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

S.A. No. 2 (C) of 2016-17
S.A. No. 148 (VAT) of 2016-17
&
S.A. No. 7 (ET) of 2016-17

(Arising out of orders of the learned JCST, Jajpur Range, Jajpur Road in First Appeal Case Nos. AA. 575- KJB (C)/14-15, AA. 574- KJB/ 14-15 (OVAT) & AA. 576- KJB (ET)/14-15, disposed of on dated 30.01.2016 respectively)

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. AMCD Transport & Minerals Pvt. Ltd., Bhadrasahi, Barbil, Keonjhar ... Respondent

For the Appellant : Sri M.L. Agarwal, Standing Counsel (CT)
For the Respondent : Sri B.B. Panda, Advocate

Date of hearing: 06.08.2020 ***** Date of order: 20.08.2020

O R D E R

Since parties are same and similar questions of law are involved, for the sake of brevity, proper and effective adjudication, all the appeals are clubbed together for disposal by the following common order.

S.A. No. 2 (C) of 2016-17:

2. Instant appeal under Rule 22 of the Central Sales Tax (Odisha) Rules, 1957 (in short, 'the Rules') read with Section 78(1) of the Odisha Value Added Tax Act, 2004 (in short' the Act') is at the behest of the State questioning the legality and judicial propriety of the impugned order dated 30.01.2016 promulgated in Appeal No. AA- 575/KJB(C)/2014-15 by the learned Joint Commissioner of Sales Tax, Jajpur Range, Jajpur (in short, 'FAA'), who set aside the order of reopened assessment dated 23.03.2015 for the tax period 01.04.2009 to 31.03.2012 passed by the learned Sales Tax Officer, Barbil Circle, Barbil (in short, 'AA') for having raised extra demand of ₹1,46,46,090.00 against the respondent dealer on the grounds inter alia that it is bad in law and therefore, deserves to be set aside in the interest of justice.

3. The respondent dealer is engaged in trading of iron ores and fines effected in course of inter-State trade and commerce, export and stock transfer. In fact, on receipt of Tax Evasion Report (in short, 'TER) for the periods 2009-10, 2010-11 and 2011-12 alleging irregular penultimate export sales and sales of inter-State trade without 'C' declaration forms, the assessment was reopened. As it appears, notice was issued to the respondent dealer and the AA assessed it on the following counts, namely, (i) non-submission of declaration forms 'C', 'F' and 'H'; (ii) defective submission of declaration forms; (iii) irregularities vis-a-vis penultimate sales under Section 5(3) of the Central Sales Tax Act, 1956 (in short, 'CST Act'); and (iv) imposed penalty twice the extra tax.

4. The learned Counsel for the respondent dealer raised a preliminary objection regarding maintainability of the appeals. It is contended that reassessments later to the direction of the FAA were accomplished, subsequent to which, the respondent dealer assailed, but the appeals stood dismissed against which S.A. Nos. 106 (C), 325 (VAT) and 147 (ET) of 2017-18 were filed, which were again dismissed on 24.09.2019 and in such view of the matter, the instant appeals by the State have become infructuous and in the light of the orders of the Tribunal in S.A. Nos. 1050 and 1051 of 2007-08 dated 01.01.2020, all are to be dismissed for being not maintainable.

5. A copy of the said order dated 01.01.2020 in S.A. Nos. 1050 and 1051 of 2007-08 of the Tribunal (FB) is produced by the learned Counsel for the respondent dealer and the same is gone through. On being perused, it is made to appear that the Tribunal disposed of the appeals for becoming redundant since for the relevant periods, reassessments were carried out pursuant to the direction of 1st appellate authority against which the respondent dealer filed appeals and 2nd appeals which ultimately resulted in dismissal. In the said appeals, State had participated. Under such circumstances, the Tribunal dismissed the appeals filed by the State for being infructuous. However, in the instant case, there has been no contested disposals, inasmuch as, the appeals which were carried at the behest of the respondent dealer culminated in rejection simpliciter for failing to pay the statutory deposits. In that view of the matter, the contention of the learned Counsel for the respondent dealer that the present appeals to be infructuous cannot be accepted as it is entirely misplaced and misconceived.

