BEFORE THE ODISHA SALES TAX TRIBUNAL: CUTTACK
(Full Bench)

S.A. Nos. 132(C) & 133(C) OF 2004-05
S.A. Nos. 23(C) & 24(C) of 2006-07

Present: Shri R.K. Pattanaik, Chairman,
Smt. Sweta Mishra, 2nd Judicial Member, and
Shri R.K. Pattnaik, Accounts Member-III

S.A. Nos. 132(C) OF 2004-05
S.A. No. 24(C) of 2006-07

(Arising out of orders of the learned ACST, Sundargarh Range, Rourkela in First Appeal Case Nos. AA. 23 (RL-II-C) of 2004-05, and AA. 106 (RL-II-C) of 2004-05, disposed of on dated 15.09.2004 and 20.01.2006 respectively)

M/s. Lotus Chrome Chemicals (P) Ltd.,
Civil Township, Rourkela ... Appellant

-Versus-

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

S.A. Nos. 133(C) OF 2004-05
S.A. No. 23(C) of 2006-07

(Arising out of orders of the learned ACST, Sundargarh Range, Rourkela in First Appeal Case Nos. AA. 18 (RL-II-C) of 2004-05, and AA. 99 (RL-II-C) of 2004-05, disposed of on dated 30.09.2004 and 20.01.2006 respectively)

M/s. Lotus Chemicals (P) Ltd.,
Civil Township, Rourkela ... Appellant

-Versus-

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

For the Appellants : Sri B.B. Panda, Advocate
For the Respondent : Sri M.L. Agarwal, Standing Counsel (CT)

Date of hearing: 12.03.2020 ***** Date of order: 21.03.2020

O R D E R

Predominantly, besides other, the following question has emerged in the instant appeals for determination which is summarised below:

> Whether surcharge levied under Section 5-A of the Odisha Sales Tax Act, 1947 (in short, 'the Act') is exigible in addition to levy of tax at the rate specified under Section 8(2) of the Central Sales Tax Act, 1956 (in short, 'CST Act') read with Section 5 of the Act with respect to the transactions of sale in course of inter-State trade or commerce falling within the meaning of Section 3(a) of the CST Act.?

2. In fact, since a question of law is involved vis-a-vis the parties, the appeals stand disposed of analogously.

3. S.A. Nos. 133(C) of 2004-05 and 23(C) of 2006-07 relate to the assessment years 2000-01 and 2001-02 respectively and principally, the assessments so made by the Assessing Authority (in short, 'AA") and confirmed by the Assistant Commissioner of Sales Tax, Sundargarh Range, Rourkela (in short, 'FAA'), is under challenge with an additional ground raised during the pendency of the appeals, such as, levy of surcharge as a rate of tax is not permissible since it is not so comprehended in the CST Act. In S.A. Nos. 132(C) of 2004-05 and 24(C) of

2006-07, which relate to the assessment years 2000-01 and 2001-02 respectively, similar is the challenge questioning the surcharge being levied. Apart from above, certain other issues have been raised like not providing adequate opportunity to furnish 'C' declaration forms with a request to adduce it as additional evidence at the stage of appeal. The Tribunal is to examine the aforesaid question besides other issues involved inter se parties.

4. In so far as due opportunity not being provided to the appellant in S.A. No. 23(C) of 2006-07 is concerned, which is with respect to 'C' declaration forms, it is contended that principles of natural justice have not been followed. In fact, in the above appeal, a 'C' form has been produced with a request to admit it, as additional evidence by the Tribunal, which is strongly opposed by the respondent on the ground that it should not to be acceded to at a belated stage, more particularly, when the appellant failed to make out a case in terms of Rule 61 of the Odisha Sales Tax Rules, 1947 (in short. 'the Rules'). It is a fact that the appellant in question did not produce or failed to furnish the declaration in 'C' forms before the FAA and presently, seeking to submit it, adverting to Rule 61 of the Rules, which allows additional or fresh evidence in appeal. The learned Standing Counsel (CT) contended that none of the conditions(s) of Rule 61 is or are fulfilled so as to admit fresh evidence before the Tribunal and while contending so, relied upon an order dated 07.03.2019 of the Hon'ble Court promulgated in STREV No. 179 of 2004, wherein, it is held that in spite of due diligence, if evidence sought to be produced as additional evidence could not be furnished earlier, it ought not

