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

S.A. No. 2411 OF 2004-05

(Arising out of order of the learned ACST, Puri Range,
Bhubaneswar in First Appeal Case No. AA. 354/BH.II/2002-03,
disposed of on dated 15.09.2004)

Present: Shri R.K. Pattanaik, Chairman,
Smt. S. Mishra, 2nd Judicial Member, and
Shri P.C. Pathy, Accounts Member-I

M/s. Samsung India Electronics Ltd.,
C-653, Epari Plaza, Unit-III,
Janapath, Bhubaneswar ... Appellant

-Versus-

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

For the Appellant : Sri A.K. Roy & Sri A.K. Mohanty, Advocates
For the Respondent : Sri M.S. Raman, ASC (CT)

Date of hearing: 26.08.2020 ***** Date of order: 24.09.2020

O R D E R

Instant appeal under Section 23(3) of the Odisha Sales Tax, Act, 1947 (in short, 'the Act') is at the behest of the dealer assessee assailing the impugned order dated 15.09.2004 promulgated in Appeal No. AA- 354/BH-II/2002-03 by the learned Assistant Commissioner of Sales Tax, Puri Range, Bhubaneswar (in short, 'FAA'), who partly confirmed the order of assessment dated 16.07.2002 passed by the learned Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar (in short, 'AA') under Section 12(4) of the Act for the impugned

period 1999-2000 on the ground that the credit notes and trade discount disallowed in appeal was unjustified, when it were accepted in course of assessment proceeding on the strength of a revised return.

2. In fact, a proceeding under Section 12(4) of the Act was initiated against the dealer for the assessment period 1999-2000. The appellant dealer is a business undertaking being a limited company having its Head Office at Noida, New Delhi with a depot at Bhubaneswar which is engaged in trading of colour TV sets, refrigerators, washing machines, air conditioners etc. on wholesale basis inside the State of Odisha. In that proceeding, the appellant dealer produced books of account and other documents relating to the business concern for the purpose of verification. After such examination of books of account and all other documents, the AA raised demand along with surcharge payable by the dealer to the tune of ₹62,94,271.90 with a direction that it is entitled to receive refund of ₹94,155.10 for having already deposited ₹63,88,427.00 under Rule 36 of the Odisha Sales Tax Rules, 1947 (in short, 'the Rules') after having accepted the credit notes and trade discount for ₹60,27,721.68 and ₹9,29,632.28 respectively. The order of assessment dated 16.07.2002 was challenged in appeal before the FAA, who, however, directed payment of balance entry tax to the tune of ₹7,97,029.00 after rejecting the credit notes and trade discount. The appellant dealer approached the Tribunal since the decision of FAA with respect to credit notes and trade discount was unsettled with other findings being confirmed.

3. The principal question which is to be considered by the Tribunal is, whether, disallowance of credit notes and trade discount by the FAA was really justified? In fact, the FAA reached at a decision that the AA could not have accepted the credit notes and trade discount on the basis of revised return submitted beyond in time as stipulated in Section 11(2) of the Act. According to the dealer, the FAA exceeded in jurisdiction and disallowed the credit notes and trade discount by casting aspersions, doubting genuineness and authenticity of the documents without any foundation and also on the ground that the AA had no competence to receive the revised return which is in violation of sub-section (2) of Section 11 of the Act. It is urged that the AA did appreciate the fact that under different schemes such trade discount is allowed and credit notes are issued in order to promote and enhance the volume of sale and rightly accepted the revised return, inasmuch as, there is no bar under Section 11(2) of the Act to receive the same. The exercise of jurisdiction by the FAA is questioned on the ground that disallowance of credit notes and trade discount which had been allowed by the AA to be bad in law.