6. A common finding is rendered by the FAA to the effect that exemption and deduction as claimed in original assessment since been disallowed, it amounts to change of opinion but the same is challenged by the learned Standing Counsel (CT) alleging it to be perverse and for being arrived at without due application of judicial mind. It is contended that respondent dealer furnished returns by way of self assessment and thereafter, no regular assessment had ever been carried out and under the above circumstances, where was the question of change in opinion by the AA. In this regard, a decision of the Hon'ble Court in the case of Nilachal Ispat Nigam Ltd. Vs. State of Orissa in W.P. (C) No. 22343 of 2015 disposed of on 06.11.2015 is cited by the State. One more decision is referred to reported in (2012) 52 VST 137 (Orissa): Bharat Petroleum Corporation Vs. STO and it is urged that the contention of change in opinion as advanced by the respondent dealer is totally a misconception. It is also claimed that during the course of hearing of the appeals, the learned Counsel for the respondent dealer rather conceded that there has been no change of opinion, so to say. If a regular assessment is made and not being a self assessment by submission of return and subsequently, without any basis and a cause of action, supported by additional materials, an assessment if reopened, under such circumstances, it may be alleged that there was change of opinion. In case of self assessment, there is, in fact, no scope for change of opinion in the event of reopening of assessment. Having said that, the claim of change in opinion must have to be rejected.

7. Initially, the AA reached at a decision regarding irregularities in penultimate sales which was not duly appreciated by the FAA and while alleging so,

the learned Standing Counsel (CT) led the Tribunal to go through the relevant provisions of law. Indeed, as per Section 5(3) of the CST Act, last sale or purchase of any goods preceding the sale or purchase occasioning the export are deemed to be in course of such export, if such last sale or purchase took place after and was for the purpose of complying the agreement or order for or in relation to such export. The Tribunal is also made to understand the statement of objects and reasons vis-a-vis Section 5 of the CST Act, according to which, the last sale or purchase of the goods are to be treated as sale in course of export only if it was in compliance of the agreement or order in respect to the export. It is contended that the sales which are claimed by the respondent dealer are no penultimate sales preceding and in due course of export which was rightly pointed out by the AA. While raising such a ground, clause (a) of Notes and Clauses, Rule 12(10)(a)(b) of Central Sales Tax (Registration and Turnover) Rules, 1957 (in short, 'Rules, 1957') and Rule 6D of the Rules are referred to and the learned Standing Counsel (CT) at last contended that until and unless the conditions as appearing in Section 5(3) of the CST Act are satisfied to the hilt, the sales cannot be said as penultimate and deemed to be in course of export. It is also contended that the sale is to be a complete one or in other words, a completed sale and not by any means to include even an agreement to sale so as to qualify as a penultimate sale for the purpose of export and in this connection, a decision of the Hon'ble Apex Court in the case of Consolidated Coffee Ltd. Vs. Coffee Board reported in (1980) 46 STC 164 (SC) is cited. At the same time, a decision of the Hon'ble Madras High Court in the case of T.P. Sokkalal Ramsait Factory Pvt. Ltd. Vs. Deputy Commercial Tax