to be accepted, since the requirement of Rule 61 of the Rules is not satisfied, and as such, fresh evidence asked for was denied. According to Rule 61 of the Rules, no party shall be entitled to adduce fresh evidence in appeal, whether oral or documentary, only if it is established that the authority below refused to admit such evidence which ought to have been admitted; if any party seeking to adduce additional evidence satisfies the Tribunal that it could not be produced or was not within its knowledge at or before the time when the order under appeal was passed, notwithstanding the exercise of due diligence, or if the Tribunal requires any such document to be produced so as to enable it to pass order or for any other substantial cause, such evidence may be permitted with a further opportunity to the other party to submit rebuttal evidence. Hence, the appellant is required to satisfy the Tribunal on the above grounds as to what prevented it from submitting the evidence which are sought to be adduced at present and whether, there was due diligence exercised and only if any of the above grounds are fulfilled, then only, the Tribunal can allow acceptance of 'C' declaration form. According to the appellant, the unit is already closed and as a result of which, the 'C' declaration form could not be procured, and that apart, the person in-charge fell sick and because of that the declaration forms could not be collected and later produced before the authorities concerned. The declaration form (No. MAH/01/5689146 dated 04.05.2000) is produced by the concerned appellant, which on a bare perusal, does not disclose the material particulars, regarding the transactions covered thereby and that apart, no reasonable or plausible explanation is offered

to satisfy the Tribunal that despite due diligence it could not be produced or furnished. Such a long delay on the part of the appellant is unexplainable. The appellant could have managed procurement of declaration 'C' forms for its production before authorities below but as it is made to understand, no such sincere effort was made for the reasons best known to it. If an evidence is produced but it is rejected by the authority, whose order is under challenge, then additional evidence can be acceptable, or if such evidence was not within the possession of the party concerned, or within the knowledge of the party, or the party failed to produce it despite the exercise of due diligence, under such circumstances alone, fresh materials can be admitted and of course, the Tribunal can do so to enable it to pass an order or for any other substantial cause, but in the present case, no such ground is really made out by the appellant. That apart, the 'C' form which has been produced by the appellant does not clearly reveal the details of the transactions covered there under and in that view of the matter, the Tribunal arrives at a logical conclusion that no ground exists to consider acceptance of additional evidence, especially when the appellant is found to be grossly negligent or a chronic defaulter, so to say. In other words, the Tribunal having regard to the totality of the circumstances is not inclined to allow the concerned appellant to lead additional evidence in terms of Rule 61 of the Rules and thus, such a request is rejected.

5. Now, the common question of law, which is raised in the appeals is to be determined by the Tribunal and the same is in relation to levy of surcharge

;vis-a-vis the inter-State trade or commerce as a rate of tax specified under Section 8(2) of the CST Act and whether, it is within the bounds of law?

6. The appellants contended that such levy of surcharge is bad in law. Before turning to the merits of the question, the respondent contended that such an issue was never raised before the authorities below and, therefore, it cannot be permitted at present, particularly, after the matter travelled such a long distance. The additional ground in appeal questioning the levy of surcharge is vehemently opposed by the respondent on the ground of delay as well as point of law. As to the delay part, the Tribunal is of the considered view that levy of surcharge, whether permissible or not, being a question of law, it could be raised at any stage. Undoubtedly, the appellants remained silent all along, but in the appeals before the Tribunal, raised the question as to leviability of surcharge, which according to the Tribunal, should be considered, while disposing it of on merit. In fact, a question of law can be raised and determined, even at the stage of appeal before the Tribunal and there is no restriction, as such. In the result, the Tribunal holds that the common question of law involved in all the appeals should end with a reply from the Tribunal.

7. The appellants contend that surcharge under Section 5-A of the Act has been introduced by way of amendment and Section 4 is the charging provision, and in so far as Article 286 of the Constitution of India, 1950 (in short, 'the Constitution') is concerned, it does encompasses within itself, a restriction for the State not to authorize or impose tax on sale or purchase, which takes place

