 'REP Licence' to different nominated Banks of RBI and in lieu thereof has received premium @20% of the face value of surrendered 'REP Licence'. However, quoting import and export regulations framed under Import and Export (Central) Act of 1947with different circulars issued and applying the ratio judgments of Hon'ble Apex Court in case of Anraj Vs. State of Tamil Nadu reported in 61 STC 165 and Hon'ble Madras High Court decision in case of P.S. Apparels vs. Deputy CTO, East Assessment Circle, Madras, reported in 94 STC 139, the LAO imposed tax on such licence, considering the said transactions under the definition of 'sale' as envisaged in section 2(g) of CST Act.

(v) Further, the LAO levied surcharge @10% on the tax calculated at state rate by applying the ratio of judgment delivered by Hon'ble Madras High Court in case of Engine Valves Ltd. Vs. Union of India and Others reported in 90 STC 84.

All these resulted in a demand of Rs.40,10,13,059.00 including surcharge by the LAO in his assessment order.

4. Being aggrieved by the aforesaid order, the dealer preferred appeal before the ld. FAA who after examining the case in detail with participation of the appellant observed as follows:-

(a) On disallowance of claim of tax exemption towards sale of goods worth of Rs.248,70,45,806.00 u/s. 5(1) of the CST Act by the LAO, the ld. FAA allowed such exemption as per his detailed reason order.

(b) On disallowance of claim of exemption toward sale of goods valued Rs.26,76,22,749.00 in course of export U/s. 5(3) of CST Act by the LAO, the ld. FAA considered that there is only a forced compliance to the provisions of Section 5(3) which is stage managed. Hence, he sustained the findings of the LAO on this score.

(c) On surrender of 'REP Licence' with a receipt of premium of Rs.3,87,07,000.00 on which the LAO raised demand, the ld. FAA appreciated the view of LAO and confirmed the demand raised as per his observation in his order.

(d) On disallowance of concessional rate of tax on account of 172 nos. of defective 'C' forms and one no. of 'D' form involving value of Rs.213,99,68,375.55 by the LAO, the ld. FAA directed the LAO to look into the compliance given by the appellant and examine the above defective statutory forms so as to ascertain the correctness of demand raised.

(e) On imposition of surcharge on tax calculated at State rate, the ld. FAA referred to the judgment of Hon'ble Apex Court in case of Aysha Hosiery Pvt. Ltd. reported in 85 STC 150 and applying the ratio of the above judgment, he sustained imposition of surcharge by LAO.

Accordingly, the ld. FAA allowed the appeal in part, partly dismissing the appeal and partly remanded the appeal.

5. Being further aggrieved by the aforesaid appeal order of the ld. FAA, the dealer knocked the door of this Tribunal by filing of the second appeal and assailed the order of the forum below.

6. The ld. Counsel for the appellant averred that both the forums below have wrongly disallowed the claim of appellant on tax exemption towards sale

made U/s.5(3) of the CST Act. In its factual representation, he stated that the Indian exporter i.e. M/s. Phoenix Overseas Ltd., New Delhi had purchased alumina of Rs.26,76,22,749.00 from the appellant for export sale to one NEZHPROMTORG, MOSCOW as per agreement No.101 dtd.25.10.1991, amended on 30.11.93. Subsequently, agreement between the appellant and Phoenix(Indian Exporter) was made vide no.AL/05/94-95 dtd.05.11.94 for purchase/ supply of alumina. Accordingly, the appellant dispatched the goods as per shipping instructions to foreign buyer vide bill of lading dtd.03.12.94, Invoice No. CAL-006 Dt.07.12.1994 & received 'H' form No.061647. Since, the above transaction fulfilled the conditions stipulated in section 5(3) of the Act, the appellant submitted required 'H' form in support of claim of exemption which was denied by both the forums below without any proper valid reason.