Officer reported in (1967) 20 STC 419 (Mad.) is referred to by the State to explain the term 'complete sale'. Furthermore, in order to strengthen the contention on export of goods and what are the conditions necessarily to be proved and established vis-a-vis penultimate sales in respect of and due course of export, the learned Standing Counsel (CT) placed reliance on a decision of the Hon'ble Apex Court reported in (2011) 38 VST 1 (SC): Saraf Trading Corporation Vs. State of Kerala. From the order of reassessment dated 23.03.2015, it is made to appear that specified sales have been shown to be effected prior to the agreement or order of the export buyer and the State considering it to be no penultimate sales in terms of Section 5(3) of the CST Act alleged that for such sales exemptions cannot be allowed. In other words, according to State, the alleged sales are only sales for the export and not in course of export as there lies a clear distinction between the two, depending on which exemptions are considered. It is further alleged that evidence in respect of the documents statutorily required has not been produced and, therefore, the respondent dealer having failed to substantiate it, the export sales are to be disbelieved for the purpose of exemption. The FAA, as it seems, proceeded on the premise that there is no need of any documentary evidence to be produced when form 'H' is submitted, particularly, in view of the amendment to Section 5 of the CST Act w.e.f. 13.05.2005. However, considering the requirements and the settled position of law, it is to be concluded by the Tribunal that not only the penultimate sales are to be proved as sales in course of export, but also are to be proved by providing particulars in form 'H'. As per form 'H', certified copy of air consignment note or bill of lading or railway receipt or goods vehicle record or

postal receipt or such other documents in support of the proof of export is to be submitted. Mere filing of declaration form 'H' without the particulars of documents is of no avail. So, in that respect, the FAA can be said to have committed an error in dispensing with production of material documents as is required along with declaration form 'H'. It is well settled that exemption when it is claimed must have to be strictly proved and in due compliance of law and in this regard, the learned Standing Counsel (CT) cited the following decisions, such as, Ramnath & Co. Vs. CIT: 2020 SCC Online SC 484; Commissioner of Customs (Import), Mumbai Vs. M/s. Dillip Kumar and Co.: (2018) 9 SCC 1; Union of India Vs. CTO: (1956) 7 STC 113 (SC); Empire Industries Ltd. Vs. Union of India: (1987) 64 STC 42 (SC); Rajasthan Spinning & Weaving Mills Ltd. Vs. CCE: (1996) 102 STC 476; and Orient Trades Vs. CTO: (2008) 13 VST 530 (SC). It is also claimed that if a statute lays a particular manner to be followed, it must be executed in that manner alone and not otherwise and in that connection, cited the decisions of Hon'ble Apex Court reported in (2000) 8 SCC 532: State Bank of India Vs. K.M. Chandra Govindji; and (2004) 267 ITR 1 (SC): CIT Vs. Pearl M.E. Foundry Works Pvt. Ltd. Having regard to the above facts, the Tribunal is of the considered view that it needs a fresh examination especially to identify the alleged sales, whether, to have been effected in course of export or not with reference to the agreements or orders allegedly placed by the export buyers. In fact, the Tribunal does not have the opportunity and comfort to go through the agreements which are not presently available in record in order to ascertain, whether, the sales in question to be truly in due course of such export or not. It is also sincerely realized by the Tribunal that the respondent dealer ought to be

provided an opportunity to furnish or supplement the necessary evidence or particulars of the documents or remedy the defects, if any, in declaration 'H' form in order to make believe its claim. As revealed from the record, certain defects were pointed out as to the declaration form 'H' but then, the FAA despite the defects on record, accepted it on the ground that the AA could not have rejected the same without providing a reasonable opportunity to the respondent dealer. At this juncture, the learned Standing Counsel (CT) alleged that how the FAA could able to accept defective declaration 'H' form on such a flimsy ground for having been accepted earlier. Under such peculiar circumstances, it would be just and proper and deemed necessary that the respondent dealer should be allowed an opportunity to meet the defects in declaration form 'H' so as to show its bonafide vis-a-vis the penultimate sales.

8. The FAA referring to a decision reported in (2009) 19 VST 363 (All.): Commissioner, Trade Tax, U.P., Lucknow Vs. Mentha & Allied Products Ltd. arrived at a decision that the respondent dealer did not commit any illegality in subjecting the goods to export not to the export buyers originally intended for, but to others as there is no such bar or restriction to do so. It is strongly objected to by the learned Standing Counsel (CT) that the respondent dealer when claimed it to be penultimate sales for a particular export was precluded to effect sales not to the export buyer, but to outsiders. The AA had indeed taken an exception on realizing that the respondent dealer purchased iron ore fines against 'H' form from M/s. T.P. Dao to export it directly under Section 5(1) of the CST Act, but later on, deviated and sold the same otherwise than export sale. The ratio in Mentha & Allied case

