BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL: CUTTACK.

Present: **Shri A.K. Das, Chairman**
Shri S.K. Rout, 2nd Judicial Member
&
Shri M. Harichandan, Accounts Member-I

S.A. No. 2078 of 2005-06

(Arising out of the order of the learned Addl. CST (Revenue), Orissa, Cuttack, in First Appeal Case No.AA.168/ACST (Assessment), BH-II/04-05, disposed of on dtd.31.12.2005)

M/s. Protection Manufacturers (P) Ltd.,
At:- Bhatkuri, P.O.-Gangapada,
Dist.-Khurda. ... Appellant

- V e r s u s -

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

S.A. No. 2079 of 2005-06

(Arising out of the order of the learned Addl. CST (Revenue), Orissa, Cuttack, in First Appeal Case No.AA.137/ACST (Assessment), BH-II/04-05, disposed of on dtd.30.01.2006)

M/s. Protection Manufacturers (P) Ltd.,
At:- Bhatkuri, P.O.-Gangapada,
Dist.-Khurda. ... Appellant

- V e r s u s -

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

For the Dealer	:	Mr. B.B. Panda, Advocate
For the State	:	Mr. D. Behura, S.C. & Mr. S.K. Pradhan, A.S.C.

Date of hearing: 24.02.2022 *** Date of order: 16.03.2022

O R D E R

Both these second appeals though relate to two different periods, involve common questions of fact and law, for which these are taken up together for hearing and are disposed of by this common order.

2. The dealer-assessee filed Second Appeal No.2078 of 2005-06 assailing the order dtd.31.12.2005 passed by learned Addl. Commissioner of Sales Tax (Revenue), Orissa, Cuttack (hereinafter referred to as, the learned FAA) in First Appeal Case No.AA.168/ACST (Assessment), BH-II/04-05, thereby reducing the tax demand to Rs.14,44,334.31 from Rs.28,10,384.00 raised by the Asst. Commissioner of Sales Tax (Assessment), Puri Range, Bhubaneswar for the assessment year 1999-2000 u/s.12(4) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as, the OST Act).

The Second Appeal No.2079 of 2005-06 is directed against the order dtd.30.01.2006 passed by the Addl. Commissioner of Sales Tax (Revenue), Orissa, Cuttack (hereinafter referred to as, the learned FAA) in First Appeal Case No.AA.137/ACST (Assessment), BH-II/04-05, thereby reducing the tax demand to Rs.10,03,095.00 from Rs.23,06,120.00 raised by the same assessing officer for the year 2000-01 u/s.12(4) of the OST Act.

3. The facts common in both the appeals are that, the dealer-assessee is engaged in manufacturing and sale of air cooler and geyser under the jurisdiction of Bhubaneswar II Circle, Bhubaneswar. It had returned the GTO at Rs.29,87,444.00 for the assessment year 2000-01 and Rs.1,52,73,828.00 for the assessment period 1999-2000 but did not pay tax on their sales effected on the ground that their industry was declared as a small scale industrial unit by the General Manager, DIC and was eligible for sales tax exemption under the Industrial Policy Resolution, in short, IPR'89 for a period of seven years from the date of start of their commercial production w.e.f. 10.07.1994. The assessment u/s.12(4) of the OST Act was completed on exparte basis on 29.03.2003 raising a demand of Rs.67,21,915.00 for the assessment year 2000-2001.

3(a). The dealer-assessee preferred writ application before the Hon'ble Court vide W.P.(C) No.1888/2004 which was disposed of on 11.03.2004 remitting the matter back to the assessing authority for fresh assessment.

3(b). Pursuant to such direction of the Hon'ble Court, the assessing authority issued notice to the dealer-assessee who on receipt of such notice appeared and produced the books of account. The dealer-assessee on being confronted to the allegations made in fraud case report submitted by the inspecting officer of the Vigilance Wing, explained that the industrial unit was registered

under the DIC, Bhubaneswar having PMT No.02885 dtd.21.12.1996 for production of coolers as per IPR'89 and accordingly the firm started commercial production on 10.04.1994 and it was entitled to avail benefit of exemption till 09.04.2001 i.e for a period of seven years. In the meantime the Government of Orissa vide Finance Department Notification dtd.30.07.1999 withdrew such benefit w.e.f. 01.08.1999 which was challenged before the Hon'ble High Court by filing writ application. He further explained that he had taken steps to register itself under IPR'96 for manufacturing of air-cooler, geyser and moulded furniture under addition and diversification programme. He further explained with regard to allegation No.2 about sale of 516 nos. of air-cooler purchased out of account that the factory was burnt by fire and the said fact was intimated to the STO, Bhubaneswar II Circle, Bhubaneswar on 29.03.2000. After the incident, the surveyor of the insurance company inspected the factory premises and reported that there were 516 nos. of air-cooler in good condition. He has intimated such fact to the Superintendent of Excise & Customs, Khurda.