7. Per Contra, the ld. Counsel for the Revenue-respondent argued that the goods sold U/s.5(3) of the CST Act is not as per provisions of the said section as the goods were actually exported to some other foreign buyer rather than the buyer executing the contract with this Indian exporter. He further argued that the ratio of judgment of Hon'ble Apex Court in case of M/s. Consolidated Coffee Ltd. Vs. Coffee Board, Bangalore reported in 46 STC 164 is squarely applicable to the instant case. He further referred to the Hon'ble Supreme Court decision in case of Gopinath Nair Vs. State of Kerala, (1997) 105 STC 580 (SC) where it has been laid down that Section 5(3) of the Central Sales Tax Act has been enacted to extend the exemption from tax liability under the Act **not to any kind of penultimate sale but only to such penultimate sale** as satisfies the two conditions specified therein namely,

(a) That such penultimate sale must take place (i.e., become complete) after the agreement or order under which the goods are to be exported.

and

(b) It must be **for the purpose of complying with such agreement or order,** and it is only then that such penultimate sale is deemed to be a sale in the course of export.

8. After hearing both the rival contentions, this Tribunal examined the informations available in the lower forum record. On such scrutiny, it is revealed that M/s. Phoenix Overseas Limited, the Indian Exporter had entered into an agreement with foreign buyer M/s. NEZHPROMTORG, Moscow vide No.101 dtd.25.10.1991 which was amended on 30.11.93 with an addendum which speak of supply of 25,000MT standard NALCO Metallurgical grade calcined alumina. Accordingly, the appellant entered into an agreement with this Indian exporter vide sale order No.AL/05/94-95 dtd.05.11.94. On 24.11.94, the Indian Exporter issued one shipping instruction to the appellant that contains mainly following instruction:-

(a) Signed commercial invoices original .....

(b) 2/3 original and 2 non-negotiable 'clean', 'on board' , Ocean bills of lading, made out as follows:

Consignee: Commercial and Investment Corporation 107078, Moscow...,

Notify: Trans-Vanino Corporation Ltd.

Vanino commercial sea port,

Khabarvsk region, Russia, TLX 141156, PIRS SU.

Accordingly, the copies of the invoices and bill of lading are found in the appeal record. However, we could not find any causal connection between the foreign importer having the agreement with the Indian exporter with the consignee i.e. Commercial and Investment Corporation, Moscow who has received the exported goods. Moreover, the Revenue has taken a

strenuous stand before us that though the supply was made by NALCO to M/s. Phoenix Overseas Ltd. pursuant to an agreement with foreign buyer i.e. MEZHPROMTORG, at the time of shipping, Commercial and Investment Corporation came into picture and as such the Revenue disputed the claim of NALCO towards exemption of tax u/s.5(3) of the CST Act.

This Tribunal having perused the record submitted by the Revenue finds that the supply of standard NALCO Metallurgical grade calcined alumina was supplied to M/s. Phoenix against which declaration from 'H' was placed before the LAO.

The LAO is, therefore, required to verify the submitted form 'H' along with other documents as required under the said declaration form keeping in mind the agreement along with addendum and the sequence of the invoices which appears to have been raised as per the shipping instructions and to reasonably decide as to whether such claim falls under U/s.5(3) of CST Act.

On 'REP Licence', the ld. Counsel for the appellant argued that the ld. FAA has wrongly upheld the view of the LAO by taxing on such licence. REP Licence was issued to the appellant by the Director General of Foreign Trade as an export initiative which allows importation of some restricted items under such licence as per Import and Export policy. Subsequently, this scheme was abolished under new Export Import policy of Govt. of India, and having no use of these requiring to surrender back to the same issuing authority for cancellation and payment of compensation which doesn't amount to sale. To consolidate his argument, he submitted a judgment of Hon'ble Apex Court dtd.08.06.2016. This Tribunal went through the aforesaid judgment of Hon'ble Supreme Court in Civil Appeal No.1798 of 2005 decided on 08.11.2016 in case

of Commercial Tax Officer and Others Vrs. State Bank of India and Others in which it is held as under:-

