BEFORE THE JUDICIAL MEMBER-I: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 207(V) of 2017-18

(Arising out of the order of the ld. Addl. CST (Appeal), South Zone, Berhampur, in Appeal Case No.AA (VAT)-72/2014-15, disposed of on dtd.12.11.2015)

P r e s e n t: **Shri S. Mohanty,**
1st Judicial Member

M/s. Hinduja Leyland Finance Ltd.,
At/P.O.- 392, BJB Nagar, Lewis Road,
Bhubaneswar. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2012 to 31.03.2013

For the Appellant ... N o n e
For the Respondent ... Mr. S.K. Pradhan, A.S.C.

Date of hearing: 11.07.2019 ******** Date of order: 11.07.2019

O R D E R

The assessee-dealer M/s. Hinduja Leyland Finance Ltd. falls in the category of private bank is involved in business of providing financial assistance to various persons who wish to purchase four wheelers but do not have adequate money of their own to purchase such vehicle and, therefore, the assessee advances money on interest at the time when the vehicle is intended to be purchased by the prospective buyer, and such vehicle is hypothecated with the assessee and a specific endorsement is made in the vehicle which is going to be registered in the name of the car owner that, the vehicle has been financed by the assessee and is hypothecated to

assessee. The agreement executed between the assessee and the buyer contains the term under which the assessee advances certain percentage of value of the car while rest is to be paid by the prospective buyer.

The taxing authority, in course of the survey, found the assessee had sold used vehicles after taking possession from those buyers who could not make payments, got the vehicle transferred in the name of assessee and thereafter either sold directly to the prospective buyer or engaged a third party being an auctioneer who conducted sales on behalf of the appellant and whenever an amount was received after charging certain amount as commission service charge, remitted the fund to the assessee.

3. The dispute revolves in the sale of so called re-possessed vehicle by the assessee, while the claim of assessee is, it is not a business of sale and purchase of vehicle attracting tax liability under the Odisha Value Added Tax. On the other hand, the plea of the taxing authority is, the sale of repossessed vehicle is certainly a sale in the hands of the assessee exigible to OVAT and accordingly it charged VAT on such sale in an assessment u/s.44 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) covering tax period 01.04.2012 to 31.03.2013 attracting the entry Sl. No.123A of the OVAT Rate Chart as the tax rate levied on such sale amount.

4. The claim of the dealer is, the owner remain the same person in whose name the vehicle was registered and admittedly in such cases, name of the financial institutions appears somewhere in the bottom, where it is simply mentioned that, the vehicle is hypothecated to so and so financing agent limited and for all practical purposes, owner remains the person who holds the registration certificate in his name i.e. the buyer of the vehicle and assessee is merely financing, cannot be said to be a owner. Only to recovered the amount which was partly realized and partly recoverable on account

of default of the buyer and merely recovering certain amount of loan, cannot even be said to be a sale in hands of assessee.

5. The assessing authority and the first appellate authority as well, treated the transaction as sale of used car by the assessee is nothing but an act of dealer under business transaction, hence liable to pay tax under the OVAT Act.

6. The appeal is heard without Cross Objection and in absence of the dealer since the dealer remained absent in the hearing in spite of receipt of the notice.

Findings:-

7. The present appeal is a dispute about the jurisdiction of the respondent department to levy tax on a transaction whereby the financier of a vehicle without being a registered owner of the vehicle merely repossess the vehicle for transfer to the purchaser in accordance with law with an intent of recovering the loan amount advanced against the vehicle in question to the borrower. To decide the dispute above following questions need to be answered.

(i) Whether in the facts and under the circumstances of the case the assessee which has disposed of cars repossessed from defaulting borrowers is a dealer within the meaning of Section 2 (12) of OVAT act 2004?

(ii) Whether in the facts and under the circumstances of the case the activity of the assessee amounts to business under Clause (i) of Section 2 (7) of the OVAT act 2004 and the transaction in question amounts to sale as per section 2(46) of OVAT act?

(iii) If the answer to Question No.i and ii above is yes, whether in the facts and under the circumstances of the case whether the first appellate authority is incorrect in confirming the order of assessing authority by imposing tax on such sale of used car by the financial institution like present assessee?

