

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

S.A. No. 48 (VAT) of 2013-14

(Arising out of order of the learned JCST, Ganjam Range,
Berhampur in First Appeal No. AA- (VAT) 75/2012-13,
disposed of on dated 17.01.2013)

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

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

-Versus-

M/s. Laxmi Agency,
Neelakantheswar Temple Road,
Berhampur ... Respondent

For the Appellant : Sri D. Behura, S.C. (CT) &
Sri S.K. Pradhan, Addl.SC (CT)
For the Respondent : Sri B. Mohanti, Sr. Advocate &
Sri S.K. Mishra, Advocate

Date of hearing: 20.06.2022 *** Date of order: 27.06.2022

O R D E R

The State has preferred this second appeal
questioning the legality of the order dated 17.01.2013
passed by the learned Joint Commissioner of Sales Tax,
Ganjam Range, Berhampur (hereinafter called as 'first
appellate authority') in Appeal No. AA- (VAT) 75/2012-13
thereby reducing the demand to ₹11,833.74 from

₹11,67,153.00 raised by the Asst. Commissioner of Sales Tax, Ganjam-I Circle, Berhampur (in short, 'assessing authority') for the period from 01.04.2005 to 31.08.2011 in the assessment framed u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act').

2. The relevant facts leading to filing of the present second appeal are that the dealer-assessee carries on business in cattle and poultry feed, ingredients, maize, oil cake, de-oiled cake etc. on wholesale basis. Consequent upon the audit conducted u/s. 41 of the OVAT Act, the dealer was served upon a notice in Form VAT-306, on receipt of which the dealer produced the books of account for verification. In course of verification of the books of account, learned assessing authority confronted the Audit Visit Report (AVR) dated 15.10.2011 received from the STO, Audit Unit, Berhampur wherein it was alleged that the dealer effected purchase of broken rice amounting to ₹48,077.00 from M/s. Jai Laxmi Agro Foods (P) Ltd., Cuttack, which it sold as such vide invoice No. 159 dated 29.12.2010. The dealer explained before the Audit Officials that due to negotiation made earlier with the purchaser, the broken rice was sold at the same price. It was further observed by the Audit Officials that since the very purpose of

VAT is value addition at every stage of sale giving due credit to ITC availed at the time of purchase, the said purpose was defeated. So, it suggested to add profit margin on the value of ₹48,077.00. Further, the Audit Officials on verification of purchase invoice found that the dealer purchased goods on defective invoices and suggested to disallow the ITC of ₹7,912.32 u/s. 20(8)(g) of the OVAT Act. Accordingly the Learned assessing authority disallowed the ITC of ₹7,912.32. The assessing authority on verification of books of account found that the dealer sold calcite powder/stone powder as tax exempted goods. It was of the view that calcite powder being a mineral is taxable @ 4% as per Part-II of the Schedule. It determined the GTO and TTO of the dealer at ₹18,59,20,927.00 and ₹11,31,62,350.90 respectively. It also levied penalty of ₹7,78,102.00 u/s. 42(5) of the OVAT Act. Thus, the total tax demand raised was ₹11,67,153.00 which includes penalty.

2(a). The dealer-assessee, being aggrieved with the demand raised by the assessing authority, filed appeal before the first appellate authority, who reduced the demand to ₹11,833.74 holding that the dealer purchased maize on defective invoices contravening Section 20(8)(g) of the OVAT Act, therefore, the assessing authority rightly disallowed the

ITC of ₹7,912.32 and that the calcite power having been used as feed supplement for manufacturing of poultry and cattle feed, it is not taxable and accordingly, allowed tax exemption on sale of calcite powder for ₹96,27,653.81.

The State being dissatisfied with the order of the first appellate authority reducing the demand to ₹11,833.74, preferred the present second appeal.

3. The only dispute involved in the present second appeal is whether the first appellate authority was correct in its approach in holding the sale of calcite powder by the dealer-assessee as tax free goods in view of the entry at Sl. No. 3 of Schedule-A of the OVAT Rate Chart? Learned Standing Counsel (CT) representing the State challenging the impugned order of the first appellate authority vehemently urged that the calcite powder having been sold as mineral, the assessing authority rightly levied tax on it. The first appellate authority illegally reduced the tax demand raised by the assessing authority holding that the dealer-assessee had sold calcite power as feed supplement for manufacturing of poultry and cattle feed including supplement being tax exempted in view of entry at Sl. No. 3 of Schedule-A of the OVAT Rate Chart and that the assessing authority was not correct in its approach in

levying tax on it. The finding of the first appellate authority is against the statutory provisions under the OVAT Act and Rules framed thereunder. He strenuously argued that the first appellate authority should not have relied upon the documents filed by the dealer which were self-serving documents and should not have allowed the claim of the dealer-assessee holding the sale of calcite powder as tax exempted. Therefore, the impugned order of the first appellate authority is unsustainable in the eyes of law and that of the assessing authority is in accordance with law and is legally sustainable. He submitted to allow the appeal, set aside the impugned order of the first appellate authority and restore that of the assessing authority.