ibid is on a different footing, where, the Hon'ble Allahabad High Court held that the goods purchased for the purpose of export differed than the one which was shown in export document and thus, observed that it cannot be a ground to infer that the dealer carried out processing before export but, according to the Tribunal, it cannot be an authority to suggest that penultimate sales meant for a particular export can be diverted to honour different export orders. The AA, rather, noticed that the purchase of iron ore fines of 9276.190 MT was for direct export, but was disposed of by other means. In the aforesaid background of facts, it needs re-examination. It is not known, whether, there was diversion and if at all cancellation of export sales to be the cause behind it or some other reason which compelled the respondent dealer to dispose of the iron ore fines not in consonance with the export orders. Such a factual aspect is required to be thrashed out by providing an opportunity to the respondent dealer.

9. On the point of imposition of penalty, the learned Standing Counsel (CT) strongly urged that it could not have been deleted by the FAA as its levy is a mandatory compliance as per the provisions of the Act and Rules. An objection is raised by the State that the FAA erred in applying a circular of the Commissioner of Sales Tax (No. 43/CT, Dt. 20.04.2015) to hold that failing to submit declaration form 'H' invites no penalty. A distinction is sought to be made by the learned Standing Counsel (CT) vis-a-vis the circular dated 20.04.2015 and it is contended that it only relates to declaration in form 'C' and 'F' and cannot apply to form 'H' as a material distinction lies in 'concessional rate of tax' and 'exemption from payment of tax'. As it is well known, if forms 'C' and 'F' are failed to be furnished, it does not invite any

penalty as the dealer receives no benefit of concession in the rate of tax and pays the regular tax, instead. On analogy, the FAA seems to have applied the circular to hold that it was inappropriate to levy penalty for failing to furnish declaration in form 'H'. In this regard, State cited a decision of the Hon'ble Court in the case of Nirmala Nayak Vs. State of Odisha reported in 2020 (I) OLR 493 to contend that a circular of present nature cannot be acted upon in order to supersede the statutory Act and Rules. In the decision supra, the Hon'ble Court observed that if a statute does not create an embargo or limitation, such cannot be indirectly allowed to surface by way of a circular or a resolution, inasmuch as, executive instructions cannot run contrary to the statutory laws. In the instant case, such is not the position. It is not that the circular dated 20.04.2015 stands as an obstacle to any statutory compliance. On a proper appreciation, the Tribunal is of the humble opinion that failure to furnish declaration forms including form 'H' only disentitles the dealer from availing the concession or exemption, as the case may be, but it cannot invite nor can ever a ground to impose penalty. To this extent, it can fairly be said that the FAA did not fell into any error. It is argued that since less amount of tax was deposited instead of full or local rate of tax, for such non-submission of forms 'C', 'F' and 'H', the State suffered for not receiving the differential tax dues in time and therefore, in view of Sections 9(2) and 9(2B) of the CST Act, a direction should be made to levy interest. A plethora of decisions of the Hon'ble Apex Court and other High Courts have been cited from the side of the State, while contending that question of levy of interest on such similar issue is no more res integra; interest to be compensatory in nature in order to restitute the loss caused

to the State exchequer for not discharging the liability etc. A ready reference may be had to the decisions of the Hon'ble Apex Court reported in (2010) 27 VST 1 (SC) and (2011) 40 VST 220 (SC) on the point of levy of interest. The sum and substance of the said rulings relate to levy of interest on the ground that the State is to be compensated for the dealers for not discharging liabilities as required under law. In the view of the Tribunal, there is indeed an interest to be levied in failing to submit declaration forms which is a statutory compliance and thus, cannot be dispensed with.

S.A. No. 148 (VAT) of 2016-17:

10. Present appeal under Section 78(1) of the Act is again at the instance of the State assailing the impugned order dated 30.01.2016 promulgated in Appeal No. AA. 574- KJB/14-15 (OVAT) by the FAA, who allowed the appeal in part, set aside the order of assessment for the periods and directed for recomputation of tax vis-a-vis the respondent dealer. As to the survival of appeal, the decision of the Tribunal is not reproduced, as it has already been dealt with in S.A. No. 2 (C) of 2016-17 with the conclusion that it is maintainable.

