BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 125 (V) of 2008-09

(Arising out of order of the learned Asst. Commissioner of Sales Tax, Ganjam Range, Berhampur, in First Appeal Case No. AA.(VAT)149/2007-2008, disposed of on dated 07.08.2008)

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

M/s. Bharat Enterprises,
At/P.O.- Loudigam,
Dist.- Ganjam. ... Appellant

-Versus-

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

For the Appellant : Sri R.P. Sahu, Advocate
For the Respondent : Sri D. Behura, S.C. (CT)

Date of hearing:13.12.2021 *** Date of order: 15.12.2021

O R D E R

The second appeal is directed against the First Appeal order dtd.07.08.2008 passed by the Asst. Commissioner of Sales Tax, Ganjam Range, Berhampur in First Appeal Case No. AA.(VAT)149/2007-2008 dealing with period of assessment from 01.04.2005 to 30.09.2007,

whereby the first appellate authority confirmed the order of assessment passed by the learned Sales Tax Officer, Ward-A, Berhampur dtd.13.11.2007.

2. The undisputed facts of the case are that, the dealer carries on business in manufacturing and extraction of Keora water and keora rooh charging of DOP oil with Keora flowers. For the purpose of business the dealer receives stock of base oil, D.O.P., liquid paraffin, sandal wood oil. The nature of business is charging of Keora flowers to D.O.P. base, liquid paraffin, sandal wood oil as per the requirement of consignors sitting outside the State of Odisha. During the period in question, the books of account of the dealer-appellant i.e. for 2005-06, 2006-07 and 2007-08 were subjected to statutory audit u/s.40(1) of the OVAT Act which did not find any suppression or irregularity but while doing assessment the Sales Tax Officer found fault with the STO, Audit as he did not scrutinise and report non-inclusion of cost of materials purchased received for manufacturing of the product in sale price while issuing tax invoices with a plea of job work and thereby disposing them otherwise than by way of sale. During the period in question the transactions as noted, both by the Fist Appellate Authority and the Sales Tax Officer is given below:-

		2005-06	2006-07	2007-08 (9/07)
A	Purchase of flowers	Rs.21,69,299.40	Rs.24,91,419.00	Rs.15,53,309.00
B	Other receipts like D.O.P.	Rs.2,96,237.00 (1680 kgs)	Rs.13,52,718.00 (1560 kgs)	Rs.4,16,420.00 (1671 Kgs)

	Liquid Paraffin, sandalwood oil			
	Total	Rs.30,95,536.40	Rs.38,44,137.00	Rs.19,69,719.00

The STO found that there has been discrepancy between ET returns and VAT returns and it has been noted by the STO that Keora flowers have been collected and purchased from the local farmers and after distilling the same and charging them to base oil or DOP oil, the resultant composition named as Keora oil is sold interstate charging appropriate rate (4% to 3%) under the CST Act. The STO is of the view that the cost of the materials received from out of the State consignors are not charged with any tax and that the registration certificate of the dealer-appellant which has been issued for the purpose of manufacturing and sale of Keora attar rooh, oil and Keora water has not been authorised to procure such raw materials on consignment basis and to use them in job work. He found no agreement between the consignor and the dealer and the result of which he applied Sec.12 of the OVAT Act which deals with levy of tax on purchase. By applying the provision as stated supra, he took out a sum of Rs.18,88,794.00 from the net turnover under the CST Act and charged purchase tax @ 12.5% u/s.12 of the OVAT Act (supra). As a result of which an extra tax demand of Rs.7,08,290.00 has been generated.

3. Appearing on behalf of the dealer-appellant, the learned Advocate vehemently argued that the present dealer is a consignee of DOP oil, sandalwood oil, liquid paraffin from outside the state from different parties who effect delivery of goods through challan with an instruction to charge the base oil with Keora flowers to a degree advised by them. That pursuant to the advice by the outside State consignors, the dealer-appellant procures Keora flowers from local farmers and having charged the oil with Keora essence send them back to outside the State suppliers by putting therein the cost price of the flowers, distillation charges, cost of packing and pays CST upon 'C' form conditions. He vehemently argued that the Audit Team of Sales Tax Department while visiting the place of business of the dealer-appellant on 17.09.2007 has found no fault in any manner but the assessing officer has found fault with his own audit team and completed the assessment to best of the judgment through pulling out the turnover of Rs.18,53,097.00 from the CST Act for which tax has been paid @ 4% on 'C' form conditions and assessing them u/s.42 of the OVAT Act by charging purchase tax u/s.12 of the said Act. He vehemently argued that Sec.12 is inapplicable as the purchases of Rs.18,53,097.00 are purely from outside the State and are not exigible to tax u/s.12 of the OVAT Act.

4. Per contra, Sri D. Beura appearing on behalf of the Revenue submitted that there is no evidence of

movement of goods as no way bills have been produced at the time of assessment or before the appeal and that Keora flowers having been purchased from inside the State is liable for tax u/s.12 of the OVAT Act.

5. We have heard the counsels on behalf of the State as well as the dealer-appellant and have carefully considered the contentions and grounds taken in the appeal memo as well as the written submission filed by the appellant and materials available in the record. Having regard to the facts of the case we are of the view that the present case gives rise to following questions of law to be answered by this Hon'ble Court.

(i) Whether in the facts of the case the impugned transaction is an intra-State sale or intra-State sale inviting application of rates under the CST Act or rates under the OVAT Act?

(ii) Whether the Sales Tax Officer is justified to overstep the audit visit report given by the audit party and applying rate of tax under the VAT Act to a turnover under the CST Act on best of judgment?

(iii) Whether the STO is justified in applying rate of tax under the OVAT Act on a turnover under the CST Act on the ground that the condition of registration has been violated?

