



2. The facts as revealed from the case record are that the dealer-assessee named and styled as "M/s. Pelican Enterprises" runs a hatchery in order to sell poultry chicks at Plot No. 312(P), Badaraghunathpur, Jatni, Khurda and is also involved in trading of poultry feed. Pursuant to Audit Visit Report (AVR) in respect of aforesaid business of the dealer-assessee notice was sent to the business concern in Form E-30. In response to the aforesaid notice the dealer-assessee appeared before the assessing officer through his Advocate and explained that in course of inter-State purchase of eggs meant for hatching and the hatching machine, the dealer-assessee had added ₹1,10,226.00 towards freight and other incidental charges on the invoice amount of purchase and paid tax accordingly and further in connection with non-collection and non-payment of entry tax @ 2% by the dealer on the sale turnover of day old poultry bird, it was submitted on behalf of the dealer-assessee that the dealer-assessee sells day old chicks by hatching the eggs which are non-scheduled goods under the OET Act and further poultry does not include day old chicks as far as schedule to the Entry Tax Act is concerned. However, the assessing officer though accepted the contention of the dealer-assessee that day old chicks are not poultry yet held that the dealer-assessee in the process of its business transaction used to process the eggs for hatching and the chicks which came out of such hatching of eggs were sold outside the local area without collection of entry tax @ 2%. The dealer-assessee deliberately, intentionally and knowingly had not

collected due entry tax and deposited the same with a clear intention of avoiding and evading the legitimate entry tax due on him. With this conclusion, the assessing officer held the dealer liable to pay entry tax @ 0.5% on the purchase of eggs from outside the local area, @ 2% on the inter-State purchase of hatching machinery including freight and @ 2% on the sale of day old chicks outside the local area and further freight charges @ 5% of the purchase invoice since the dealer did not produce any supporting document before him (assessing officer) towards payment of freight charges. Thus the assessing officer required the dealer-assessee to pay a sum of `12,75,513.00 in total towards tax, penalty and interest as per the terms and conditions of the demand notice.

Being aggrieved with this order, the dealer-assessee preferred an appeal before the first appellate authority. However, as the dealer-assessee did not participate in the hearing of its appeal, the same was taken up by the first appellate authority for final disposal on merits by taking into account the grounds of appeal. The first appellate authority in course of deciding the appeal held that chicks are nothing but baby fowls and hatching is a part of the poultry farm processing. Therefore, the chicks come under the category of poultry. In the result, the first appellate authority upheld the assessment order of the assessing officer and levy of tax u/S. 9C(4) of the OET Act as determined by the latter. Consequently, he also upheld the imposition of penalty on the dealer-assessee u/S. 9C(5) of the OET Act.

3. In the aforesaid circumstances, the dealer-assessee came up with this appeal before the Tribunal questioning the legality of the orders passed by the assessing officer and the first appellate authority. In the appeal, the dealer-assessee contended that pursuant to notice for audit assessment u/S. 9C of the OET Act it produced all the books of account alongwith written submission before the Assessing Authority (ET), Bhubaneswar-I Circle, Bhubaneswar. The assessing authority though agreed to the main contention raised by the dealer that poultry as per the entry in Sl. No. 15 of Part-II of the Schedule of OET Act does not include "day old chicks", however, concluded that the dealer was to pay entry tax for selling those chicks outside the local area. Learned assessing authority thus mechanically determined the liability of the dealer-assessee without assigning any reason for the same and further the first appellate authority even did not bother to hear the dealer-assessee on the issue and as such they both wrongly determined his liability which is absolutely not in consonance with the statute connected to it.

4. In course of hearing learned Counsel for the dealer-assessee brought to the notice of this Tribunal that hatching activities of eggs in order to get "day old chicks" and subsequent sale as well as trading of poultry feed on wholesale basis are exempted from tax under the OVAT act and non-schedule goods under the OET Act. In the instant case, the assessment u/S. 9C of the OET Act in respect of the aforesaid

business of the dealer-assessee was done covering the period 01.07.2006 to 31.07.2009. The assessing officer raised the demand of tax and penalty to the tune of `12,75,513.00 on the assumption that day old chicks are scheduled goods as per the entry in the OET Act. The Joint Commissioner of Sales Tax, Bhubaneswar Range, before whom the dealer-assessee preferred an appeal against aforesaid order of assessment dated 31.12.2009 also held that day-old chicks are scheduled goods under Entry No. 15 of Part-II of the Schedule as contained in the OET Act and, therefore, it (the dealer-assessee) is liable to collect entry tax and to pay the same to the Government u/S. 26 read with Sec. 3 of the OET Act. However, as day old chicks has already been taken as non-schedule item and further hatching of eggs in order to get day old chicks cannot bring one within the definition of 'manufacturer' as per Rule 2(c) of the OET Rules, the dealer-assessee cannot be made liable to pay the entry tax as demanded from him. Learned Counsel for the dealer-assessee also brought to the notice of this forum the definition of 'manufacturer' as envisaged in Rule 2(c) of the OET Rules and as defined u/S. 2(28) of the OVAT Act, 2004. 'Manufacturer' as defined u/R. 2(c) of the OET Rules, 1999 is as follows:-