outside the State, or in course of import, or export of goods into or out of the territory of India, as the case may be and therefore, the levy of surcharge as a tax under Section 8(2) of the CST Act is impermissible, inasmuch as, such a provision is beyond the constitutional scheme of things and competence of the State to create and impose. So far as the Section 5-A of the Act is concerned, it has not so far been declared ultra virus. Considering it as an additional tax, the surcharge is imposed and accordingly, both the authorities below directed the appellants to pay. According to the appellants, since surcharge is levied in respect of a class of dealers and not generally, and as such, there is no uniformity maintained, it is no tax in the eye of law and, therefore, not leviable along with tax under Section 5 of the Act. While advancing such an argument, reference is made to a decision of the Hon'ble High Court of Karnataka in the case of Shivamoni Steel Tubes Ltd. Vs. Joint Commissioner of Commercial Taxes (Vigilance), Gandhinagar, Bangalore reported in [1998] 3 STC 385. In that decision, it is held that in common parlance, in the context of Sales Tax laws, the meaning of the word 'rate' is the percentage of turnover, which is required to be paid as tax and, therefore, generally applicable would be the rate which is uniformly applied, in respect of the turnover of all the dealers covered by the State. As it is understood, the decision (supra) does relate to a provision of set off of tax paid on raw materials used for manufacture of iron and steel items which was considered in juxtaposition to the deduction generally in rate of State Sales Tax and in that context, it was held by the Hon'ble Court that such a rate cannot be said to be the rate of tax prescribed generally under the

State Act within the meaning of Section 8(2A) of the CST Act. The appellant draws an analogy by contending that so far as Section 5-A of the Act is concerned, it is not a rate of tax and the position prior to Orissa Act 3 of 2001 classified the dealers on the basis of gross turnover and, therefore, when the rate of tax is not uniform, surcharge could not have been levied. Post Orissa Act 3 of 2001, such classification was deleted, making every dealer to pay surcharge at the rate of ten per centum of the total amount of tax so payable by him, in addition to the tax payable under the Act. Earlier, levy of surcharge was on the basis of gross turnover with classified dealers or class of dealers, but later on, by virtue of Orissa Act 3 of 2001, each and every dealer is made liable to pay surcharge in terms of Section 5-A of the Act, over and above, the tax payable under the Act. Such classification of dealers prior to Orissa Act 3 of 2001 was based on the objective of imposing additional tax against the dealers having economic superiority. However, at present, no such distinction lies, inasmuch as, Section 5-A of the Act demands surcharge from every dealer and that too, it is not based on gross turnover but payable at the rate of ten per centum of the total amount of tax. To hold that the classification of dealers does mean the surcharge is not an additional tax, as is contended by the appellants, is liable to be rejected outrightly. Such a classification was with the intent and purpose to impose additional tax on a dealer or class of dealers having economic superiority. It was not to be levied against each and every one but only imposable against a classified group of dealers who are having specified gross turnover. Therefore, to contend that surcharge is not a tax on such a ground and

on the ground that a uniform rate which is generally applicable not being there in respect of surcharge and thus, not a tax at all is unacceptable. The learned Standing Counsel (CT) placed reliance on an order dated 28.09.2000 of the Hon'ble Court in M/s. Aerocom Private Limited Vs. Sales Tax Officer, Puri-I Circle, Puri in O.J.C. No. 5438 of 2000, wherein, it is held that levy of surcharge under CST Act is a question which has already been decided by the Hon'ble Supreme Court of India in the case of Deputy Commissioner of Sales Tax Vs. Aysha Hosiery Factory (P) Ltd. reported in [1992] 85 STC 105 (SC) and on that ground, declined to entertain the matter and accordingly, dismissed it. It would be profitable to quote the ratio of the Hon'ble Apex Court in the decision (supra) which is to the effect that the expression 'tax' is not only what is charged as tax but also includes surcharge; the surcharge levied by Section 5-A of the Act is nothing but additional sales tax though called 'surcharge'; and there is no reason to construe that an inter-State sale attracts less tax than an intra-State sale; furthermore, it cannot be gainsaid that even the provisions of a taxing enactment have to be reasonably construed having regard to the object and purpose underlying it and the attempt should be to achieve the said object. It is further held and observed therein that the rate of tax has been prescribed under Section 5, whereas, surcharge under Section 5-A of the Act; the tax payable under the Act is not only at the rate contemplated under Section 5 but such as may be determined on a combined reading of Sections 5 and 5-A; in other words, the assessee has to pay the amount which is determined in accordance with the provisions of Sections 5 and 5-A of the Act and