11. Here, the challenge relates to discrepancy in stock and an objection in applying a decision of the Hon'ble Court in the case of Haribhagat Agrawalla Vs. State of Orissa reported in (1982) 51 STC 355 (Orissa), wherein, it is observed that sampling method of verification as to stock may be used for certain purposes, but it cannot be a basis for imposition of tax. The learned Standing Counsel (CT) contends that said decision of the Hon'ble Court is not at all applicable to the facts and circumstances of the present case. In fact, the closing balance as per the books

of account till 31 March, 2011 figures at 4797.682 MT as against mining return at 8305.510 MT. According to the State, the closing balance as per the books of account includes credit loss of 542.409 MT, which occurred in course of business and therefore, the difference in closing stock stands at 3507.828 MT which ought to have been treated as stock discrepancy, nevertheless, by taking a lenient view the AA to the best of his judgment enhanced and capped it at 3507.555 MT, which is quite reasonable and rational. Admittedly, the fact of discrepancy has not been disputed by the FAA or by the respondent dealer. So, the FAA could not have applied the ratio of Haribhagat Agrawalla case of the Hon'ble Court vis-a-vis discrepancy in stock. With respect to the question of moisture loss, as per the learned Standing Counsel (CT), it does not arise at all. The FAA, however, referring to a report of Indian Standards Institution held that the loss on account of moisture should be allowed with a minimum of 6.381% and maximum at 10.80%. There is no denial to the fact that moisture loss does take place with respect to iron ores and it has to be accordingly calculated. In fact, a copy of the Indian Standards Institution on method of moisture determination of iron ore lump is submitted at the Bar for reference of the Tribunal. On perusal of which, it indicates that a particular process is to be followed and method adopted in respect thereof. In the considered opinion of the Tribunal, a moisture loss occasions and notwithstanding the credit loss shown at 542.409 MT, it has to be freshly calculated.

S.A. No. 7 (ET) of 2016-17:

12. In terms of Section 17 of the Odisha Entry Tax Act, 1999 (in short, 'OET Act'), the appellant State filed the appeal against the impugned order dated

30.01.2016 promulgated in Appeal No. AA. 576-KJB (ET)/14-15 by the FAA, who set aside the order of reassessment under Section 10 of the OET Act for the tax period 01.04.2009 to 31.03.2012.

13. As per the State, assessment was reopened after a notice to the dealer and it was assessed for an escaped turnover of ₹3,03,71,770.00 and imposed tax @ 1% and penalty twice the tax assessed amounting to ₹9,11,153.00. The AA disallowed the purchase of iron ore fines from M/s. T.P. Dao against 'H' forms for export, but sold otherwise, not in course of export; and imposed tax on account of discrepancy in stock of 3507.555 MT. The same argument as advanced in S.A. No. 148 (VAT) of 2016-17 is adopted by the State in this regard. On stock discrepancy, it has already been concluded by the Tribunal that the approach of the FAA not to be correct, rather, the AA rightly enhanced the turnover at 3507.555 MT. However, on the question of moisture loss, the Tribunal is of the humble opinion that it ought not to have been allowed by the FAA more particularly when a credit note deduction of 542.409 MT was allowed. In fact, the taxable event of entry tax is on entry of the scheduled goods into the local area, a fact which was completely lost sight of by the FAA.

14. Hence, it is ordered.

15. In the result, the appeals stand allowed to the extent indicated herein above. As a necessary corollary, the impugned orders dated 30.01.2016 are hereby set aside with a direction to the AA to consider the assessments for the alleged period afresh keeping in view the findings and observations of the Tribunal as above and to complete the entire exercise preferably within a period of three

months from the date of receipt of the present order after providing due opportunity of hearing to the respondent dealer and expedite its disposal in accordance with law.

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