

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

S.A. No. 119 (VAT) of 2011-12

&

S.A. No. 69 (ET) of 2011-12

(Arising out of orders of the learned DCST, Jajpur Range,
Jajpur Road in First Appeal Nos. AA- 124- KJ-09-10 &
AA- 282- KJB (ET) – 09-10, disposed of on dated 22.06.2011)

Present:

Shri A.K. Das, Chairman

Shri S.K. Rout, 2nd Judicial Member

&

Shri M. Harichandan, Accounts Member-I

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

... Appellant

-Versus-

M/s. Shree Krishna Enterprises,
At/PO- Barbil, Dist. Keonjhar

... Respondent

For the Appellant

: Sri D. Behura, S.C. (CT) &
Sri S.K. Pradhan, Addl.SC (CT)

For the Respondent

: Sri B.N. Mohanty, Advocate

Date of hearing: 29.06.2022 *** Date of order: 20.07.2022

O R D E R

Both these second appeals as involved of
common question of facts and law are taken up together for
hearing and are disposed of by this composite order.

2. The State has preferred S.A. No. 119 (VAT) of
2011-12 challenging the order 22.06.2011 passed by the
learned Deputy Commissioner of Sales Tax, Jajpur Range,

Jajpur Road, (hereinafter called as 'first appellate authority') in Appeal No. AA- 124- KJ- 09-10 thereby reducing the extra demand of ₹81,59,655.00 raised by the Sales Tax Officer, Barbil Circle, Barbil (in short, 'assessing authority') for the period 01.04.2005 to 31.03.2008 in the assessment framed u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act').

3. It also preferred S.A. No. 69 (ET) of 2011-12 assailing the order dated 22.06.2011 passed by the same first appellate authority in Appeal No. AA- 282- KJB (ET)- 09-10 thereby reducing the extra tax demand of ₹16,19,946.00 raised by the same assessing authority for the tax period 01.04.2005 to 31.03.2008 in the assessment framed u/s. 9C of the Odisha Entry Tax Act, 1999 (in short, 'OET Act').

4. Briefly stated, the facts common in both the appeals are that the dealer-assessee deals in Ammonium Nitrate, which it purchases from outside the State of Odisha and effects sale both inside the State of Odisha and in course of inter-State trade and commerce. While making VAT sales, the dealer sometimes collected tax @ 12.5% and sometimes @ 4%. On receipt of Audit Visit Report (AVR) on 22.06.2009, proceeding was initiated u/s. 42 of the OVAT

Act and notice was issued to the dealer-assessee to appear and produce the books of account. Learned assessing authority on verification of books of account found that the dealer-assessee made the following purchases from outside the State of Odisha :

Period	Quantity purchased (in bags) 50 Kg. each	Purchase Value (₹)
2005-06	12370	75,23,425.00
2006-07	30700	1,77,62,997.00
2007-08	35340	2,61,40,450.00

It was further found by the assessing authority that for the period 2005-06 the dealer charged tax @ 12.5% on entire sale of Ammonium Nitrate, i.e. on total value of ₹66,40,430.00 and collected tax of ₹8,30,054.00. Similarly, for the year 2006-07 the dealer has collected tax of ₹14,59,554.00 @ 12.5% on sale of 14,644 bags of Ammonium Nitrate at a value of ₹1,16,76,408.00. Further, he sold 4,988 bags of Ammonium Nitrate for value of ₹37,94,000.00 on which it has collected tax of ₹1,51,760.00 @ 4%. Likewise for the year 2007-08, the dealer-assessee sold 5,538 bags of Ammonium Nitrate at a value of ₹52,07,250.00 and collected tax of ₹6,50,905.00 @ 12.5% and it also sold 23,869 bags of Ammonium Nitrate at a value of ₹2,63,31,408.00 and collected tax of ₹10,53,259.00 @ 4%.

On being confronted to the authorized representative of the dealer-assessee about the anomalies in the collection of tax for different periods, it was explained that being ignorant of law, tax was charged @ 12.5% on the entire value and when they became aware that Ammonium Nitrate is a chemical fertilizer charged tax @ 4%. It was further explained that when some customers insisted on paying tax @ 12.5% to claim ITC, they charged tax @ 12.5%. The authorized representative of the dealer-assessee vehemently refuted the allegation that Ammonium Nitrate was sold as explosive.

4(a). Learned assessing authority considering the materials on record vis-a-vis the statement of the authorized representative of the dealer came to the conclusion that Ammonium Nitrate by itself is neither a fertilizer nor an explosive. The dealer having sold the goods to the mines owner and raising contractors, who uses the same for purpose of blasting, it was liable to pay tax @ 12.5%. Accordingly, it raised extra demand of ₹81,59,655.00 including penalty of ₹54,39,770.00.

4(b). So far as entry tax is concerned, it was held by the assessing authority that Ammonium Nitrate being a chemical compound of Nitrogen and Ammonia, the same comes under entry No. 73 of Part-I of the Schedule and is

exigible to tax @ 1%. Accordingly, it raised extra demand of ₹16,19,946.00, which includes penalty of ₹10,79,964.00.

