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

S.A. No. 156 (ET) of 2015-16

(Arising out of order of the learned JCST, Koraput Range,
Jeypore in First Appeal No. AAE (KOR) 03/2015-16
disposed of on dated 22.09.2015)

Present: Shri R.K. Pattanaik, Chairman,
Shri A. K. Dalbehera, 1st Judicial Member, and
Shri P.C. Pathy, Accounts Member-I

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

-Versus-

M/s. Om Sri Laxmi Ganesh Cashew Industries,
Randapalli, Jeypore ... Respondent

For the Appellant : Sri S.K. Pradhan, Additional Standing Counsel (CT)
For the Respondent : Sri N. Anand Rao, Authorized Representative

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Date of hearing: 25.11.2020 ***** Date of order: 28.01.2021

O R D E R

Instant appeal under Section 17 (1) of the Odisha Entry Tax Act, 1999 (hereinafter referred to as 'the Act') is at the behest of the State assailing the impugned order dated 22.09.2015 promulgated in Appeal Case No. AAE (KOR) 03/2015-16 by the learned Joint Commissioner of Sales Tax, Koraput Range, Jeypore, (in short, 'FAA'), who annulled the order of assessment passed under Section 10 of the Act directed by the learned Sales Tax Officer, Koraput Circle,

Jeypore (in short, 'AA') on the grounds inter alia that it is palpably wrong and thus, liable to set aside in the interest of justice.

2. In fact, the respondent dealer assessee is engaged in manufacturing of cashew kernel from raw cashew nuts and sells it within and outside the State of Odisha. Basing on a Tax Evasion Report received from the DCST (Vigilance) Koraput Division, Jeypore, assessment under Section 10 of the Act for the impugned period 01.04.2012 to 24.09.2013 was initiated against the dealer assessee and consequently, the AA raised an additional tax assessed to ₹5,63,274.00 and penalty was imposed with a total demand of ₹16,89,822.00 which was challenged before the FAA, who, for no discussion and specific findings as to whether cashew kernel to be a scheduled goods or not and for having not carried out the verification of the return filed by the dealer assessee and no GTO or TTO to have been determined, annulled the order of assessment dated 03.06.2015. The appellant State challenged it on the ground that the assessment could not have been annulled but set aside if at all, it was deemed proper and that apart, cashew kernel is a dry fruit which finds a place at Entry No.20 of Part-II of the Act, the fact which was completely lost sight of during and in course of assessment by the AA. Per contra, the dealer assessee justified such annulment under the impugned order dated 22.09.2015. The contention of the State is required to be examined to find out and ascertain, if the order of assessment dated 03.06.2015 was rightly annulled and whether, cashew kernel is a scheduled goods as per Entry No.20 of Part-II of the schedule of the Act.

3. In course of argument, the learned Counsel for the respondent dealer assessee cited an order of the Hon'ble Court in W.P.(C) No.11400 of 2005 (M/s. Hindustan Lever Limited Vs. The Sales Tax Officer, Cuttack I East Circle and Another) decided on 21.01.2010 and contended that cashew kernel is not a dry fruit nor is synonymous with cashew nuts for being a scheduled goods as per Entry No.20 Part-II of the Schedule. One more decision of the Hon'ble Court in the case of S. Sadasiva Rao Vrs. State of Odisha and Others decided on 17.07.1980 in OJC Nos. 508 and 509 of 1977 is placed reliance, wherein, cashew nuts held not to come within the definition of 'fruit' which is not exigible to tax, besides, an earlier order dated 28.05.2016 of the Tribunal in S.A. No. 6(ET) of 2015-16, where, it is concluded that applying the ratio of M/s. Hindustan Lever Ltd. ibid, cashew kernel, since does not find place in Part-II of the Schedule under the Act, no entry tax could be levied thereon. The aforesaid contention of the dealer assessee and argument in that respect was accepted by the FAA and at the same time, the order of assessment dated 03.06.2015 was annulled in absence of a finding as to whether the dealer assessee is engaged in selling scheduled goods and as such liable to pay entry tax which has been levied mainly because it has been recommended under the Tax Evasion Report.

4. The question is, whether, the FAA was justified in annulling the order of assessment dated 03.06.2015? According to the FAA, there was no specific finding as to if the dealer assessee was dealing with the scheduled goods; and for the fact that the return, if any filed was not analysed nor GTO or TTO was