4. Firstly, the objection of the appellant dealer as to the observation of the FAA is to be considered by the Tribunal. In fact, with respect to the credit notes and trade discount, the FAA concluded that all such documents in that respect produced at the time of assessment with a considerable amount of delay which is about two and half years raised suspicion as to its authenticity. According to the FAA, the appellant dealer produced the documents, such as, the debit notes, credit

notes, etc. at the time of assessment, on perusal of which, it could easily be inferred that one may easily procure it. In other words, the FAA entertained suspicion with respect to the documents produced by the dealer assessee during assessment. From the record, it is made to appear that the AA considered the credit notes and other documents and after examination of it, accepted the same and allowed the deduction on the head of trade discount. No suspicion was raised by the AA with respect to the alleged documents produced at the time of assessment, but it is not clearly discernible, as to what prevailed upon the FAA to draw such an inference. If certain documents are examined and verified and, thereafter, it is deducted that the same cannot possibly be relied upon doubting its genuineness or authenticity, then things would be different. In the instant case, only on account of delay, doubt has been entertained vis-a-vis the credit notes and other documents, without any proof in respect thereof, which in the considered view of the Tribunal, would not at all be justified. The conclusion on the matter so arrived at by the FAA without being substantiated cannot, therefore, stand the scrutiny of the Tribunal. The law is well settled that suspicion, howsoever, large cannot take the place of legal proof. The FAA only for the delay in producing the documents doubted its authenticity which is nothing but a decision purely based on surmises and conjectures.

5. Secondly, the jurisdiction of the FAA is questioned by the appellant dealer on the ground that it is not in consonance with Section 23(2) of the Act read with Rule 50 of the Rules on the ground that enhancement in the turnover is not at all tenable in law. In the present case, the credit notes on trade discount as claimed

by the dealer assessee was accepted by the AA, but was rejected by the FAA and against such a backdrop, it is contended that enhancement in the turnover is vitiated as is not comprehended under law. As per Section 23(2) of the Act, an appellate authority may confirm, reduce, enhance or annul assessment, or impose penalty or interest, or set aside the assessment, penalty or interest and direct a fresh enquiry. As per Rule 50 of the Rules, the appellate authority may hold further enquiry and even direct such enquiry to be conducted by other authorities and as per sub-rule (3) thereof, enhancement of assessment or for imposing penalty, reasonable opportunity showing cause is required to be made. Thus, considering the above, it can well be said that an appellate authority is having all the powers as envisaged in Section 23(2) of the Act and can even go for fresh enquiry and order assessment to be enhanced of course by providing an opportunity to the dealer concerned. In the instant case, on a bare perusal of the notice served upon the dealer assessee at the instance of the FAA, it is clearly discernible that the assessment was needed to be enhanced. The appellant dealer does appear to have received ample opportunity of hearing vis-a-vis the enhancement of assessment. In such view of the matter, it would not be fair to allege that the enhancement of assessment and exercise so undertaken in that behalf by the FAA was vitiated by a jurisdictional wrong, as is alleged by the learned Counsel for the dealer assessee. So, the conclusion is that the dealer assessee was duly noticed and reasonable opportunity of showing cause was provided and thereafter, the FAA deemed it just

and proper to enhance the assessment by rejecting the credit notes and other documents as against the claim of deduction on account of trade discount.

6. From the side of the respondent State, a point is raised that the AA was not authorised to accept the revised return furnished by the dealer assessee as it was not filed within three months and in the manner prescribed under Section 11(2) of the Act. It is alleged that at the time of assessment, the revised return could not have been entertained by the AA and the credit notes accepted which is clearly in flagrant violation of sub-section (2) of Section 11 of the Act. The learned Counsel for the appellant dealer contends that there is no wrong in considering revised return even though it is filed at the stage of assessment and beyond three months time limit as prescribed in Section 11(2) of the Act. It is also contended that not only Section 11(2) of the Act does not interdict and impose any bar from accepting a revised return at the time of assessment, but also, the assessing authority is not disentitled from considering the books of account and other material documents with regard to the credit notes, etc. while dealing with deduction on trade discount. In this regard, the learned Counsel for the appellant dealer relied upon a decision of the Hon'ble Apex Court in the case of State of Orissa Vs. Babu Lal Chappolia reported in (1966) 18 STC 17 (SC) and it is contended that revised return could be accepted at the stage of assessment even by the 1st appellate authority. Actually, revised return was earlier allowed to be filed till the time of assessment, but it was substituted by a period of three months by the Act 5 of 1964. The Hon'ble Apex Court in the decision (supra) held that the 1st appellate authority could take into