4(c). The dealer-assessee challenging the aforesaid demands raised by the assessing authority under the OVAT Act as well as under the OET Act, filed two separate appeals before the first appellate authority, who accepted the contention of the dealer-assessee that Ammonium Nitrate is a chemical fertilizer and taxable @ 4%. Accordingly, it reduced the extra demands raised by the assessing authority and directed for refund of extra tax, if any, paid.

5. The State being dissatisfied with the orders of the first appellate authority reducing the demands raised by the assessing authority holding Ammonium Nitrate sold by the dealer-assessee as chemical fertilizer, preferred these two second appeals one under the OVAT Act and another under the OET Act. No cross-objection has been filed by the dealer-respondent.

6. Mr. Behura, learned Standing Counsel (CT) for the revenue, challenging the impugned orders of the first appellate authority passed under the OVAT Act as well as under the OET Act vehemently urged that the first appellate authority under misconception of law and on erroneous

appreciation of materials on record, reduced extra demands raised by the assessing authority. The first appellate authority though specifically observed that levy of tax on sale of Ammonium Nitrate depends upon the fact as to for what purpose it was used, did not give any finding to that effect while reducing the demands raised by the assessing authority. The first appellate authority simply basing on the claim of the dealer-assessee that it effected purchase of Ammonium Nitrate of fertilizer grade, held that the dealer is liable to pay tax @ 4%. The authorized representative of the dealer having specifically admitted that the goods were sold to mines owner and raising contractors who used the same for blasting purpose, the first appellate authority should not have ignored such statement of the authorized representative of the dealer-assessee while reversing the finding of the assessing authority that Ammonium Nitrate was used as explosive. The orders of the first appellate authority are illegal, perverse and against the weight of the materials on record. Therefore, the same are unsustainable in the eyes of law. He submitted to set aside the orders of the first appellate authority passed under the OVAT Act as well as OET Act.

7. Per contra, learned Counsel for the dealer-assessee supporting the impugned orders of the first appellate authority contended that he(dealer) purchased Ammonium Nitrate of fertilizer grade and sold the same to be used as such. Therefore, the assessing authority was not correct in its approach in levying tax @ 12.5% instead of 4% as collected by it (dealer-assessee). He vehemently urged that there is no material to show that Ammonium Nitrate sold by the dealer-assessee was used as explosive for the purpose of levying tax @ 12.5% and the Ammonium Nitrate sold by it being the chemical fertilizer, it also does not come under the purview of the OET Act to levy entry tax on entry of the said goods into the local area. The first appellate authority on thorough scrutiny of the materials on record rightly held that Ammonium Nitrate was chemical fertilizer and levied tax @ 4%. There is no illegality or impropriety in such finding of the first appellate authority warranting interference of this Tribunal. He submitted to dismiss both the appeals filed by the State under the OVAT Act and OET Act and confirm the orders of the first appellate authority.

8. We have heard the rival submissions of the parties, gone through grounds raised in the memorandum of appeal filed under the OVAT Act and OET Act vis-a-vis the

impugned orders of the forums below and the materials on record. The crux of the dispute centres round the issue whether Ammonium Nitrate sold by the dealer-assessee to different persons was used as explosive or as chemical fertilizer. On perusal of the impugned orders of the forums below we find that the assessing authority charged tax @ 12.5% under the OVAT Act and 1% under the OET Act treating Ammonium Nitrate as chemical, whereas the first appellate authority levied tax @ 4% treating Ammonium Nitrate sold by the dealer-assessee as chemical fertilizer and deleted the entry tax levied by the assessing authority holding the same as unscheduled goods. Now, therefore, it is to be seen whether the first appellate authority was correct in its approach in holding Ammonium Nitrate as chemical fertilizer for the purpose of levying tax @ 4% or it was the assessing authority who was correct to levy tax @ 12.5% holding that the same was used as explosive.

9. Before addressing the issue involved in the present appeals, it is profitable to narrate some relevant facts for better appreciation of the case. There is no dispute in the present case that the dealer-assessee deals in Ammonium Nitrate, which he purchased from outside the State of Odisha and effects sales intra-State as well as inter-

State. The dealer-assessee during the period 2005-06 charged tax @ 12.5% on entire sale of Ammonium Nitrate, i.e. on total value of ₹66,40,430.00 and collected tax of ₹8,30,054.00. Similarly, for the year 2006-07 the dealer has collected tax of ₹14,59,554.00 @ 12.5% on sale of 14,644 bags of Ammonium Nitrate at a value of ₹1,16,76,408.00. Further, he sold 4,988 bags of Ammonium Nitrate for value of ₹37,94,000.00 on which it has collected tax of ₹1,51,760.00 @ 4%. Likewise for the year 2007-08, the dealer-assessee sold 5,538 bags of Ammonium Nitrate at a value of ₹52,07,250.00 and collected tax of ₹6,50,905.00 @ 12.5% and it also sold 23,869 bags of Ammonium Nitrate at a value of ₹2,63,31,408.00 and collected tax of ₹10,53,259.00 @ 4%. It is in the aforesaid factual backdrop, the issue involved in the present appeal is to be adjudicated.