3(c) As regards the allegation No.3 about understatement of sale turnover of Rs.9,87,714.80 during the quarter ending 6/2000, the dealer explained that at the investigation stage the total sales was shown at Rs.86,90,065.00 which included OST sale of Rs.29,87,444.00 and CST sale of Rs.57,02,621.00 but

subsequently it came to notice that due to some calculation error some OST sale had been included in CST sale and vice-versa for which the dealer-assessee filed revised return for the quarter ending 30.06.2000 basing on real sale figure as per the books of account. As regards allegation No.4 about non-entry of sale of Rs.42,196.00 in the sale register, the dealer-assessee explained that it had duly accounted for in the sale register vide invoice No.7 dtd.02.04.2000 amounting to Rs.42,196.00 and as regards allegation No.5 about sale of scrap worth Rs.6,40,796.00, the dealer explained that sale of ferrous and non-ferrous scrap were not goods nor were it the dealer's business. Even though the same had been shown in the account are not taxable under the OST Act.

3(d) The assessing authority considering the allegations made in the fraud case report and the explanation submitted by the dealer-assessee and materials on record took the view that after withdrawal of the benefit provided under IPR'96 by the Government vide Finance Department Notification No.33558-CTA-71/99-F dtd.30.07.1999 w.e.f. 01.08.1999, the dealer-assessee was not entitled to benefit of exemption under IPR'96 as claimed. The allegation of purchase of 516 nos. of air-coolers out of account could not be established in view of the report of the surveyor showing stock of 560 pieces of air-cooler in good condition after the fire accident.

3(e) The allegation of suppression of sale of Rs.47,196.00 could not be established. The explanation of the dealer that sale of scrap worth Rs.6,40,796.00 are not goods and are not part of dealer business is not convincing. Ferrous and non-ferrous scraps are exigible to tax @ 12%. The dealer-assessee having failed to reflect the sale of scrap worth Rs.6,40,796.00 in the returns filed by it, the same amounts to sale suppression.

3(f) The assessing officer so observing determined the GTO at Rs.1,58,03,364.00 (i.e. GTO returned Rs.29,87,444.00 + Rs.1,28,15,920.00 enhanced towards sale suppression). The exemption claimed by the dealer-assessee having been disallowed, the TTO determined at Rs.1,58,03,764.00 which is taxed @ 16% on Rs.27,22,957.00 sale of air-cooler, @ 12% on Rs.2,64,487.00 sale of geyser, @ 12% on Rs.1,28,15,920.00 i.e. sale of scrap comes to Rs.20,05,321.96. The assessing officer also calculated surcharge @ 15% on the tax amount of Rs.20,05,321.96 which came to Rs.3,00,798.29. The tax and surcharge together was calculated at Rs.23,06,120.25 for the assessment period 2000-2001. The assessing authority on verification of the record found that the dealer-assessee manufactured 16,765 nos. of air-cooler during the period 1999-2000 and sold 15,103 nos. of air-cooler. At the time of assessment the dealer has shown total sale of 13,403 nos. of air-cooler out of which the total quantity of sale

under the OST Act at 5,518 nos. and under the CST Act at 7,965 nos., the sale figure during the period 01.04.1999 to 31.04.1999 was shown at Rs.82,23,785.00. Similarly, from 01.08.1999 to 31.03.2000 the dealer has shown sale of 2,061 nos. of air-cooer for Rs.70,50,043.00 and has submitted revised return accordingly. The assessing authority disbelieved the figure submitted by the dealer on the ground of discrepancy in the figure submitted before the STO, Vigilance and before it (assessing authority) and completed the assessment to the best of his judgment. The learned assessing authority determined the GTO at Rs.1,52,73,828.00 for the year 1999-2000 which is taxed @ 16% and calculated surcharge @ 15% on the tax amount of Rs.24,43,812.48. The tax and surcharge was calculated at Rs.28,10,384.35.