"Manufacturer", with all its grammatical variations and cognate expressions, means a dealer or a person in the business of manufacture as defined in the Orissa Value Added Tax Act, 2004;"

A plain reading of Sec. 2(28) of the OVAT Act reveals 'manufacture' means any activity that brings out a change in an article or articles as result of some process, treatment, labour and results in transformation into a new and different article so understood in commercial parlance having a distinct name, character and use, but does not include such activity of manufacture as may be notified. This definition of 'manufacture' brought for interpretation before the Hon'ble Apex Court in the context of determining whether business of hatching can be considered as manufacturing activities contemplated under the definition of 'manufacture'. In support of his argument, learned Counsel appearing on behalf of the dealer-assessee cited the decision rendered by the Hon'ble Apex Court in the case of Commissioner of Income Tax Vs. Venkateswara Hatcheries (P) Ltd., reported in (1999) 237 ITR 174, wherein it was observed by the Hon'ble Apex Court that steps taken by the assessee for the alleged production of chicks do not cover formation of chicks by him with the aid of mechanical process. The formation of chicks being a natural and biological process, the assessee has no control over it. The assessee only helps the natural or biological process of giving birth to chicks by preserving and protecting the eggs at a particular temperature which would otherwise could have been produced by conventional or natural method which is an event of nature only. In the said decision it was observed by the Hon'ble Apex court that this process of hatching by the assessee cannot be taken as its producing chicks and ultimately it was

held by the Hon'ble Apex Court that the assessee in such a case is neither an industrial undertaking nor is it engaged in the business of producing articles or things to make him entitle to developmental allowance u/S. 32A of the I.T. Act. For better appreciation, we feel it appropriate to quote the observation of the Hon'ble Apex Court in the decision cited by the learned Counsel for the dealer-assessee as under :-

Quote : "From a perusal of the self-stated steps taken by the assessee for the alleged production of chicks it is clear that the assessee does not contribute to the formation of chicks. The formation of chicks is a natural and biological process over which the assessee has no hand or control. In fact, what the assessee is doing is to help the natural or biological process of giving birth to chicks. The chicks otherwise can also be produced by conventional or natural method and in that process also, same time is taken when the chicks come out from the eggs. What the assessee by application of mechanical process does in the hatchery is to preserve and protect the eggs at a particular temperature. But the coming out of chicks from the eggs is an event of nature. The only difference seems to be that, by application of mechanical methods, the mortality rate of chicks is less and the assessee may get chicks more in number. This, however, would not mean that the assessee produces chicks and that chicks are articles or things. We are, therefore, of the opinion that the assessee is neither an industrial undertaking nor does the business of hatchery carried out by the assessee fall within the meaning of Section 32A and Section 88J of the Act." Unquote

In reply to such argument as advanced by learned Counsel for the dealer-assessee, learned Addl. Standing Counsel (CT) appearing on behalf of the State in terms of cross-objection pointed out that entry No. 15 of Part-II of Schedule of the OET Act provides 'poultry' as a scheduled goods so as to attract liability under the OET Act. Day old chick in common parlance as understood is a live stock since ultimately it would develop into a full grown bird in course of time. He also cited some decisions rendered in the cases of Royal Hatcheries Pvt. Ltd. Vs. State of Andhra Pradesh and another, reported in [1994] 92 STC 239 (SC); Belaire Refrigeration Services Vs. Additional Commissioner of Commercial Taxes, reported in [2001] 123 STC 463 (Kar); Commissioner of Sales Tax Vs. Jaswant Singh Charan Singh, reported in [1967] 19 STC 469 (SC); Minerals & Metals Trading Corpn of India Ltd. Vs. Union of India, reported in (1973) 1 SCR 997; Dunlop India Ltd. Vs. Union of India, reported in (1976) 2 SCR 98; State of UP Vs. Kores (India) Ltd., reported in [1977] 39 STC 8 (SC); and Indian Aluminium Cables Ltd. Vs. Union of India, reported in [1987] 64 STC 180 (SC). Accordingly, he contended that if the meaning of day old chicks would be considered rationally then it can be brought under the purview of OET Act.

5. From the assertions and counter-assertions as advanced by the learned Counsel for the dealer-assessee and the State respectively, it is understood that this forum is required to determine first whether a day old chick (day old poultry bird) comes within the meaning of 'poultry'

as described in entry 15 of Part-II of the Schedule appended to the OET Act or not and then next whether hatching of eggs to produce chicks would bring the dealer-assessee within the definition of 'manufacturer' as envisaged u/R. 2(c) of the OET Rules and as such, attracts its liability u/S. 26 of the OET Act, 1999.