consideration a revised return and may even allow a new ground to be taken in whatever manner and form; even instead of a revised return, it could entertain a fresh ground accepting a written statement. In the instant case, the learned ASC (CT) harped on the time limit of three months as prescribed in Section 11(2) of the Act and urged that the AA completely went wrong in accepting the revised return at the time of assessment. If the aforesaid decision is properly understood vis-a-vis Section 11(2) of the Act, the conclusion of the Tribunal is that no doubt a dealer is permitted to file a revised return within the prescribed period but late filing does not debar the assessing authority from taking cognizance of it. The Tribunal is of further conclusion that the assessing authority, if not inclined to accept the revised return for being filed belatedly, still it cannot disengage itself from considering the books of account and other documents furnished at the time of assessment. Having said that, the Tribunal is of the conclusion that the AA even though accepted the revised return but in any way, had the authority to consider all the materials with regard to trade discount produced at the time of assessment and as such, no wrong or error was committed, as consequence.

7. Another objection is raised by the respondent State contending that there was a great amount of delay in submitting the credit notes and other documents, inasmuch as, a delay of two and half years did occasion in that respect and on that ground, the credit notes were not accepted, thus, dismissing the claim of trade discount so allowed by the AA. According to the learned ASC (CT), such a delay of two and half years in furnishing the credit notes on trade discount resulted

in unjust enrichment of the dealer assessee as by the time the discount was allowed, the goods travelled and sold to innumerable consumers, who did not receive the benefit. The AA, as per the learned Counsel for the appellant dealer, examined all the credit notes and other documents and then, accepted the same. It is further contended that the copies of the credit notes with reference to the sale bills, instructions received from the Head Office of the Company and all other relevant documents in that respect were examined and finally, the AA allowed the discount fully knowing the trade practices and its dominant purpose which is to promote sale. Admittedly, no such doubt was there in the mind of the AA in accepting the credit notes even after a delay of two and half years. In fact, as per the dealer assessee, such a delay of two and half years towards production of credit notes at the time of assessment has been misconstrued by the FAA. It is contended that a claim of deduction after two and half years is not correct as the assessment was completed on 16.07.2002. In other words, according to the dealer assessee, after two years and three months from the closing period 31.03.2000, the assessment was concluded and during that time, the credit notes were produced. In the considered view of the Tribunal, the contention that the credit notes were procured to defraud the Government and in order to defeat the actual benefit being received by the consumers is not at all justified. It is made to understand that the benefit on trade discount was not really transmitted after two and half years, but the accounts in respect thereof were shown and produced before the AA during the assessment which was undertaken and completed in the year 2002. The

credit notes and all other documents on trade discount by way of revised return even though was entertained by the AA, at the time of assessment, as is made to appear, it was in relation to the transactions prior to the receipt of the consideration money. Inasmuch as, such post-sale discount on the strength of credit notes is found to be permissible under law. Having considered the above facts, the Tribunal reaches at a logical conclusion that when the credit notes were with reference to the transactions supported by documents furnished at the time of assessment, it was not at all correct on the part of the FAA to reject and dismiss it on the ground of delay which is nothing but a production after two and half years at the time of assessment which was completed in the year 2002 respecting the assessment period 1999-2000. So, the contention of the learned ASC (CT) to the effect that such trade discount allowed by the AA later to the original return filed showing the sales tax collection to the tune of ₹84,66,509.05 being a part of sale price as tax collected becomes a part and parcel of sale turnover as held in the case of Delhi Cloth & General Mills Co. Ltd. Vs. Commissioner of Sales Tax: (1971) 28 STC 331 (SC) and that the burden after such collection is shifted to consumers is indefensible for the fact that the credit notes with reference to the trade discount are in connection with the transactions prior to the receipt of the consideration money by the dealer assessee. The Tribunal concludes that there was no material before the FAA to doubt the veracity and authenticity of the documents with respect to the credit notes and trade discount and if at all, there was any suspicion as to its genuineness, the appellant dealer should have been confronted with in

that respect. If as per the FAA, sales tax was collected and some element of doubt loomed large regarding the trade discount with the inference that the benefits did not percolate to the consumers, as a statutory authority, its bounden duty was to bring it to the notice of the appellant dealer. Had such an opportunity been provided, the appellant dealer would have had the opportunity to clarify as to if it collected the sales tax and the same was, whether, prior to the receipt of the consideration money. From the assessment made, it is clearly made out that the AA exerted an exercise while considering the credit notes and trade discount. If no doubt was entertained by the AA, it was quite but natural for the FAA to indicate and clearly specify as to why the credit notes are not to be accepted and why such an inference affecting its genuineness to be drawn. Rather, from the assessment order dated 16.07.2002, it is clearly discernible that a good amount of sincere effort was put in while considering and accepting credit notes. So, in the humble opinion of the Tribunal without any real proof, it would not be proper to discard the credit notes with an adverse inference as has been drawn by the FAA.