the rate of tax under Section 8(2)(b) of the CST Act cannot be confined to the rate contemplated under Section 5 of the Act alone and, therefore, on a conjoint reading of Sections 5 and 5-A of the Act, rate of tax is not only the one prescribed but only the one prescribed under Section 5 but it may be arrived at by combining the tax levied under Sections 5 and 5-A of the Act, inasmuch as, surcharge is nothing but an additional sales tax. The learned Counsel, Sri B.B, Panda appearing for the appellants attempted to distinguish the aforesaid decision by referring to the citation of the Hon'ble Karnataka High Court in the case of Shivamoni Steel case. But, as earlier discussed, classification of dealers under the old law vis-a-vis the surcharge is only to identify the dealers and therefore, there is no uniformity and on that ground, a surcharge cannot be declared something other than a tax. The learned Standing Counsel (CT) by submitting a copy of an order of the Hon'ble Apex Court in M/s. Aerocom Private Limited case contended that the order of the Hon'ble Court in O.J.C. No. 5438 of 2000 has been confirmed with the conclusion that there being no challenge to the validity of Section 5-A of the Act, levy of surcharge there under to be payable and has to be regarded as rate of tax payable under Section 8(2) of the CST Act in view of the decision in Aysha Hosiery Factory (P) Ltd. case. Apart from the above, the learned Standing Counsel (CT) referred to a series of decisions of the Hon'ble Apex Court, such as, in Hoechst Pharmaceuticals Ltd. Vs. State of Bihar: [1994] 55 STC 1 (SC), Ashok Service Centre Vs. State of Orissa: [1983] 53 STC 1 (SC), Commissioner of Commercial Taxes Vs. Bajaj Auto Limited: [2017] 97 VST 22 (SC) in order to contend that surcharge is a tax

and nothing else. The sum and substance of the ratio in the aforesaid decisions is that surcharge partakes the nature of sales tax and, therefore, it is within the competence of the State legislature to enact Section 5-A of the Act for the purpose of levy of surcharge on certain class of dealers in addition to the tax payable; a surcharge in its true nature and character is nothing but a higher rate of tax to raise revenue for general purposes; Section 5 of the Act provides rate of sales tax whereas Section 5-A thereof levy surcharge on the dealer, which is nothing but an additional tax and such a provision is a self contained one. So, the settled position of law is that the surcharge is principally an additional tax leviable over and above the tax payable under the Act. The attempt of Sri Panda for the appellants, distinguishing the above authorities to suggest that surcharge is not a tax, is not tenable. One more unreported decision of the Hon'ble Apex Court in the case of M/s. Achal Industries Vs. State of Karnataka in Civil Appeal No. 4837 of 2011 disposed of on 28.03.2019 is referred to by the learned Counsel Sri Panda while challenging the leviability of surcharge as a tax. In the aforesaid decision, the Hon'ble Apex Court quoted with approval the decision of M/s. Hoechst Pharmaceuticals Ltd. while entertaining a challenge based on total turnover and not taxable turnover with reference to the constitutional validity of Section 6(B) of Karnataka Sales Tax Act, 1957 (in short, 'KST Act'). The challenge before the Hon'ble Apex Court was with regard to the State's power or authority to levy tax with respect to the subjects under Entry 54 of List II of the Seventh Schedule of the Constitution. Such a challenge was rejected by the Hon'ble Apex Court on the

ground that it is within the competence of the State legislature to levy tax on gross turnover notwithstanding Article 286 of the Constitution, while making a law under Entry 54 of List II of the Seventh Schedule thereof for the purpose of registration of a dealer, submission of returns of sales tax, including transactions covered by Article 286. In fact, in that case, Section 5(1) of the Bihar Finance Act, a provision pari materia Section 6(B) of KST Act and its validity was under question on the ground that it was not within the competence of the State legislature to levy surcharge on the gross turnover in relation to the tax payable in reference to Article 286 read with Entry 54 of List II of the Seventh Schedule of the Constitution. The Hon'ble Apex Court in the decision of Achal Industries reaffirmed its view shared in Hoechst Pharmaceuticals Ltd and categorically observed that such a classification of dealers on strength of gross turnover is absolutely justified and unassailable. The decision in Achal Industries rather dismantles the contention of learned Sri Panda for the appellants. In other words, through there is a classification under the old law prior to Orissa Act 3 of 2001, such is permissible, even with respect to the subjects within the purview of Article 286 which is absolutely within the constitutional scheme and competence of State legislature, as has been expounded by the Hon'ble Apex Court in the decisions discussed herein above. Regarding the decision in India Carbon Ltd. Vs. State of Assam reported in [1997] 106 STC 460 (SC), which is relied upon by the learned Counsel Sri Panda, it is of no help to the appellants, which is concerning charging of interest under the Assam Sales Tax Act in absence of a substantive provision in the CST Act itself. The