4. The dealer-assessee being dissatisfied with the tax demand raised by the assessing authority for the assessment period 1999-2000 and 2000-2001 filed appeal before the first appellate authority u/s.23(1) of the OST Act, 1947 in which the first appellate authority reduced the tax demand toRs.13,77,886/- from Rs.28,10,384 for the assessment year 1999-2000 and to Rs.10,03,095.00 from Rs.23,06,120.00 for the assessment year 2000-2001 on the following findings:-

(i) The dealer is not entitled to exemption under IPR'96 after withdrawal of the notification by the

Government vide Notification No.33558-CTA-71/99-F dtd.30.07.1999 w.e.f. 01.08.1999.

(ii) There is sufficient force in the argument advanced by the learned Counsel for the dealer-assessee that enhancement of sale turnover disclosed on account of sale of scrap eventually arising out of the accident.

(iii) The explanation offered by the dealer-assessee with regard to sale of goods for Rs.42,196.00 and understatement of sale turnover of Rs.9,87,714.50 is not convincing.

(iv) The enhancement to the extent of Rs.1,28,15,920.00 made by the learned assessing authority to the returned GTO only on account of their sale of scrap while rejecting the books of account appears to be unreasonable on the face of the record.

(v) The first appellate authority on such observation preferred to enhance the GTO twice the turnover returned by the dealer-assessee to cover the possible suppression of sale for the entire year of assessment.

(vi) In First Appeal Case No.AA.168/ACST (Assessment), BH-II/04-05 dtd.31.12.2005 filed in respect of assessment period 1999-2000, the dealer is entitled to exemption claimed for the period from 01.04.1999 to 31.04.1999 to the extent of 8,000 nos. of air-

coolers and the excess claim of exemption in respect of 320 nos. of air-coolers which is calculated at Rs.7,99,600.00 is entitled to tax @ 16%.

5. The dealer-assessee being aggrieved with the tax demand of Rs.10,03,095.00 raised by the first appellate authority for the assessment year 2000-2001 preferred SA No.2079/2005-2006 mainly on the ground that:-

(i) The forums below were wrong in their approach in disallowing the claim of exemption under IPR'96 on the ground that the benefit provided under the IPR'96 was subsequently withdrawn by the State Government vide notification No.33558-CTA-71/99-F dtd.30.07.1999 w.e.f. 01.08.1999.

6. The learned Counsel for the dealer-assessee vehemently urged before this Tribunal that both the forums below under misconception of law disallowed the claim of exemption under IPR'96. The dealer's industrial unit being a priority industry was entitled to exemption under IPR'96 for a period of seven years. He relying upon the judgments of the Hon'ble High Court in W.P.(C) No.5491 of 2009 argued that the dealer-assessee having been declared as a priority industry in terms of IPR'96 Clause 2.7(i) and (xii) Part-II, it was eligible to get an additional two years of sales tax exemption. The dealer-assessee unit having undertaken expansion and modernisation after 1st March, 1996 and certificate of exemption having been issued in its favour, the forums

below were not correct in their approach in disallowing the exemption claimed by it on the ground of withdrawal of the benefit by the Government w.e.f. 01.08.1999. He further submits that the dealer-assessee is also entitled to exemption in respect of sale of 8,320 nos. of air-cooler, the authorities below were not justified to treat 320 nos. of air-cooler manufactured and sold by it as taxable on the ground that the dealer produced such quantity of air-coolers over and above the installed capacity of 8,000 during the period from 01.04.1999 to 31.07.1999. The installed capacity fixed by the authorities under law is not to restrict the dealer-assessee to produce and sale goods to that extent only. If any unit produced goods more than the installed capacity, the same should be exempted from tax under IPR'96. He submits to set aside the judgments of both the forums below and exempt the dealer's unit for paying tax.