4. Per contra, Mr. B. Mohanti, learned Senior Counsel for the dealer-assessee supporting the impugned order in terms of cross-objection filed by it, vehemently urged that the first appellate authority has passed the impugned order holding that the calcite powder was used as feed supplement for manufacture of poultry and cattle feed, which was tax exempted in view of entry at Sl. No.3 of Schedule-A of the OVAT Rate Chart and such finding of the first appellate authority was based on materials on record. Learned Standing Counsel (CT) nowhere has pleaded in the

memorandum of appeal that calcite powder was used as mineral by the dealer-assessee on account of which the sale of the same would attract tax liability under the OVAT Act. Rather the documents on record clearly prove that the calcite powder was used as feed supplement for manufacture of poultry and cattle feed. Therefore, the first appellate authority did not commit any illegality in allowing the claim of the dealer-assessee that sale of calcite powder for ₹96,27,653.81 was tax free. The assessing authority neither discussed the material on record nor the statutory provision in levying tax on sale of calcite powder. The tax demand has been raised against the statutory provisions in order to harass the dealer-assessee, who is a genuine tax payer. He submitted to dismiss the appeal and confirm the order of the first appellate authority.

5. We have heard rival submissions of the parties, gone through the grounds raised in the memorandum of appeal vis-a-vis the impugned orders of the forums below and the materials on record. The sole dispute in the present case is whether sale of calcite powder for ₹96,27,653.81 is taxable under the OVAT Act or it is tax exempted being tax free item as per entry at Sl. No. 3 of Schedule-A of the OVAT Rate Chart? On going through the

assessment order of the assessing authority, we find that it has levied tax @ 4% holding calcite powder as mineral. The order of the assessing authority does not reveal as to on what basis, it came to the conclusion that the calcite powder sold by the dealer-assessee was mineral and was taxable under Part-II of the Schedule. The first appellate authority did not agree with such finding of the assessing authority and reduced the tax demand to ₹11,833.74 holding sale of calcite powder as tax free item. The impugned order of the first appellate authority reveals that it has taken note of xerox copy of the letter having reference No. CFP : QC: 10: 2012-13/96 dated 24.04.2012 of the Plant Manager, Orissa State Co-Operative Milk Producers Federation Ltd., Cattle Feed Plant, Radhamadhabpur, Cuttack, wherein it has been clearly mentioned that M/s. Laxmi Agency, Berhampur had been supplying calcite/stone powder to OMFED, Bhubaneswar and the form of the above mentioned powder was same as per the laboratory testing and it was being used as cattle feed supplements, which is tax exempted under the OVAT Act since 01.07.2005. It also took note of xerox copy of letter of M/s. Ganapati Agro Products (P) Ltd., Bhagabanpur Industrial Estate, Patrapada, Bhubaneswar, wherein it has been categorically mentioned that the

purchasing dealer used the calcite powder as feed supplement for manufacturing of poultry and cattle feed. The finding of the first appellate authority is based on the above documents produced by the dealer-assessee before it, whereas the finding of the assessing authority is not based on any document. Neither there is any testing report nor any report of the purchaser about use of the calcite powder by them. Therefore, the order of the assessing authority was unsustainable in the eyes of law. Entry at Sl. No. 3 of Schedule-A appended to OVAT Act is quoted hereunder for better appreciation of the dispute involved in the present appeal:

“3. Aquatic feed, poultry feed and cattle feed including supplements, concentrates, additives, de-oiled cake, grass, hay and straw and husk of pulses, wheat and groundnut including chokod.”

Calcite powder in the present case having been used by the purchaser as poultry and cattle feed, is clearly covered under the above entry, and therefore, it is a tax free item. The first appellate authority has rightly exempted the sale of calcite powder for ₹96,27,653.81 from tax liability thereby reducing the demand to ₹11,833.74 from ₹11,67,153.00. We do not find any illegality or impropriety in such finding of

the first appellate authority warranting interference of this forum.

6. For the foregoing discussions, we are of the view that the first appellate authority has correctly held the sale of calcite powder as tax exempted goods as the same was used as poultry and cattle feed. Accordingly, the appeal filed by the State being devoid of any merit 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/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member

I agree,

Sd/-
(S. Mishra)
Accounts Member-II