BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A.No. 364(V)/2017-18

(From the order of the ld.JCST, Balasore Range, Balasore, in Appeal No.AA-28/BA-2017-18 (VAT), dtd.26.10.2017, confirming the assessment order of the Assessing Officer)

Present: Sri S. Mohanty
2nd Judicial Member

M/s. Jagadamba Polymers Pvt.Ltd.,
25, Ganeswarpur Industrial Estate,
Dist. Balasore. ... Appellant

-Versus-

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

For the Appellant : Mr. K. Kurmy, Advocate &
Mr. R. Sharma, Advocate
For the Respondent : Mr. S.K. Pradhan, ASC (C.T.)

(Assessment Period : 01.07.2012 to 18.10.2016)

Date of Hearing: 24.11.2018 Date of Order: 24.11.2018

ORDER

The assessee-dealer being unsuccessful before both the fora below has preferred this second appeal challenging the sustainability of the confirming order of learned First Appellate Authority/Joint Commissioner of Sales Tax, Balasore Range, Balasore (in short, FAA/JCST) the dealer saddled thereby with additional amount of tax and penalty as determined in a proceeding u/s.43 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act) covering the tax period from 20.07.2012 to 18.10.2016 relating to the appellant-dealer who was engaged in manufacturing and sale of plastic moulded articles such as chair, buckets, jugs. The dealer was self assessed but in a latter period

on the basis of a Advance Ruling passed by this Tribunal in connection with different dealer but relating to the same goods dealt by the present dealer, re-assessment u/s.43 of the OVAT Act was initiated. It was held that, the goods like pet-pre-forms is not a schedule goods under the Act, so to say as per Entry Sl.No.83 as claimed by dealer and then held the same as an unspecified item exigible to tax @13.5% to 14.5% as the case may be. The AA capitalised his findings basing the advance ruling and negated all the argument of by the dealer like-: the act of the AA amounts to change of opinion, the advance ruling is not binding on the instant dealer or the re-assessment is barred by limitation. Consequently, he determined the tax liability treating the goods like pet-pre-forms as unspecified item, resulting extra demand of tax of Rs.29,42,281/-and thereafter imposed penalty i.e. twice of the balance tax due calculated at Rs.49,19,812/. The total demand raised to Rs.78,62,093/-.

2. The matter was carried before the First Appellate Authority (in short, FAA) by the dealer who in turn also accepted and adopted the findings of the AA and thereby the tax due and penalty as imposed remain undisturbed. On this backdrop, this second appeal has been filed by the dealer. The contention of the dealer-appellant are, pet-pre-forms is a packing material as per Entry Sl.No.83 of the Act or in alternative it should be treated as an industrial input as it is used for manufacturing of water bottle attracting thereby Entry Sl. No 74 of the schedule II. But in no case pet-pre-forms can be treated as a non-scheduled item. The next contention of the dealer is, reopening of the assessment in the case in hand is nothing but a change of opinion which is not sustainable in law, the reassessment proceeding is barred by limitation as initiated after period of limitation as per Sec.49(1) of

the OVAT Act whereas the penalty as imposed in this case is not sustainable as the dealer was not guilty under any of the grounds enumerated in the provision u/s.43(1) of the OVAT Act.

3. The substantive question of law and facts raised for decision in this appeal are,(i) if the goods dealt by the dealer like pet-pre-forms is a schedule goods or not and (ii)if it is a schedule goods falls under the Sl.No.83 as packing materials or 73 as Industrial inputs,(iii) If the re-assessment proceeding as initiated u/s.43 is nothing but a change of opinion by the AA not permissible under law,(iv) if the re-assessment proceeding as instituted under 3 year of regular assessment is barred by law as it contravenes the provision u/s.49(1) of the OVAT Act. (v) if the penalty imposed as per Sec.43 of the OVAT Act is not sustainable in the eye of law as there is no mensrea and when the act of dealer is bonafide, (vi) if the re-opening on the basis of advance ruling which is per inquirium with the decision of the Apex Court is binding on the dealer,and (vii) if not, whether basing the advance ruling the re-assessment as done in this case is sustainable or not ?

