BEFORE THE JUDICIAL MEMBER-I:
ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 190(V) of 2018
(Arising out of the order of the learned Addl. CST, Odisha, Cuttack, in Appeal Case No. CUII-AA-I/08/2007-08, disposed of on dtd.30.06.2016)

P r e s e n t: Shri A.K. Dalbehera, O.S.J.S.
M.A., LL.M.
1st Judicial Member

M/s. Maa Durga Flour Mill Pvt. Ltd.,
At:- Kairipari, P.O.- Kotashi, Tangi,
Dist.- Cuttack. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. B.B. Panda, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 23.04.2021 *** Date of order: 30.04.2021

O R D E R

This appeal is directed against the order dtd.30.06.2016 passed by the learned Addl. Commissioner of Sales Tax, Odisha, Cuttack (hereinafter referred to as, the learned ACST) in Appeal Case No. CUII-AA-I/08/2007-08, wherein he confirmed the order of the learned Asst. Commissioner of Sales Tax (LTU), Cuttack II Range, Cuttack (hereinafter referred to as, the learned AA) for the assessment

period 01.04.2005 to 31.05.2006 u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act).

2. The brief facts of the case are that, the appellant-dealer is the owner of flour mill and registered under OVAT Act bearing TIN-21281300954. It is engaged in production of 'Atta', 'Maida' & 'Suji'. It effects sale of its products both inside and outside the State of Odisha and the sale is mostly on wholesale basis. For the purpose of manufacturing 'Atta', 'Maida' & 'Suji' it purchases wheat both from within and outside the State of Odisha. The purchases from inside the State of Odisha is mostly from FCI and the purchases from private dealers is very less. The assessment proceeding was initiated on the basis of Audit Visit Report (in short, the AVR) and the learned Assessing Officer raised the impugned demand which was also confirmed by the learned ACST.

3. Being aggrieved by the order of the learned AA, the appellant-dealer preferred an appeal before the learned ACST who confirmed the assessment order. Being aggrieved by the order of the learned ACST, the appellant-dealer has preferred this second appeal.

4. The appellant-dealer has come up with the second appeal on the grounds that the order of assessment was passed violating the principle of natural justice and the same also amounts to want of statutory jurisdiction as the learned AA was the part and parcel of audit objection who proceeded and completed the assessment; that during pending disposal of the first appeal and set aside assessment no such rectification or revision has been made to protect the interest of revenue; that after the ruling of the Hon'ble High Court the

principle of law should be equally applicable to all parties for which no subsequent assessment is permissible under law and is liable to be quashed; that the by-products for the preceding period of the appellant-dealer was assessed as chokad and that for this period the same product cannot be treated as husk and bran of wheat or paddy in any manner for which the disputed findings are not tenable in the facts and circumstances as well as in the nature and character of the appellant-dealer's business as a whole; that the charging of tax on sale of chokad and at the same time disallowance of ITC for sale of exempted goods as claimed in the return amounts to double taxation which is not permissible in the eye of law; that as per settled principles of law the curative amendment should be applied from the date of commencement of the Act in case of treating a product wrongly as taxable gods instead of exempted goods and that the object of the amendment bill should be taken into account in order to meet the ends of justice.

Cross objection has been filed by the respondent-Revenue supporting the impugned order.

5. Heard the learned Counsel for the appellant-dealer so also the learned Addl. Standing Counsel appearing for the Revenue. Perused the materials available on record so also the orders passed by both the fora below. I have also meticulously gone through the grounds of appeal and the plea taken in the cross objection. It was submitted by the learned Counsel for the appellant-dealer that on the point of jurisdiction the law is well settled by the Hon'ble High Court of Orissa in the case of Tata Sponge Iron Ltd. Vrs. Commissioner of Sales Tax, Orissa