" (i) The communication sent by the RBI to the Chairman, Bank authorized the Bank to purchase the Exim scrips as an agent of RBI and after payment of the premium at 20% of the value to the holder, the scrip was to be cancelled. Certain formalities were stipulated to be complied by the holder as well as by Bank.[17]

(ii) The replenishment licences or Exim scrips would be 'goods', and when they are transferred or assigned by the holder/owner to a third person for consideration, they would attract sale tax. However, the position would be different when replenishment licences or Exim scrips are returned to the grantor or the sovereign authority for cancellation or extinction. In this process, as and when the goods are presented, the replenishment licence or Exim scrip is cancelled and ceases to be a marketable instrument. It becomes a scrap of paper without any innate market value. The Bank, when it took the said instruments as an agent of the RBI did not hold or purchase any goods. It was merely acting as per the directions of the RBI, as its agent and as a participant in the process of cancellation, to ensure that the replenishment licences or Exim scrips were no longer transferred. The intent and purpose was not to purchase goods in the form of replenishment licences or Exim scrips, but to nullify them. The said purpose and objective was the admitted position. The object was to mop up and remove the replenishment licences or Exim scrips from the market. The initial issue or grant of scrips was not treated as transfer of title or ownership in the goods. Therefore, as a natural corollary, it must follow when the RBI acquires and seeks the return of replenishment licences or Exim scrips with the intention to cancel and destroy them, the replenishment

licences or Exim scrips would not be treated as marketable commodity purchased by the grantor. Further, the Bank was an agent of the RBI, the principal. The Exim scrips or replenishment licences were not "goods" which were purchased by them. The intent and purpose was not to purchase the replenishment licences because the scheme was to extinguish the right granted by issue of replenishment licences. The "ownership" in the goods was never transferred or assigned to the Bank. The present Court concurred with the view of the High court that the Respondent Bank was not liable to levy of purchase tax under the Act.[33],[34] and[35]"

Applying the above ratio of judgment of Hon'ble Apex court in the instant case, we reasonably observe that 'REP Licence' or 'Exim scrips' surrendered by the appellant as per instructions of Central Govt. circulars doesn't amount to sale and hence not taxable.

On levy of surcharge on CST due on account of inter-state sales effected by the appellant, both the forums have taken the legal support from the ratio of judgment delivered by Hon'ble Madras High Court in case of Engine Valves Limited Vs. Union India and others reported in 90 STC 84 in which the Hon'ble Court held that the word 'sales tax law of the appropriate states' in section 2(1), 8(2)(b) and 8(2-A) of the CST Act, 1956 will encompass in law providing for levying of sales tax and not merely the general sales tax only. The additional tax, surcharge levied are, therefore, includable in computation of rates tax for the purpose of section 8(2)(b) and section 8(2-A) of the CST Act, 1956. In this connection, this forum also relied on the judgment of Hon'ble Apex Court in case of Deputy Commissioner of Sales Tax Vs. Aysha Hoseiry Factory Pvt. Ltd. reported in (1992) 85 STC 106 (SC) in which it is held that Additional Sales Tax (Surcharge) can be levied on inter-state sale (if not covered under

statutory forms). Accordingly, surcharge is leviable on CST due (except declared goods) on account of inter-state sale not covered by statutory forms.

9. Accordingly it is ordered.

The appeal filed by the dealer-appellant is allowed in part and the case is remanded to the LAO to re-compute the tax payable by the appellant taking into the consideration the observations made herein above and pass fresh order preferably within three months from the date of receipt of this order, giving the appellant a reasonable opportunity of being heard.

The case is disposed of accordingly.

Dictated & corrected by me,

Sd/-
(**Srichandan Mishra)**
Accounts Member-II

Sd/-
(Srichandan Mishra)
Accounts Member-II

I agree,

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(Sweta Mishra)
2nd Judicial Member