4. So far as the re-opening of the assessment as per Sece.43 of the act which is done in this case, learned Counsel for the dealer vehemently argued that, when the AA initiated re-assessment proceeding as per Sec.43 of the act alleging escapement of assessment, the order must satisfy that there was reason for re-opening of the assessment and in the case in hand, it is nothing but a change of opinion. It was the same AA had accepted the returns of the dealer for previous periods including the present period without any objection treating the goods dealt by the dealer as packing materials as per Entry Sl.No.83. So, re-opening of the assessment holding the nature of

goods i.e. pre-pet-form as, not a packing material but an unscheduled item is nothing but mere change of opinion. To counter this argument, learned Addl. Standing Counsel draws the attention of the Court to the impugned order, whereby the FAA has held that, this proceeding is initiated on the basis of advance ruling by this Tribunal in **Kalinga Gases Pvt. Ltd. Vrs. State of Odisha A.R. Appeal No.01/2011-12.** For better appreciation of the implication of the advance, the provision u/s.49(1) of the OVAT Act is reproduced below :

> **49. Power of reassessment in certain cases. –**
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> (1) Where any order passed by the assessing authority in respect of a dealer for any period is found to be erroneous or prejudicial to the interest of revenue consequent to, or in the light of, any judgment or order of any Court or Tribunal, which has become final and binding, then, notwithstanding anything contained in this Act, the assessing authority may proceed to reassess the tax payable by the dealer in accordance with such judgment or order, at any time within a period of three years from the date of the judgment or order".
>
> (ii) xxx xxx xxx xxx

The provision as it contemplate, on the basis of advance ruling which came into effect even after regular assessment, the AA within his competency can re-open assessment taking resort to Sec.49(1) of the act. Referring to the present case, though the nomenclature of the provision basing which the reassessment was initiated i.e. Sec.43 but in fact, the AA has taken resort to Sec.49(1) for re-opening of the assessment. If that be, the ingredient of Sec.43 which is a pre-condition for re-assessment under that provision and its prove in this case are redundant. Yes, if we go by the provision u/s.43 then in respectful agreement with the submission of the learned Counsel for the dealer, it can be said that, the re-assessment is nothing but a

change of opinion, which is not permissible u/s.43 of the act. Accordingly, the question raised by the dealer is answered with the finding that, the present re-assessment be treated as the reassessment on the basis of Sec.49(1) of the OVAT Act.

5. The main contention of the dealer is, the present re-assessment proceeding is barred by law. Learned Counsel argued that, if this is a proceeding initiated as per Sec.49(1) of the Act, then it should have completed within 3 years from the date of advance ruling. Since it is not completed within 3 years, the present assessment is barred under law. Per contra, learned Addl. Standing Counsel, Mr. Pradhan argued that, because this is a proceeding u/s.43 and the period prescribed under law for completion of re-assessment proceeding u/s.43 is 7 years. Further, learned Addl. Standing Counsel also advanced argument taking cue from the provision of Sec.49 that, the 3 years period as per Sec.49(1) is from the date of judgment/order passed against the present dealer from the date of his regular assessment. As the assessment is completed within 3 years from the original assessment, then this reassessment even though as per Sec.49(1) still it is not barred by limitation.

Provision u/s.49 is purely independent of regular assessment or re-assessment u/s.43 of the OVAT Act. It is a separate provision empowering the AA for re-assessment on the basis of a judgment or order of any Court or Tribunal. If that is, the scope under this provision cannot be elastic or stretched to an indefinite period. Basing the judgment or order, if assessment re-opened in every case, at any time, it will defeat the ends of justice as well as it will lead to multiplicity. In **Popat Bahiru Govardhane & ors. V. Special Land Acquisition Officer & anr., (2013) 10 SCC 765,** it is held as follows :

> 13. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The Court has no power to extend the period of limitation on equitable grounds. The statutory provision may cause hardship or inconvenience to a particular party but the Court has no choice but to enforce it giving full effect to the same. The legal maxim "dura lex sed lex" which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute. "A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." (See : The Martin Burn Ltd. v. The Corporation of Calcutta, AIR 1966 SC 529; and Rohitas Kumar & Ors. v. Om Prakash Sharma & Ors., AIR 2013 SC 30) In view of the above, we are of the candid view that none of the submissions advanced on behalf of the appellants is tenable.

In M/s. Veena House Vrs. Sales Tax Officer, Assessment Unit, Nayagarh and Others in W.P.(C) No.22697 of 2014 while dealing with Sec.49 of the Act the Hon'ble Court has also taken the similar view.

6. Thus, from the discussion above, there is no escape from the conclusion that, re-assessment u/s.49 of the OVAT Act should be completed within 3 years from the date of the judgment or order which forms the basis of reassessment. In the case in hand, if we calculate the time period, it is found that, the advance ruling was passed on dt.08.02.2012 and the re-assessment of the dealer was completed on dt.06.06.2017 i.e. beyond the period of 3 years. Hence, it is held that, the present reassessment is barred under law hence it is not sustainable.