Issue No.(i)

We have gone through the case record and found that the outside State consignors like SMD. AYUB MD. YAQUB, N.R. Perfumers have dispatched lubricating base oil to the dealer-appellant with an instruction which reads like this:-

(i) Lubricating Base Oil 16*25 kgs each drum please apply sixteen Thousand Keora Flowers (1000 Flowers each drum) as processing and return back to us after manufacturing of Attar-Keora Oil. Forty empty d rums for Keora Water. Please apply one hundred Keora flowers each drums, Docket No.421739920 dtd.25.04.2007.

(ii) Challan No.11 dtd.17.11.2005

Not For Sale

DOP Oil 6*25 k

The above material is sent to you for manufacturing Keora please apply 15000 Keora flowers on it & please send back to us after manufacturing. R.R. No.665090/17/11/05.

The transactions stated supra are illustrative under which all other transactions are covered. Bare reading of the documents will show that they are delivery challans and not document of sale or purchase. The goods have been received from outside the State consignors with challan no. and R.R. number with an instruction to charge Keora flower to base oil and re-send the compound to the above stated consignors. Since the property in

materials received from outside the State belongs to the outside consignors, there cannot be an element of sale by the dealer-appellant as the property in DOP oil, paraffin, sandalwood oil does not vest in him. The property in Keora flowers distilled and charged to the base oil is made on accretion basis and therefore it is sold interstate the movement it is applied to the base oil. The dealer-appellant is correct in collecting CST @ 4% since the materials in question is purported to be sold on interstate u/s.3 of the CST Act which provides as follows:-

> "**3. When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce.-**
> A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase-
> (a) occasions the movement of goods from one State to another; or
> (b) is effected by a transfer of documents of title to the goods during their movement from one State to another."

(A) As stated supra, the dealer-appellant has applied the Keora oil to the DOP base as per the agreement with the outside State consignor which is evident from the body of the challans, therefore the procurement of Keora flowers and applying them to DOP base is for the purpose of satisfying contract with the outside State consignors as a result of which the impugned transactions falls u/s.3 of the CST Act.

(B) On the other hand, out attention is drawn to the preamble of Odisha Value Added Tax in which it has been stated that it is an act to provide for imposition and collection of tax on the sale and purchase of the goods in the State. The Sec.12 of the OVAT Act provides that every dealer who in course of his business purchases or receives in taxable goods within the State from registered dealers in which no tax is payable u/s.11 or is from an unregistered dealer or goods are disposed, consumed in the manufacture of goods declared to be exempted from tax or disposed otherwise then by way of sale will attract purchase tax under that section. We find that the impugned transaction does not fall under the ambit of Sec.12 of the OVAT Act for two reasons.

(i) For that impugned goods are not received within the State;

(ii) After their use they have not been disposed otherwise then by way of sale.

6. Since the property in goods are vested in outside the State dealers and the materials are received on consignment basis u/s.6 of the CST Act and have been sent back to the said consignors with payment of tax on value of Keora oils received from them, there is hardly any violation under the OVAT Act to attract purchase tax u/s.12 of the said Act.

Issue No.(ii)

Our attention is drawn to the orders passed by the assessing authority and the first appellate authority, wherein findings by the audit team constituted u/s.41 of the OVAT Act in so far as goods from outside the State has not been taxed u/s.12 of the OVAT Act has been disputed and differentiated by the Sales Tax Officer and affirmed by the first appellate authority. A bare reading of the Sec.42(1) of the OVAT Act will give impression that, the assessment under that section will be attracted when as a result of sub-section (3) of Sec.41 detection of suppression of purchases or sales or both, erroneous claims of deductions including input tax credit, evasion of tax or contravention of any provisions of the Act affects the tax liability of the dealer. In the present case while conducting assessment u/s.42(1) of the OVAT Act, we find that none of the conditions as has been enshrined in the provisions supra has been fulfilled. Therefore, the opinion of the Sales Tax Officer initiating best of judgment assessment differing from the findings of the Audit Visit Team represents a change of opinion and cannot be sustained in law.

Issue No.(iii)

That the Sales Tax Officer while making best judgment assessment has given a reasoning that the registration of the dealer-appellant under the CST Act entitles him to manufacture of the Keora oil and therefore he is not entitled to any job work. On the basis of this

reasoning he pulled out a turnover from the CST Act and subjected to assessment u/s.42 of the OVAT Act as stated supra. There is a fundamental flaw in the reasoning of the Sales Tax Officer in so far as a job work has not been recognised by him as works contract. A job work is also a species of works contract and is widely applied both in respect of moveable and immovable properties under the Sales Tax Act. Therefore, the argument of the Sales Tax Officer that the dealer-appellant is not entitled to works contract law under the CST Act is incorrect particularly when he has paid tax on Keora oil under the CST Act and has provided 'C' forms thereon. This has been fairly admitted both by the counsels on behalf of the Revenue and the dealer-appellant.

7. In view of the discussion supra, we are of the considered view that the impugned transactions fall under the CST Act whereby the goods have been received from the consignors from outside the State u/s.6A of the CST Act upon R.R. and advice and have been sent back to the consignors by the dealer-appellant with value additions and payment of CST u/s.3 of the CST Act. Accordingly, Sec.12 will not have any application to these transactions as goods have been received from outside State consignors and property in goods lies with them throughout the movement of goods to State of Odisha from outside the State. For this reason, the appeal filed by the dealer-

appellant is allowed and the first appeal order is set aside and the assessment order is reduced to return figure.

Dictated & Corrected by me

Sd/-
(S.M. Dash)
Accounts Member-III

Sd/-
(S.M. Dash)
Accounts Member-III

I agree,

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member