contention of the appellants that there is no such provision as to surcharge in CST Act and, therefore, it cannot be levied and for that, a reference is made to Section 9(2) thereof. The decision (supra) is of the year 1997 and in the meantime, a provision of charging interest has been included in Section 9(2) of the CST Act by way of Finance Act 2000 (No. 10 of 2000) w.e.f. 12.05.2000. The contention is that when there is no provision of surcharge in Section 9(2) of the CST Act, it cannot be levied by the State by resorting to Section 5-A of the Act, which is in relation to surcharge and not a tax. Under Section 9(2) of the CST Act, the authorities are to assess, reassess, collect and enforce payment of any tax under the General Sales Tax law of the appropriate States shall, on behalf of the Government of India, assess, reassess, collect and enforce payment of tax including any interest or penalty payable by a dealer under the Act, as if the tax, interest or penalty payable by such a dealer under the Act is a tax or interest or penalty payable under the General Sales Tax law of the State and for this purpose, may exercise all or any of the powers, they have under the General Sales Tax law of the State. In view of the settled law, surcharge being an additional tax, such is to be collected under Section 9(2) of the CST Act, since the authorities concerned are to assess, reassess, collect and enforce payment of tax besides interest and penalty as payable by the dealer. In the case of India Carbon Ltd. in absence of any substantive provision in the CST Act as to interest, the collection thereof under Section 35A of the Assam Sales Tax Act, was interfered with. However, in the present case, when surcharge is held as an additional tax and a provision which can be made within the constitutional

framework and legal competence of State legislature, it has to be held that it is leviable and collectable in terms of Section 9(2) of CST Act. So, the decision in India Carbon Ltd. is of no help to the appellants, since surcharge is a tax over and above regular tax payable under the Act, which comes within the ambit of Section 9(2) of the CST Act that prescribes collection of all kinds of tax including any interest or penalty payable by a dealer.

8. Besides the above decisions, the learned Standing Counsel (CT) placed reliance on the following decisions, such as, Sidwal Refrigeration Industries (P) Ltd. Vs. State of Haryana: [1993] 89 STC 97 (P&H); Engine Valves Ltd. Vs. Union of India: [1993] 90 STC 84 (Mad.); Raasi Cement Ltd. Vs. CCT: [2006] 146 STC 66 (AP), wherein, similar views have been expressed by the Hon'ble Courts. One more decision in the case of N.A. Jailabdeen Vs. State of Kerala reported in [1999] 113 STC 100 (Ker.) besides the case of Aysha Hosiery Factory (P) Ltd. have been highlighted which are on payment tax under the Kerala Additional Sales Tax Act. In the aforesaid cases, additional tax has been considered as a tax with higher percentage and in effect considered to be a tax levied on the sales or purchases of the dealers. So far as Section 5-A of the Act is concerned, it has come into existence after repeal of Orissa Additional Sales Tax Act, 1975 which is virtually a tax in addition to the tax payable under Section 5 of the Act. So, having regard to the settled principles of law, the conclusion of the Tribunal in unequivocal term is that surcharge under Section 5-A of the Act is an additional tax to be payable besides the regular tax which is exigible at the rate specified under Section 8(2) of the CST

Act read with Section 5 of the Act on the transactions on sale in course of inter-State trade or commerce. As a corollary, it is to be concluded that all the contentions of the appellants questioning the levy of surcharge by the authorities concerned are bound to fail.

9. Since the appellants could not submit declaration 'C' forms in respect of certain transactions, the authorities concerned rightly disallowed the concessional rate of tax to that effect and consequently, levied the surcharge, which is absolutely justified and in accordance with law.

10. Hence, it is ordered.

11. In the result, the appeals stand dismissed. As a consequence, in view of the reasons cited above, the impugned decisions of the AA and FAA are hereby confirmed.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(Sweta Mishra)
2nd Judicial Member

I agree, Sd/-
(R.K. Pattnaik)
Accounts Member-III