7. Next contention raised by the dealer is, the goods dealt by the instant dealer i.e. pet-pre-form is a schedule goods. It should be

treated as packing material as per Entry Sl.No.83 of schedule B Part-IV or in alternative when it is not disputed that, the goods was used for preparation of water bottle and the same goods is simply converted to water bottle, it also can be treated as industrial input attracting Entry Sl.No.74 read with notification no.20279CTA-19/2005-F(SRO 153/2006)dtd.15.5.2006. Countering the advance ruling whereby this Tribunal has held that, the pet-pre-forms is a non-schedule item. The Learned Counsel for the dealer argued that, the Full Bench while passing the advance ruling had failed to take note of the ratio laid down by the Apex Court in **Lieu Govt. Delhi and Others Vrs. Ganesh Flour Mill Co. Ltd. (1973) 31 STC 354**. It is argued that bare reading of the decision which relates to other materials like Tin sheets but used for the purpose of packing materials, it can definitly held that,pet-pre-form is a schedule goods coming under the category of packing materials. Learned Counsel also placed reliance on many of the authorities whereby the principle is well settled that, when the goods in question can by no conceivable process of reasoning or liberal interpretation be brought under any of the specific entries, resort can then be had to the residuary entry. It is argued that, while basing the Advance Ruling, the Full Bench of this Tribunal has not invoked the principle under law settled by the authorities that liberal interpretation should be given to see if a goods come under the purview of any specific entry and in other case only the goods should be treated under residuary entry. It is further argued that the Advance Ruling relates to different dealer has got no binding effect on the present dealer. Gone through the authorities relied by the learned Counsel for the dealer. The ratio laid down by the authorities as it revealed, the residuary heading has to be resorted to only when by a

liberal construction of the specific heading cannot cover the goods in question.

It is pertinent to mention here that, the decision of the Apex Court is not related to pet-pre-form but relates to similar item used for packing purpose. May be the ratio laid down by the authority if applied pet-pre-form should be treated as packing material but the question is, whether this Single Bench can distinguish itself from the Advance Ruling by the Full Bench keeping in view the provision u/s.78(A)(6) of the Act. The provision u/s.78(A)(6) reads as follows :

> **[78A. Advance Ruling on disputed questions.-**
>
> **xxx xxx xxx xxx xxx**
>
> (6) The advance ruling so pronounced by the Advance Ruling Authority shall have effect on other dealers situated in similar facts and circumstances of any case".

Once an Advance Ruling relating to the particular goods is there and it adversely affects the interest of the dealer before this Tribunal or other dealer like the instant dealer in that case, even though the instant dealer, who was not a party to that Advance Ruling application has also a right under law to challenge the Advance Ruling before the higher forum. Further, if the principle has been well settled by the Apex Court of the land and it was not brought to the notice of the Court or Tribunal, who is necessarily subordinate to the Apex Court, in that case also, irrespective of the lack of jurisdiction to review, a Tribunal or Court can take note of the principle settled by the Apex Court and recalled its own order. In either case, it is held that, a Single Bench has no jurisdiction to override the decision taken by the Full Bench while passing the Advance Ruling. It is the dealer, who has not knocked the door of the higher forum or this Tribunal for recalling of

the Advance Ruling and unless and until the Advance Ruling is not set-aside it is applicable in accordance to Sec.78(A)(6) of the OVAT Act. I have no hesitation to hold that, even though the plea advanced by the dealer has got its own force but as Advance Ruling became a rider, no other view can be taken by this Tribunal. As a result, it is held that, the goods dealt by the dealer is not a schedule goods either as per Entry Sl.No.74 or 83 as claimed.

8. Next point of argument of the dealer is, the penalty as imposed invoking u/s.43(2) of the OVAT Act in the case in hand is not sustainable. At the outset, it is apt to mention here that, once it is held that the present proceeding is drawn as per Sec.49 of that which is an independent section, then in that case, provision u/s.43(2) of that imposing penalty has no application. Even otherwise, if we go into the merit it can safely be said that, it is the authority had been accepting the returns of the dealer for previous year including the period under question in this appeal without objection and it is because of the Advance Ruling, the assessment has been re-opened, so, when the AA was sure that, the goods dealt by the dealer was a schedule good and the return by the dealer were accepted time to time, then the bona-fides of the dealer cannot be questioned. If that be, the dealer also cannot be asked to pay penalty invoking provision u/s.43 of the OVAT Act.

9. In the wake of above narrative, it is held that, (i) the re-assessment as done in this case is not covered u/s.43 but u/s.49 of the OVAT Act (ii), if the re-assessment will be treated as a re-assessment as per Sec.43, then it is held that, the re-assessment is not maintainable because it is simply a change of opinion by the AA (iii), the re-assessment as done invoking provision u/s.49(1) is barred

by limitation since it is not completed within 3 years of the Advance Ruling passed by this Tribunal (iv), the goods dealt by the dealer never can be treated as a schedule goods as claimed by the dealer keeping view the rider as per Sec.78(A)(6) and as there was Advance Ruling by this Tribunal to treat this goods as non-scheduled item and (v) the penalty as imposed is bad both in law and facts, hence not sustainable. Accordingly, it is ordered.

The appeal is allowed on contest. The impugned order thereby confirming the tax liability as determined by the AA is set-aside.

Dictated and Corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

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