9(a). Ammonium Nitrate is a chemical compound with chemical formula NH_4NO_3 . It is a white crystalline solid consisting of ions of Ammonia and Nitrate. It can be used in different field and different activities. It is clarified by the Ministry of Commerce and Industry (Directorate General of Anti-Dumping & Allied Duties) that HDAN prill are known as “fertilizer Ammonium Nitrate” whereas LDAN are commercially known as “Explosive or Industrial Ammonium

Nitrate". High density Ammonium Nitrate in prill has a bulk density greater than 0.85 g/cc and purity is about 99.4%. It is commonly used in agriculture as high nitrogen fertilizer and it is also used as an oxidizing agent in explosive including improvised explosive devices. It is that main component of ANFO, a very popular explosive. Ammonium Nitrate has dual use. It can be used as fertilizer as well as making of explosive. Ammonium Nitrate by itself is neither fertilizer nor explosive. Therefore, levy of tax depends upon the use of Ammonium Nitrate. The first appellate authority in its impugned orders has also taken same view that Ammonium Nitrate having dual use, levy of tax depends upon the purpose for which it was used and simply levying tax on it treating it as chemical tantamount to denial of justice. The first appellate authority though specifically observed that levy of tax dependent upon the use of Ammonium Nitrate, it without giving any finding that Ammonium Nitrate sold by the dealer-assessee to different purchasers were used as chemical fertilizer, levied tax @ 4% and reduced extra demands raised by the assessing authority. This finding of the first appellate authority, in our considered view, is not legally sustainable for the following reasons.

9(b). The dealer-assessee in most of the cases collected tax @ 12.5% knowing it very well that same was not used as chemical fertilizer. If we accept the plea of the dealer that Ammonium Nitrate was used as chemical fertilizer, next question comes to mind then why the dealer-assessee has collected tax @ 12.5%. It was explained by the dealer because of ignorance of law, it collected tax @ 12.5% and when it became aware of the law collected tax @ 4%. But the facts on record falsify this plea taken by the dealer-assessee to explain the reason for collection of tax @ 12.5%. It is found from the materials on record that the dealer-assessee collected tax @ 4% on sale of 4,988 bags of Ammonium Nitrate for a value of ₹37,94,000.00 during the year 2006-07. Again in 2007-08, he collected tax @ 12.5% on sale of Ammonium Nitrate. So, this conduct of the dealer-assessee shows that knowing very well that Ammonium Nitrate is taxable @ 12.5%, collected tax from different customers accordingly. There being no dispute at Bar that levy of rate of tax on sale of Ammonium Nitrate depends upon its use, let us now examine the materials on record to find out as to for what purpose Ammonium Nitrate was sold and used. The dealer-assessee in course of hearing of the second appeals did not dispute that it has sold almost all

the goods to mines owner and raising contractors and the authorized representative of the dealer-assessee also gave statement to that effect before the assessing authority. When Ammonium Nitrate was sold to mines owner and raising contractors, the only inference can be drawn is that they used it for the purpose of making explosives and not for the agriculture purpose. The dealer-assessee could not produce any material to show that Ammonium Nitrate sold by it was used as chemical fertilizer. It also could not produce any document obtained from the mines owners and raising contractors to whom the goods were sold to substantiate its plea that Ammonium Nitrate were used as chemical fertilizer by them. In the absence of any material contrary to the statement of the authorized representative of the dealer-assessee, the only irresistible conclusion is that Ammonium Nitrate sold by the dealer-assessee to the mines owner and raising contractors were used for making explosives. Therefore, the assessing authority rightly levied tax @ 12.5% and raised extra demand accordingly. The dealer-assessee itself having collected tax @ 12.5%, it should not claim to pay tax @ 4% on the ground that Ammonium Nitrate was used as chemical fertilizer. Even though Ammonium Nitrate is predominantly used as chemical fertilizer, the same

having been used as explosive in the present case, levy of tax @ 12.5% by the assessing authority is justified and in accordance with law. Similarly, the assessing authority was also legally correct in levying entry tax @ 1% treating Ammonium Nitrate as chemical as per entry No. 73 of Part-I of the Schedule. The first appellate authority though reduced extra demand raised by the assessing authority under the OVAT Act and deleted levy of tax under the OET Act, reversing the findings of the assessing authority did not give any cogent reasons for doing so. The first appellate authority simply has discussed about the utility of Ammonium Nitrate and its chemical composition and reduced the extra demands. The orders of the first appellate authority not being based on the materials on record and being contrary to the statement of the authorized representative of the dealer-assessee, the same is unsustainable in the eyes of law.

10. In the light of discussions made above, we disagree with the finding of the first appellate authority that Ammonium Nitrate is a chemical fertilizer taxable @ 4% and is not exigible to entry tax under the OET Act. Accordingly, both the second appeals filed by the State are allowed and the impugned orders of the first appellate authority passed

under the OVAT Act and OET Act are hereby set aside and the orders of the assessing authority are restored.

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/-
(M. Harichandan)
Accounts Member-I