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

S.A. No. 1182 OF 2007-08

(Arising out of order of the learned ACST(Appeal), Puri Range,
Bhubaneswar in First Appeal Case No. AA. 56/BH.II/2005-06
disposed of on dated 10.08.2007)

Present: Shri R.K. Pattanaik, Chairman,
Smt. S. Mishra, 2nd 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. Ortel Communication Ltd.,
B. Bhoinagar, Bhubaneswar ... Respondent

For the Appellant : Sri M.S. Raman, ASC (CT)
For the Respondent : Sri A.K.Panda, Advocate

Date of hearing: 06.08.2020 ***** Date of order: 01.09.2020

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 instance of the State questioning legality and judicial propriety of the impugned order dated 10.08.2007 promulgated in Appeal No. AA – 56/BH.II/2005-06 by the learned Assistant Commissioner of Sales Tax (Appeal), Puri Range, Bhubaneswar (in short, 'FAA'), who reversed the finding of the learned Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar (in short, 'AA') on the grounds inter alia that the decision on the subject matter is completely wrong and erroneous and thus, deserves to be set aside.

2. The respondent dealer is involved in television network and is possessed of a RC for sale of cable modem and set top box w.e.f. 16.12.2000 and telecommunication equipments w.e.f. 05.10.2002. As is revealed from the record, at the time of assessment, the respondent dealer was held to have purchased telecom equipments and sold in course of its business transactions and during the year under consideration, the total purchase was alleged to the tune of ₹4,11,73,805.00, out of which first point tax was paid ₹1,73,31,310.00 and rest was added to the taxable turnover being purchased from outside the State and taxed at the appropriate rate. However, according to the respondent dealer, most of the items purchased were utilized for its own satellite network and cable television network. According to the appellant State, the telecom equipments were purchased at a concessional rate for the purpose of resale and referring to the RC, the AA rightly made the assessment, but the FAA committed the error and ultimately held it not to be taxable, particularly, in absence of sale transactions and morefully when, it has been used for own consumption.

3. The learned ASC (CT) for the appellant State contended that the telecom equipments having been so purchased for the purpose of resale, the FAA fell into grave error to exclude it from the taxable turnover on the ground that the same were utilized and consumed by the respondent dealer. The learned Counsel for the respondent dealer, on the other hand, contended that there is no wrong or error committed by the FAA in arriving at such a conclusion morefully when there has been no further sale of telecom equipments which were procured for its own use. It is also urged that the telecom equipments had, in fact, been procured for its

own consumption, but inadvertently the RC issued to the respondent dealer included it for the purpose of resale, the fact which was completely lost sight of by the AA.

4. The learned Counsel for the respondent dealer placed reliance on a ruling of the Hon'ble Apex Court in the case of Bhopal Sugar Industries Ltd., M.P. and another Vs. D.P. Dube, Sales Tax Officer, Bhopal Region, Bhopal and another reported in (1963) 14 STC 406 (SC) in order to contend that there was no sale of telecom equipments and even when, the same were assumed to be handed over to its contractor, no sales had really been effected, the contention which was rightly appreciated by the FAA. A decision of the Hon'ble Court in the case of State of Orissa Vs. Narahari Pradhan reported in (1972) 30 STC 558 (Orissa) is also referred to while contending that there is no liability for the respondent dealer to discharge, especially when, there is no evidence of sale of telecom equipments, even if the RC is accepted at its face value. The learned Counsel for the respondent dealer produced a copy of an order dated 07.05.2011 of the Tribunal passed in S.A. No. 1183 of 2007-08 to substantiate the claim that there was no sale of telecom equipments and its purchase cannot be presumed in absence of any material to that effect.