Per contra, the learned Standing Counsel (CT) representing the State supporting the impugned order in terms of the cross objection filed by it, vehemently urged that the exemption under IPR'96 having been withdrawn by the State Government w.e.f. 01.08.1999 by notification dtd.30.07.1999, the forums below are fully correct in their approach in disallowing the claim of exemption by the dealer-assessee. He strenuously argued that, whether the withdrawal of benefit by the Government w.e.f. 01.08.1999 was valid or not was challenged before the

Hon'ble High Court by several dealers by filing writ application. The Hon'ble Court while disposing of such writ applications held that withdrawal of such benefit was valid and constitutional. The order of Hon'ble High court was challenged before the Hon'ble Apex Court at the instance of some of the dealer-assessee who also affirmed the view of the Hon'ble High Court holding the notification dtd.30.07.1999 as valid. He further argued that, the dealer-assessee was entitled to exemption only in respect of the goods manufactured as per the installed capacity. Anything manufactured over and above the installed capacity was taxable. The dealer-assessee having only installed capacity of producing 8,000 nos. of air-coolers excess production made by him was exigible to tax. Accordingly, the forums below have computed the tax liability of the dealer-assessee and there is no illegality in such assessment warranting interference of this Tribunal. He submits to affirm the orders of the forums below.

7. We have heard the rival submissions of the parties, gone through the impugned orders of both the forums below, grounds of appeal vis-a-vis the materials on record. The dealer-assessee in course of argument mainly harped on the issue that it was entitled to avail exemption under IPR'96 even after withdrawal of such benefit by the Government vide Finance Department Notification No.33558-CTA-71/99-F dtd.30.07.1999 w.e.f. 01.08.1999. Before addressing on this issue, it is relevant to discuss

some important facts for effective adjudication of the dispute. The dealer-assessee is an SSI unit engaged in manufacturing of air-cooler and registered under the DIC, Bhubaneswar having PMT No.15/15/02885 dtd.21.12.1996 for production of air-cooler as per IPR'89. Accordingly, the dealer started commercial production from 10.04.1994 and was entitled to avail benefit of exemption up to 09.04.2001. In the meantime the Government of Orissa vide Finance Department Notification No.33558-CTA-71/99-F dtd.30.07.1999 withdrew such benefit w.e.f. 01.08.1999. The forums below in view of such withdrawal of the notification disallowed the claim of exemption for the dealer-assessee and raised tax demand. It is pertinent to mention here that, the validity of notification dtd.30.07.1999 was raised before the Hon'ble High Court of Orissa **in case of M/s. Shree Jagannath Packers and Others Vrs. State of Orissa and others reported in (2005) 141 STC 26 (Orissa)** in which the Hon'ble Court upheld the validity of the notification dtd.30.07.1999. Some of the assessee carried the matter to the Hon'ble Supreme Court by filing Special Leave Petition which was also dismissed and the order of the Hon'ble Court in the case of Shree Jagannath Packers (supra) was affirmed. **In the present case the dealer-assessee claimed benefit under IPR'96 as priority industry as per the notification vide SRO 141/2000 dt.17.02.2000.** The dealer in order to

substantiate his claim filed the order dtd.31.05.2021 passed by the Hon'ble High Court of Orissa in W.P.(C) No.5491 of 2009, wherein the present appellant was petitioner. On perusal of the judgment dtd.31.05.2021 passed by the Hon'ble Court in aforementioned writ petition, we find that the present appellant has been held to be a priority industry and thus eligible to avail sales tax benefit as contemplated under IPR'96 in terms of notification dtd.02.02.1999. The relevant portion of the judgment of the Hon'ble Court is quoted below:-

> "22. Once the Petitioner has been declared as a priority industry in terms of IPR 1996 Clause 2.7 (i) and (xii) Part-II, the Petitioner's unit was eligible to get an additional two years of sales tax exemption. The Petitioner is right in its contention that the Opposite Parties are mistaken in their stand that IPR 1996 was meant only for a New/SSI/Medium/Large industry. The notification issued by the Opposite Parties themselves belies this contention. SRO 475/96 dated 26th July 1996, referred to hereinbefore, envisages an existing industrial unit undertaking "fixed capital investment" and having commenced after 1st March, 1996. Clearly, this would include an existing unit, which undertakes expansion and modernization after 1st March, 1996. The certificate issued by the DoI on 7th March, 2002, in Form II-A, granting the Petitioner eligibility for sales tax concession "on sale of finished

products" acknowledges both the new products as well as the existing product viz., 'air coolers'.