determined besides having no decision as to why penalty was imposed under Section 10 of the Act. Referring to Section 98 of the Odisha Value Added Tax Act, 2004, it is contended by the learned Additional Standing Counsel that the FAA for any mistake or defect in the assessment could not have annulled the order of assessment dated 03.06.2015. In fact, Section 98 ibid deals with assessment proceedings etc. not to be invalid, if in substance or effect found to be inconformity with or according to the intents, purposes or requirements of the Act. In the considered view of the Tribunal, it is not such a case, where an assessment proceeding can be validated on account of any mistake, defect or omission. No doubt, the FAA said to have annulled the order of assessment dated 03.06.2015. But, in effect, the merits of the case have been considered by the FAA for reaching at a decision that the order of assessment dated 03.06.2015 cannot be sustained. In essence, the FAA set aside the assessment vis-a-vis the dealer assessee for the relevant period from 01.04.2012 to 24.09.2013. Further to add that it is also not a case where lack of jurisdiction of the AA can be alleged. In fact, the AA did have the jurisdiction to initiate the action under Section 10 of the Act and therefore, the assessment proceeding was a valid. In any event, the Tribunal arrives at a conclusion that the FAA though observed certain short comings in the assessment proceeding and the order of assessment not to be with any specific findings, if at all the assessee was dealing in scheduled goods or not, but considered and decided the claims of the rival parties and ultimately held that cashew kernel since does not find place in the Schedule of the Act, entry tax cannot be levied. In other words, deciding the case

on merit and accepting the contention of the dealer assessee, the FAA proceeded to dispose of the assessment and set aside the order of assessment dated 03.06.2015 although stated to have annulled it. Hence, the Tribunal is of the humble opinion that the FAA not on account of want of jurisdiction annulled the assessment, rather, set aside the order of assessment dated 03.06.2015 passed by the AA for lack of merit.

5. The other limb of the argument from the side of the State is that cashew kernel is a scheduled goods as per Entry No. 20, Part-II of the Schedule under the Act and that apart, in course of vigilance, 1073 tins of cashew kernel was found to have been packed, whereas, the conclusion drawn by the FAA was otherwise and under such circumstances, in view of the fact that it is a taxable goods, the FAA committed serious illegality to form an opinion to the contrary. As per Entry 20, Part-II of the Schedule of the Act 'dry fruits, jam, potato chips, packaged cashew nuts and pickles' are the scheduled goods taxable @ 2%. According to the State, cashew kernel is a scheduled goods and thus, exigible to tax under the Act. So to say, as per the State, it is to suggest that cashew kernel is either a dry fruit or cashew nuts and therefore, it comes within the ambit of Entry 20, Part-II of the Schedule of the Act. Per contra, the learned Authorised Representative (AR) contended that cashew kernel is neither a dry fruit nor can be said to be cashew nut and while contending so, placed reliance on the decision of M/s. Hindustan Lever Ltd. ibid. It is further contended that since cashew kernel is not specifically mentioned in the said schedule, it cannot be treated as a scheduled goods to make it liable to tax under

the Act. Also referred to the other decision in S. Sadasiva Rao case, wherein, the Hon'ble Court held and observed that cashew nuts do not come within the purview of dry fruit as both the commodities are distinctly different. There is no authority relied upon by the learned Additional Standing Counsel to satisfy the Tribunal as to if cashew kernel and cashew nut are similar or synonymous or the terms are used interchangeably. Admittedly, cashew kernel, in absence of any reasoning, cannot be held as dry fruit. The Tribunal is also not convinced that cashew kernel and cashew nut are one and the same. According to the decision of the Hon'ble Court in M/s. Hindustan Lever Ltd. case supra, entry tax under the Act can only be levied on the goods specifically mentioned in the schedule. In fact, there are some goods shown in Part-II of the Schedule in generic term or specific. There is some element of interpretation involved to consider expanding a definition where general terms are used in the Schedule. But, in case a particular goods is mentioned or indicated in the schedule, the Tribunal does not have any jurisdiction to add or subtract or suppliant anything to it. In the instant case, cashew kernel cannot be treated as a cashew nut or a dry fruit which are ordinarily treated as distinct and different items. The ratio of the Hon'ble Court in S. Sadasiva Rao is that if one item of goods is not found in the list of goods exempted, the theory of consideration in common parlance is to be applied. Applying the above principle, the Tribunal holds that in common parlance, a cashew kernel, by no stretch of imagination, is understood as dry fruit or cashew nut. On a similar point, the Tribunal in one of its earlier orders dated 28.05.2016 in S.A. No. 6 (ET) 2015-16 had decided that cashew kernel is not a scheduled goods in so

far as Part-II of the Schedule under the Act is concerned and therefore, no entry tax can be levied. The Tribunal is not informed as to whether its said order dated 28.05.2016 has been held no longer to be a good law. In the said case, the Tribunal by taking note of the ratio of the Hon'ble Court in M/s. Hindustan Lever Ltd. case concluded that levy of entry tax and penalty as was directed in the assessment but was set aside in appeal was unjustified. In other words, the Tribunal upheld the decision rendered in appeal and deleted the levy of entry tax and penalty on the turnover of cashew kernel which had been directed by the assessing authority. For the discussions made herein above, a similar conclusion is reached at and it is held that the impugned order dated 22.09.2015 does not suffer from any legal infirmity and therefore, to be confirmed.

6. Hence, it is ordered.

7. In the result, the appeal stands dismissed. As a necessary corollary, the impugned order dated 22.09.2015 passed in Appeal Case No. AAE (KOR) 03/2015-16 is hereby affirmed.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree,

Sd/-
(A.K. Dalbehera)
1st Judicial Member

I agree,

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