8. One more objection is raised by the learned ASC (CT) alleging that there is no such provision of allowing trade discount under the Act since the definition of 'sale price' in Section 2(h) of the Act permits cash discount only. As per the definition in Section 2(h) of the Act, 'sale price' means the amount payable to a dealer as consideration for the sale or supply of any goods, less any sum allowed as cash discount according to ordinary trade practice but including any sum charged for anything done by the dealer in respect of the goods at the time of or

before delivery thereof. In this connection, the learned ASC (CT) cited rulings, such as, Orient Paper Mills Vs. State of Orissa: (1975) 35 STC 84 (Orissa); Deputy Commissioner of Sales Tax Vs. Advani Oerlikon Pvt. Ltd: (1980) 45 STC 32 (SC) to contend that the concept of cash discount and trade discount are distinct and in absence of any such trade discount in Section 2(h) of the Act, the same could not have been allowed. A comparable study is engaged by the learned ASC (CT) with reference to the definition of 'sale' with discount by relying upon a decision of Hon'ble Apex court in the case of IFB Industries Ltd. Vs. State of Kerala reported in (2012) 49 VST 1 (SC). Of course, there is no mention of trade discount in Section 2(h) of the Act which defines 'sale price'. At this juncture, the learned Counsel for the appellant dealer placed reliance on a decision of the Hon'ble Apex Court in the case of Southern Motors Vs. State of Karnataka and others reported in (2017) 98 VST 207 (SC), wherein, its earlier ruling on the subject of discount rendered in Advani Oerlikon Pvt. Ltd. case was quoted with approval. In the latter case, the Hon'ble Apex Court considered a question, whether, for the purpose of computing the turnover assessed to sales tax under the Central Sales Tax Act, 1956 (in short, 'CST Act'), the sale price of goods, if to be determined by including the amount paid on account of trade discount. In the decision (supra), it has been categorically held and observed that sale price which enters into computation of the assessee's turnover for the purpose of assessment under the CST Act would be determined after deducting the trade discount from the catalogue price. It has also been held therein that a trade discount conceptually is a pre-sale concurrence, the

quantification whereof depends on many factors in commerce regulating the scale of sale/purchase depending amongst others on goodwill, quality, marketable skills, discounts etc. contributing to the ultimate performance to qualify for such discount which have already been recognized with the rider that they ought not to be disallowed only because not being payable at the time of each invoice or deducted from the invoice price. In fact, in ordinary trading practices, such pre and post sale discounts are allowed. A trade discount is normally employed to promote trading activities. Since Section 2(h) of the Act is pari materia to the CST Act and only indicates cash discount deductible from the sale price, considering the normal trade practices and in view of the settled position of law as laid down by the Hon'ble Apex Court in the decision of Southern Motors ibid, it has to be concluded that trade discount as well be permissible. In the ultimate analysis of the Tribunal, a trade discount is a normal practice which is quite often followed by the traders and ordinarily observed in both pre and post sale of goods. In the decision of Hon'ble Apex Court in Southern Motors Ltd. ibid even in absence of a provision as to trade discount in the definition of 'sale' under the CST Act, it was accepted considering the trading practices. If such is the case, it has to be held that apart from cash discount, which is normally allowed in order to promptly secure payments, trade discounts are allowed too. So, the contention of the learned ASC (CT) in this regard, by referring to Section 2(h) of the Act to the effect that only cash discount to be permissible trade discount not being mentioned therein cannot be sustained.

9. Hence, it is ordered.

10. In the result, the appeal stands allowed. As a necessary corollary, the impugned order dated 15.09.2004 promulgated in Appeal No. 354/BH-II/2002-03 is set aside. Consequently, the assessment order dated 16.07.2002 passed by the AA is confirmed.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(Smt. S. Mishra)
2nd Judicial Member

I agree, Sd/-
(P.C. Pathy)
Accounts Member-I