and others as reported in (2012) 49 VST 33 (Ori.), where their lordships have held that in order to maintain transparency, any officer who is involved in any manner or has acted with the process of audit and preparation of the audit report in respect of the dealer should not be the assessing officer of the dealer, otherwise there will be violation of cardinal principles of natural justice. The learned Counsel for the appellant-dealer further submitted that relying on the said judgment the Full Bench of this Tribunal passed favourable order in support of the dealer in S.A. No.382(VAT) of 2014-15, disposed of on dtd.17.11.2017. It was also submitted that in Sec.32 of the Orissa Tribunal Regulations, 1992 the provision of the acceptance of the decision of the larger Bench has been formulated and as per the said formulation when a larger Bench has decided same question or questions of law in a particular way, until revision of the same, smaller Bench will decide such question accordingly. With such submission it was urged to decide the issue of jurisdiction in favour of the appellant-dealer. The learned Counsel for the appellant-dealer thereafter raised the second point which is disallowance of ITC against sale of exempted goods. As per the submission of the learned Counsel, the appellant-dealer has not sold by-products i.e. chokad/kunda produced in course of manufacturing of rice from the paddy. It was submitted that the learned AA did not have any technical report or sample test which he was authorized to do in order to determine the actual tax liability. It was submitted that chokad is exempted as taxable goods w.e.f. 01.07.2005 for which the dispute relates to one quarter only but the learned AA held the same

as bran for the entire period ignoring the books of account maintained and produced before him where all sale invoices were made describing the by-products of the mills as chokad/kunda for use of the same as cattle feed. It was submitted that where exempted sales were disallowed, further disallowance of proportionate ITC amounts to double taxation which is not permissible. The learned AA on the one hand taxed chokad as bran of rice and on the other hand disallowed the ITC availed on such sale as exempted goods which amounts to double taxation. It was finally submitted by the learned Counsel for the appellant-dealer that where the discrepancy is disallowed on the basis of the disclosed admitted figures in the books of account and returns, as per the ruling of the Hon'ble Apex Court in the case of Shree Krishna Electricals v. State of Tamilnadu & another reported in (2009) 23 VST 249 (SC) where their lordships have held that where the turnover is available in the books of account penalty cannot be levied should be applied.

6. The learned Addl. Standing Counsel on the other hand submitted that the ratio of the judgment Tata Sponge Iron Ltd. narrated supra, is inapplicable to the facts of the present case. It was submitted by the learned Addl. Standing Counsel that the person who asserts the fact is required to adduce evidence. The appellant-dealer has not placed any material to justify its stand that the Asst. Commissioner of Sales Tax was in any manner involved in the process of audit as submitted by the learned Addl. Standing Counsel. Hence it was submitted that the contention of the appellant-dealer may not deserve consideration. I do not agree with such contention

of the learned Addl. Standing Counsel. If the appellant-dealer failed to adduce the required evidence as alleged it was also the bounden duty of the Revenue to place the entire record before this Tribunal for consideration of the same. No LCR is produced before this Tribunal by the Revenue who is the custodian of records. The learned Addl. Standing Counsel without caring to produce the LCR to disprove the contention of the appellant-dealer remained silent and alleged that the appellant-dealer failed to adduce evidence. Needless to mention that the Revenue is equally responsible to place all record and documents before this Tribunal for proper adjudication of the matter. Hence to ascertain the aforesaid fact it is necessary to remand the matter to the learned AA for necessary verification. The same is also required in view of the decision of the Full Bench of this Tribunal while deciding the second appeal vide S.A. No.382(VAT) of 2014-15, disposed of on dtd.17.11.2017. The relevant extract of the said order is as follows:-

> "3. It is forcefully argued by Sri B.B. Panda, learned Counsel appearing for the dealer that in the case hand JCST of Cuttack II Range had constituted the Audit Team and the report of such audit was also submitted to him. Therefore, according to Sri Panda, the JCST being the reporting officer cannot be the assessing officer at the same time, more so, as he had also approved the AVR.
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> 4. Per contra, Sri M.S. Raman, learned Addl. Standing Counsel (CT) appearing for the

Revenue in terms of cross objection filed contends that formation of Audit Team, receipt of report and approval thereof are purely administrative functions undertaken by the JCST and hence, it cannot be said that any illegality causing prejudice to the dealer was committed. Alternatively, Sri Raman submits that in the event of the impugned order of assessment being held to be passed without jurisdiction, the matter may be remanded for assessment afresh by another officer.