23. The Petitioner has also pointed out how it satisfied all the requirements of being declared as a unit 'in the pipeline' in terms of SRO 141/2000. This has not been able to be countered by the Opposite Parties. In particular, they have been unable to dispute that the Petitioner was first registered as an SSI under the OST Act on 30th January 1997, which registration was kept renewed from time to time. The Petitioner, for the purpose of its expansion, purchased a land on 20th July, 1998 i.e. prior to 1st January, 2000. In other words, the expansion drive was undertaken by an investment made after 1st March, 1996. The Petitioner also applied to the State Bank of India on 8th December, 1999 for finance i.e. prior to 1st January, 2000. It was to commence its production before 1st January, 2002. In fact, it commenced its commercial production on 12th November, 2001.

24. Further, the Petitioner is a multiproduct industry. The dates of production of its various products, as modified by a letter dated 15th September, 2004 of the DoI reads thus:

"Product		Date of production
a. Emergency light	-	03.01.2001
b. UPS	-	03.01.2001
c. Moulded Furniture & other household goods	-	03.01.2001
d. TV sets (B/W & CTV)	-	12.11.2001"

25. Indeed, the Opposite Parties have no answer to the above contention of the Petitioner that it was a unit 'in the pipeline' in terms of SRO 141/2000. The Petitioner has also clarified how its agreement with M/s. Nilkamal Plastic Private Limited had no relevance to its claim for sales tax exemption. The machineries for the manufacture of moulded plastic furniture were purchased from M/s. Nilkamal Plastic Private Limited under proper invoices, challans and excise gate passes. It was the Petitioner that produced the finished products. That it was an industry in the pipeline as on 1st January, 2000 has been admitted by the Opposite Parties themselves as its figures at Serial No. 24 of the list dated prepared by the DoI on 24th March, 2003. With the Petitioner satisfying all the requirements of the applicable notifications, there appears to be no justification in the Opposite Parties seeking to revoke the sales tax exemption thereby cancelling the certificate issued for that purpose.

26. For all the aforementioned reasons, the Court sets aside the impugned decision dated 18th January, 2008 of the DoI, Opposite Party No.2, and revives the sales tax exemption certificate dated 15th October, 2005 granted in its favour. In other words, it is held that the Petitioner, as a priority industry, is eligible to avail sales tax benefit as contemplated under IPR 1996 in terms of notification dated 2nd February, 1999 and, therefore, is entitled to sales tax exemption for an additional two years as claimed by the Petitioner."

8. It is worthwhile to mention here that the above judgment of the Hon'ble Court had not come into existence at the time the forums below passed the impugned orders. Therefore, they had no occasion to take note of the said judgment and grant benefit of IPR'96 to the dealer-assessee being a priority industry. The learned Standing Counsel for the State though vehemently objected to grant of exemption to the dealer-assessee under IPR'96 after withdrawal of the benefit w.e.f. 01.08.1999 failed to satisfy this Tribunal that the dealer-assessee was not a priority industry and was not entitled to benefit of IPR'96 as held by the Hon'ble Court in W.P.(C) No.5491 of 2009. The dealer-assessee having already been adjudicated upon by the Hon'ble Court to be priority industry and is entitled to benefit of sales tax concession for additional period of two years, the orders of the forums below disallowing such claim of the dealer-assessee cannot withstand the scrutiny of law. The dealer-assessee is entitled to the benefit of IPR'96 for extended period of two years as observed by the Hon'ble Court in W.P.(C) No.5491 of 2009. So far as calculating tax on excess production of 320 nos. of air-cooler than the installed capacity of 8,000 nos., this Tribunal is of the view that the dealer-assessee is entitled to exemption only to the extent of the installed capacity of 8,000 nos. and not more than that. In the eligibility certificate the dealer-assessee has been specifically authorised to manufacture and sale

8,000 nos. of air-coolers. So, any production more than that is exigible to tax as held by the forums below. There is no illegality or impropriety in such finding.

8. In view of the discussions made above, both the appeals filed by the dealer-assessee are allowed in part and the impugned orders of both the forums below are set aside. The matter is remitted back to the assessing authority to recompute the tax liability of the dealer-assessee keeping in view the observations made hereinabove within a period of three months from the date of receipt of this order. Cross objection filed by the State-respondent 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/-
(M. Harichandan)
Accounts Member-I