8. As far as present case is concerned the facts are more or less similar to those in the case of State Bank of India v. State of Odisha (2014) 74 VST 120 (Ori). There the State Bank of India (SBI) initiated action under Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act') for enforcing the security interest to realize the outstanding loan dues. The accounts of the borrowers had been classified as non-performing assets ('NPA'). The movable assets of such borrowers were put to auction sale under Rule 6 of the Security Interest (Enforcement) Rules 2002 and the sale proceeds were appropriated to the loan account of the borrowers. When the said sale was brought to tax by the Sales Tax Officer, SBI challenged the assessment order contending that it is not a 'dealer' under the Orissa Value Added Tax Act 2004 ('OVAT Act') and that there was no legal element of 'sale'. Reference has been made to the decision in State of Tamil Nadu v. Board of Trustees of the Port of Madras (supra) as well as Federal Bank Limited v. State of Kerala (2007) 6 VST 736 (SC). After analyzing the provision of OVAT Act, it was held that the definition of 'dealer' under the OVAT Act did not exclude the bank when the bank is selling the goods as part of its business of banking. This was inconsonance with the decision of the Supreme Court in Federal Bank Limited (supra). Further the decision in Board of Trustees of the Port of Madras (supra) was distinguished and it was observed that "unlike activities of Port Trust, sale of pledged goods is in the course of banking business."

9. In Tata Motors Finance Limited, ICICI Bank Limited and Family Credit Limited v. Assistant Commissioner of Sales Tax (decision dated 8th October 2033 in W.P.T.T. Nos. 4 and 6 of 2011 and 24 of 2010) the Division Bench of the Calcutta High Court was considering the question whether the bank was a dealer within the meaning of Section 2 (11) of West Bengal Value Added Tax Act, 2003 ('WBVAT Act'). In that case, the bank had disposed of vehicles

hypothecated to it for recovery of outstanding loans under the strength of irrevocable power of attorney obtained from the borrower. It was held that the Petitioners/Banks were 'dealers' under the wider meaning of that expression under Section 2 (11) of the WBVAT Act. The word 'dealer' included an 'agent' and since the bank had undertaken the sale on the strength of irrevocable power of attorney, it was also acting as an agent. It was noted that "they undertake the activity of selling the hypothecated vehicles for the purpose of realizing the consideration which had already passed from them to the borrower. By selling the vehicles both the banking and non-banking financial companies realize their dues which naturally include profits."

10. Further in the decision of HDFC Bank Limited v. The State of Tamil Nadu 2015 VIL 372 (Mad), it is held as follows

> "11. It is true that in a hypothecation, the ownership of the hypothecated goods remains only with the person creating the hypothecation. But, as observed by the Tribunal, a bank, which advances facilities for the purchase of a vehicle, enters into an agreement with the loanee. The hypothecation agreement invariably contains clauses empowering the bank to repossess the vehicle in the event of a default and also to bring the vehicle to sale through public auction or by private negotiation without even involving the owner of the vehicle."

11. Who can be termed as a dealer is defined under section 2(12) of the VAT act which reads as follows

> "***DEALER***" means any person who carries on the business of buying, selling, supplying or distributing goods, executing works contract, delivering any goods on hire-purchase or any system of payment by installments, transferring the right to use any goods or supplying by way of or as part of any service, any goods directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration and includes-
> (a) a casual dealer;
> (b) a commission agent, a broker or a del credere agent or an auctioneer or any other mercantile agent, by whatever name called;

(c) a non-resident dealer or an agent of a non-resident dealer, or a local branch of a firm or company or association or body of persons whether incorporated or not, situated outside the State;
(d) a person who, whether in the course of business or not,-
  (i) sells goods produced by him by manufacture, agriculture, horticulture or otherwise; pr
  (ii) transfers any goods, including controlled goods whether in pursuance of a contract or not, for cash or for deferred payment or for other valuable consideration;
  (iii) supplies, by way of or as part of any service or in any other manner whatsoever, goods, being food or any other articles for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration;"

12. The definition as above under clause (b) and (d) certainly covers the activity like the sale by the financing authorities of cars hypothecated to it or offered as security against loans advanced towards financing the purchase of the car is a 'sale' within the meaning of Sec. 2 (46) of the OVAT Act. Even if the borrower is the owner in possession of the car, the sale is made by the dealer on the strength of the letter of authorization executed in its favour by the borrower.

13. The next question is whether the selling of vehicles hypothecated to it by the assessee constitutes business'' within the meaning of Section 2 (7) of the OVAT Act. The word 'business' as defined is an inclusive one. It includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not it is for gain or profit. It also includes "any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern." It is not in dispute that the assessee was granted permission to sell goods/assets offered to it as security for the purposes of recovering the outstanding loans. Thus, the selling of the assets by way of

auction or otherwise by assessee to realise its dues and adjust it against the outstanding loan indeed forms part of the permissible business activity of the as4essee. Thus it is held that the sale of cars here in this case covers under business transaction.

From the discussions herein above it only can be said that though the orders of both the fora below are not reasoned orders but the ultimate findings is correct, more to say, the assessee-dealer is involved in sale of used car exigible to OVAT at the rate of 5% as per entry sl. No.123-A of the rate chart and the present dealer being an unregistered dealer is rightly held liable in assessment u/s.44(1) of the OVAT Act. Hence the impugned order calls for no interference, consequentially, it is confirmed. Accordingly it is ordered.

The appeal is devoid of merit, hence dismissed.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

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