5. Law is well settled that the reporting officer himself cannot be the assessing officer. Moreover, having constituted the Audit Team and having approved the AVR, the JCST in the instant case could not have conducted the assessment himself as it amounts to being the judge of his own cause, which is not tenable in the eye of law. In the case of Tata Sponge Iron Ltd. Vs. Commissioner of Sales Tax, Orissa and others, report in [2012] 49 STC 33 (Ori.), our Hon'ble Court have taken the aforesaid view to hold that "xxx in order to maintain transparency, any officer who is involved in any manner or has acted with the process of audit and preparation of the audit report in respect of the dealer should not be the assessing officer of that dealer. Otherwise, there will be violation of cardinal principles of natural justice xxx".

6. In view of the ratio laid down in the above case, there can be no manner of doubt that

> the order of assessment is unsustainable in the eye of law and must be held to have been passed by the JCST contrary to the principle of natural justice. It is surprising that despite being specifically raised before him, learned first appellate authority did not even take it up for consideration much less decide it either way. In such view of the matter, the impugned order also becomes susceptible to interference.
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> 7. In the result, the appeal is allowed and the impugned order is set aside. It is, however, open to the Revenue to assess the dealer afresh as per law by granting due opportunity of hearing to it. Cross-objection is disposed of accordingly."

In view of aforesaid order of the Full Bench of this Tribunal this Bench has to follow the same. Hence, it is a fit case for remand as stated aforesaid.

7. The other ground on which the appellant-dealer has preferred this second appeal is regarding assessment of the appellant-dealer as regards the chokad. It was submitted by the learned Counsel as narrated supra that the said product cannot be treated as husk and bran of wheat or paddy in any manner for which the disputed findings is not tenable in the facts and circumstances as well as the nature and character of the appellant's business as a whole. It was repeatedly argued that charging of tax on sale of chokad and at the same time disallowance of ITC on sale of exempted goods as claimed in the returns amounts to double taxation

which is not permissible in the eye of law. On perusal of the impugned order it is seen that the learned assessing authority observed that the appellant-dealer obtained chokad in course of manufacturing of atta, suji, maida etc. from wheat and effected sale of the same mostly to the retailer or semi-wholesaler issuing invoice for sale of chokad as cattle feed. The learned JCST also held that there are number of decisions of the court observing that chokad is primarily used as cattle feed. The learned JCST held that there is no iota of doubt that chokad is used as cattle feed directly or as a component of manufactured balance feed for cattle, poultry or fish. The learned JCST took note of Sl. No.39 of Part-II of Schedule-B of OVAT Act with entry connoting "husk & bran of cereals" for levy of VAT @ 4%. The learned JCST held that chokad was included in inclusive and enlarged entry of Sl. No.3 of Part-I of Schedule-A w.e.f. 01.07.2005. It was held that sale of chokad worth Rs.1,28,28,522.00 made during the period 01.04.2005 to 30.06.2005 is rightly levied with tax @ 4% as per provision of law and as such upheld the order of the learned AA.

8. The learned Counsel for the appellant-dealer relied on the judgment of the Hon'ble Apex Court in the case of Commissioner of Sales Tax v. Ram Chandra Asha Ram reported in (2001) 123 STC 415. The observation of the Hon'ble Apex Court is as follows:-

> "The respondent purchased from Food Corporation of India damaged wheat unfit for human consumption, subject to restriction to sell only on conversion into cattle fodder, and after grinding it sold it as cattle fodder. The High Court held that the cattle fodder sold by the respondent fell under item No.10 of notification dated June 5,

> 1985, which specified "cattle fodder including green fodder, chunni, bhusi, chhilka, choker, javi (popularly known as ghurjai), gowar, de oiled cake, de-oiled rice polish, de-oiled rice bran or de-oiled rice husk, but not including oil cake (khali), rice polish, rice bran or rice husk", because the items specified therein had been stated only by way of illustration, and was, therefore, exempt from sales tax under the U.P. Sales Tax Act, 1948. On appeal to the Hon'ble Supreme Court it was held, affirming the decision of the Hon'ble High Court, that what was exempt under the notification of June 5, 1985, was cattle fodder. In the generic sense the expression "cattle fodder" was inclusive of everything that was fed to cattle including damaged wheat."