5. Admittedly, as is made to appear, the respondent dealer is a company registered under Companies Act for operating satellite network and cable network to air news and entertainment meant for its customers. It is also made to understand that initially request for registration by the respondent dealer was rejected since it was not in conformity with the Act in force and subsequently, as it

was bringing materials for utilization of its telecom networking process by paying appropriate tax, it was granted for resale of cable and waste cables and then, stood amended for sale of cable modem, set top box, whereafter, returns were submitted. In other words, originally registration was disallowed on the ground that the activities which are being performed by the respondent dealer do not come within the purview of 'sale', inasmuch as, satellite television network and cable television network do not result in any sale, however, a certificate of registration was issued in its favour, as was earlier stated and subsequently, the same was allowed to be amended. In fact, from the record and the materials presently furnished by the learned Counsel for the respondent dealer, it is also made to understand that on 05.10.2002 application for amendment of RC was submitted indicating therein that various telecom equipments required to be procured for using it in internet and data service business besides networking process. But, the same was allowed with an amendment for its resale w.e.f. 05.10.2002. Admittedly, the RC with the aforesaid amendment was not rectified at the instance of the respondent dealer. However, the fact of the matter is, the request for amendment was for obtaining telecom equipments for using it in networking process, but wrongly or by inadvertence, it was allowed for resale. According to the respondent dealer, the telecom equipments have not been resold but utilized for its own purpose and consumption and therefore, there was no tax liability, as such. Indeed, there is no material on record even to remotely suggest that the respondent dealer had ever sold the telecom equipments. It is alleged that the telecom equipments were made over to the contractor. Even assuming so, when, there is no transfer of

property merely by handing over the telecom equipments to its contractor, the respondent dealer cannot be said to have indulged in sale. It must be established that the telecom equipments which were purchased had been sold inside the State so as to invite the tax liability. In the instant case, no material evidence is on record to prove and establish that the telecom equipments so purchased by the respondent dealer had been sold within the State. Even with the assumption that the purchased telecom equipments were handed over to the contractor, it would in no circumstances result in its sale. The law is well settled that any material which is purchased, but subsequently utilized for own consumption would not amount to sale. The decision in Bhopal Sugar Industries Ltd. ibid enunciated the law that consumption by an owner of goods in which he deals is not a 'sale' within the meaning of the Indian Sale of Goods Act, 1930 and therefore, it is not 'sale of goods' as per Entry 54, List-II of Schedule VII of Constitution of India, 1950. The decision in Narahari Pradhan case of the Hon'ble Court (supra) may also be borrowed to the extent that merely by possessing the telecom equipments without any proof of sale cannot create any liability under the Act. In the said case, a forest lease was granted to a contractor and alleging sale of forest produce, liability was sought to be enforced, but the Hon'ble Court held and observed that initial burden would always be upon the State to show that there has been a sale, inasmuch as, no presumption is available to be raised that a forest contactor to have sold forest materials and that apart, even in possession of a forest lease, one may not be able to operate it at all; or the lease might get cancelled; or the lessee, for some reason or other, may not be able to exploit the lease hold subject and therefore, merely

from the fact that there exist a forest lease, by inference, it cannot be assumed that the forest produce had been sold. In the case at hand, as earlier discussed, there is no material on record so as to make it believe that the telecom equipments which were purchased by the respondent dealer had been sold inside the State. It appears from the record that the respondent dealer rather procured the telecom equipments for its use and consumption. Notwithstanding the fact that the required correction to the RC was not attended to by the respondent dealer, then also it is unlikely to prove that they were sold, particularly, in absence of any material in that behalf. As previously discussed, an item which is purchased for the consumption of the owner would not amount to sale and not to fall within the definition of 'sale'. According to Section 2(g) of the Act, there has to have a transfer of the goods for cash, deferred payment, or other valuable consideration. The meaning of 'sale price' as per Section 2(h) thereof indicates that it is an amount payable to a dealer as consideration for the sale or supply of any goods, less any discount allowed, according to the ordinary trade practice. Having regard to the above and taking into account the fact that the respondent dealer even though failed in getting the RC corrected, but for having utilized the telecom equipments for its own use and consumption, it cannot be said to have effected any sale in respect thereof. Even assuming that the telecom equipments were made over to the contractor of the respondent dealer, in absence any evidence as to its transfer on payment of consideration, no sale can be alleged. The aforesaid aspect was duly considered by the FAA and, in the considered view of the Tribunal, such a finding deserves no interference.

6. Hence, it is ordered.

7. In the result, the appeal stands dismissed for the reasons indicated herein above. As a logical sequitur, the impugned order dated 10.08.2007 promulgated in Appeal No. 56/BH.II/2005-06 is hereby 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