6. After going through the decision in the case of Commissioner of Income Tax Vs. Venkateswara Hatcheries (P) Ltd., reported in (1999) 237 ITR 174, cited by the learned Counsel appearing on behalf of the dealer-assessee, we found that the aforesaid decision of Hon'ble Apex Court had gone against the dealer-assessee by disentitling him to developmental allowance u/S. 32A of the I.T. Act and deductions u/S. 80HH, 80HHA, 80I and 80J of the I.T. Act on the ground that the assessee in the said case was neither an industrial undertaking nor it was engaged in the business of producing articles or things. In the said decision, it is also observed by the Hon'ble Apex Court that the meaning assigned to a particular word in a particular statute cannot be imported to a word used in a different statute cannot be used in a different statute.

Learned Counsel for the dealer-assessee further mentioned about a decision rendered by the Hon'ble Kerala High Court in the case of M/s. Tropical Farms Vs. State of Kerala disposed of on 28.03.2012 without filing a copy of the said decision or giving appropriate reference to find out the same through internet or law journals to apprise this Tribunal that one or two day-old chicks can never be considered as

poultry since the chicks have only an intrinsic and potential value for growth which depends on its rearing to grow into full grown birds. He also requested the Tribunal to find out the meaning of 'poultry' from Oxford Dictionary and other Dictionaries to come to a proper conclusion in the matter at hand.

7. Learned Addl. Standing Counsel (CT) also cited a number of decisions to apprise this Tribunal that day-old chicks or elder chick and chicken would come within the ambit of expression 'livestock' and as such would be taxable at purchase point. The decision cited by learned Addl. Standing Counsel (CT) reported in [1994] 92 STC 239 (SC) (Royal Hatcheries Pvt. Ltd. Vs. State of Andhra Pradesh and another and Venkataramana Hatcheries P. Ltd. Vs. Commercial Tax Officer) gives a guideline for the Court to find whether any article or thing could be brought within the purview of Sales Tax enactment. While deciding the question as to whether day-old chicks were contemplated as included within clause (xxvi) of Rule 5(2) of the Andhra Pradesh General Sales Tax Rules, 1957 Hon'ble Apex Court held –

Quote :                "It is well-settled proposition that such expressions occurring in sales tax enactments must be understood in their popular sense, that is in the sense in which "people conversant with the subject-matter with which the statute is dealing would attribute to it."

Unquote

and further held –

Quote :                "Another rule of construction which is equally well-established is that the court would not adopt a construction which would render some of the words in a statutory provision nugatory and/or superfluous. It is from the above standpoint that we have to approach and interpret the clause in question and determine whether day-old chicks can be said to fall within its scope ?"     Unquote

and then ultimately held that the chicks sold by the appellants are not included within clause (xxvi) of Rule 5(2) of the Andhra Pradesh General Sales Tax Rules because chicks being referred to as birds were not included in clause (xxvi) of Rule 5(2) of the Rules.

8.                Thus, it is found that a day-old chick is held as a bird and having all the potentialities to grow as a bird (such as chicken or duck) that is raised on farms for its egg or meat certainly comes within the dictionary meaning of 'poultry' ultimately. Since 'poultry' is a specific entry in the Schedule of the OET Act, the same is necessarily taxable irrespective of the fact that the dealer is not a manufacturer in the instant case (Referred the decision of Hon'ble Apex Court in the case of Commissioner of Income Tax Vs. Venkateswara Hatcheries (P) Ltd., reported in (1999) 237 ITR 174). In the present case there is no material to find that the dealer had entered any taxable goods into the local area from outside and further there is also no evidence to hold that he had sold the day-old chicks outside the local area. Thus as it is found that the sale

point is the dealer's hatching unit itself he cannot be held liable for entry tax under the relevant statute.

9. Considering all these circumstances as discussed in the foregoing paragraphs, we accept the view of learned first appellate authority that day-old chick being a baby fowl can be brought under the purview of OET Act as 'poultry'. However, so far as levy of tax from the dealer-assessee is concerned we hold that the finding of learned first appellate authority is not correct because the dealer-assessee cannot be treated as a manufacturer of day-old chick – poultry.

10. In the result, this Tribunal set aside the orders of the first appellate authority dated 28.05.2012 and consequentially the order passed by the assessing officer dated 31.12.2009. Hence, the appeal is allowed and cross-objection is disposed of accordingly.

Dictated & Corrected by me,

**Sd/-**  
**(Smt. Suchismita Misra)**  
**Chairman**

**Sd/-**  
**(Smt. Suchismita Misra)**  
**Chairman**

I agree,

**Sd/-**  
**(Subrat Mohanty)**  
**2<sup>nd</sup> Judicial Member**

I agree,

**Sd/-**  
**(Rabindra Ku. Pattnaik)**  
**Accounts Member-III**