Now it is to be seen whether the ratio laid down in the aforesaid decision of the Hon'ble Apex Court is applicable to the facts and circumstances of the present case. On bare reading of the pre-amendment provision of the OVAT Act it is seen that no such exclusion of chokad used as feed of cattle is there. The pre-amendment position w.e.f. 01.04.2005 as submitted by the learned Addl. Standing Counsel means entry-3 of Schedule-A which denoted aquatic field, poultry feed and cattle feed including grass, hey and straw which were list of goods exempted from VAT. Thus, there was no specific mention of chokad in the entry. There was also no specific entry of chokad in Sl. No.39 of Part-II of Schedule-B prior to the amendment which denoted husk and bran of cereals. The dictionary meaning of chokad is bran of wheat. It means chokad was included in Sl. No.39 of Part-II of Schedule-B i.e. goods taxable @ 4%. The learned Addl. Standing Counsel relied upon on order of this Tribunal in the case of M/s. Master Food Products v. State of Odisha vide S.A. No.380(V) of

2013-14, disposed of on dtd.22.04.2015 wherein it was observed as follows:

> "when the dealer-appellant has sold chokad which is 'husk of cereals' or 'bran of cereals' or mix of both it is taxable. In the facts and circumstances of the case, I accept the contention of the learned Addl. Standing Counsel (C.T.) on behalf of the Revenue."

Thus there is a distinction and the ratio laid down in the case of Commissioner of Sales Tax v. Ram Chandra Asha Ram, (2001) 123 STC 415 (SC) is not applicable to the facts and circumstances of the present case. The stand taken by the learned AA as well as the learned ACST to tax sale of chokad worth Rs.1,28,28,522.00 @ 4% for the period 01.04.2005 to 30.06.2005 is correct in view of inclusion of chokad in entry Sl. No.3 of Part-I of Schedule-A of the OVAT Act w.e.f. 01.07.2005 and not prior to that.

9. Against the other point raised by the appellant-dealer i.e. disallowance of ITC on exempted goods, the learned Addl. Standing Counsel relied upon the decision of the Tribunal vide S.A. No.290(V) of 2017-18 disposed of on dtd.18.08.2018. The relevant extract of the said order is reproduced below:

> "Sec.2(25) of the OVAT Act says, the meaning of "Input" in the process of manufacturing, Sec.2(29) says about output tax i.e. the tax leviable and payable against sale of any taxable goods in course of business. Rule 12(3) reads as follows:- (3) Where the processing or manufacturing activity of a dealer results in the production of both taxable

goods and goods exempt from tax, input tax credit admissible shall be determined by applying the principles as provided under sub-rule (1) of Rule 11 in respect of each tax period.

Rule 11(1)(c) postulates the method of calculation of ITC in the contingencies under Rule 12(3) whereas, as mentioned above, Sec.20(3) proviso 'c' which is a rider to the Section and is a mandatory one says:-(c) where a registered dealer sells or despatches goods, both taxable and exempt under this Act, the input tax credit shall be allowed proportionately only in relation to the goods which are not so exempt.

Keeping view the statutory provisions mentioned above and a harmonious reading of those along with the authoritative pronouncement by the Apex Court of the land in State of Karnataka Vrs. M.K. Agro Tech Pvt. Ltd. (2018) 52 GSTR 215 (SC) (supra), the irresistible conclusion is, when it relates to both, sale of taxable goods and exempt goods, the calculation of ITC should be made in accordance to Rule 11(1)(e) as done by both the fora below in the case in hand. Accordingly, the findings of both the fora below on this question calls for no interference, hence confirmed."

The aforesaid appeal is similar to the facts and circumstances of the present appeal. Hence the appellant-dealer is not entitled to ITC on the tax exempted goods. The computation of allowable ITC to the extent of Rs.27,39,095.89 is proper in view of the provisions of Section 20(3) of the OVAT Act read with Rule 11 of the OVAT Rules. In view of such discussion and in the light of the decision of the Full Bench of

this Tribunal narrated supra the impugned order is susceptible to interference. Hence, it is ordered.

10. The appeal is allowed in part. The matter is remitted back to the learned AA for necessary verification whether the Officer who was involved in any manner or had acted with the process of audit and preparation of the audit report in respect of the appellant-dealer was the Assessing officer of the appellant-dealer and if it is so found then the appellant-dealer shall be assessed afresh as per law by granting due opportunity of hearing to it. The cross objection is accordingly disposed of.

Dictated & corrected by me,

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

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