

BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No. 219(C) of 03-04

(Arising out of the order of the learned ACST, Koraput Range,
Jeypore in first Appeal Case No. AAC (KOII)16/2002-2003, disposed of on
30.09.2003)

Present :- Shri A.K. Das, Shri.S.K. Rout, & Shri S. Mishra,
Chairman 2nd Judicial Member Accounts Member-II.

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

... Appellant.

-Vrs.-

M/s. Indian Metals and Ferro Alloys Ltd.,
Bomikhal, Bhubaneswar.

... Respondent.

For the Appellant:

: Mr. D. Behura, ld. S C (C.T.)

: Mr. S.K. Pradhan, Ld. A S C (C.T.)

For the Respondent:

: Mr. P.K. Jena, ld. Advocate.

Date of Hearing : 16.03.2022

Date of Order :28.03.2022

ORDER

This second appeal has been filed by the State against the order dtd.30.09.2003 passed by the learned Assistant Commissioner of Sales Tax, Koraput Range, Jeypore (in short, ld. FAA) in Appeal Case No. AAC (KOII)16/2002-2003, allowing the appeal in part thereby reducing the demand to Rs.1,058.00 from Rs.19,88,838.00 raised by the Sales Tax Officer, Koraput-II Circle, Rayagada, Ward-A (in short, LAO) Under Rule 12(5) of Central Sales Tax (O) Rules, 1957 (in short, CST(O) Rules) for the year 2001-2002.

2. Being aggrieved by the aforesaid order of the ld. FAA, the State has preferred second appeal before this Tribunal challenging

the said order as unjust, illegal, erroneous and bad in law mainly on the following grounds:-

- a. "That the order of the ld. ACST deleting levy of surcharge on the tax calculated under the State Sales Tax Act is not just and correct.
 - b. That the ld. ACST while passing his order has not properly appreciated the ratio of the judgment of the Hon'ble Apex court in case of Deputy Commissioner of Sales Tax Vrs. Aysha Hosiery Factory (P) Ltd. in 85 STC 106 pages.
 - c. That the ld. STO had framed his order of assessment with proper application of mind with reference to the nature of transaction and the judgment of the Apex Court."
3. The brief fact of the case is that the assessee M/s. Indian Metals and Ferro Alloys, Therubali is a Pvt. Ltd. Company registered under the Companies Act, 1956, having its registered office at Bomikhal, Rasulgarh, Bhubaneswar and branches in different states of the country. It manufactures Ferro Alloys such as Ferro Silicon and high carbon Ferro Chrome at Therubali and makes intra-State, inter-State sale including branch transfer of goods and sale in course of export. For its day to day business, it maintains all sort of books of accounts required under this Act and IT Act.
4. At assessment stage, in course of examination of books of accounts with relevant documents and statutory forms filed, the LAO

observed that the assessee has returned its gross turnover at Rs.100,45,30,568.00 of which Rs.1,09,79,366.00 relates to freight charges shown separately on the body of the bills and Rs.1,95,11,266.00 towards collection of Central Sales Tax. Accordingly, it has disclosed its net turnover at Rs.97,40,39,936.00 out of which it has claimed inter-state sale of goods of Rs.97,31,79,389.00 against 'C' and 'D' Forms to be taxed @2%. However, the assessee failed to submit the required statutory forms for Rs.7,14,148.00 which was taxed @8%. Moreover, he observed that against the total sale turnover of Rs.3,30,931.00 returned at 8% taxable group, an amount of Rs.42,101.00 i.e. sale turnover of generator carbon fines is taxable @12%. Further, he accepted the 'H' form submitted by the assessee and allowed deduction on the score from GTO towards sale in course of export U/s 5(3) of CST Act. On stock transfer of goods of Rs.64,60,45,128.00 to its different branches, the LAO accepted 'F' forms submitted and allowed towards deduction from the gross turnover. However, the LAO was of the opinion that the appellant is liable to pay surcharge on concessional rate of tax claimed in view of the ratio of judgment of the Hon'ble Supreme Court in case of Deputy Commissioner of Sales Tax Vrs. Aysha Hosiery factory (P) Ltd. reported in 85 STC 106. Accordingly, he levied 2.2% tax including surcharge on sale value of Ferro Silicon sold against declaration in form 'C'. These resulted in an extra tax demand of Rs.19,88,838.00 in the assessment order passed by the

LAO for the impugned year which was challenged by the assessee before the Ld. FAA.

5. At first appeal stage, the ld. FAA, after due examination of the case reduced the demand of tax to Rs.1,058.00 with following observations:

- i. Since, the assessee produced the balance required 'C' Form for Rs.7,14,148.00 which was in order, he taxed it at concessional rate of 2%.
- ii. He deleted the surcharge imposed by LAO on tax calculated at concessional rate of 2% with his following findings:

“As per SRO No.161/2001. Dtd.31.03.2001, Ferro Alloys and Ferro Silicon are subject to levy of tax @2%. The State Govt. had issued the notification in exercise of powers conferred U/s. 8(5) (b) of the CST Act, 1956. Such lower rate of tax is subject to the condition of production of declaration in Form-‘C’. The appellant has submitted relevant declaration in Form-‘C’ covering those sales. In the case of Deputy Commissioner of Sales Tax Vrs. Aysha Hosiery Factory (P) Ltd., the question for adjudication was related to transactions falling under 8(2-A) or Sec.8(2)(b) of the CST Act. The applicability of additional Sales Tax Act under Kerala General Sales Tax, 1963 was required to be determined and the Hon’ble Apex Court had decided that additional sales tax could be levied on Inter-State sales in

regard to which no notification has been framed U/s.8(5) of the CST Act, 1956 fixing a specific lower rate in the public interest. In the said judgment, notification U/s.8(5) of the CST Act was clearly discussed and transactions falling under that notification were excluded from levy of additional sales tax. Under the circumstances, the calculation of tax of 2.2% including surcharge @10% on tax payable of 2% is not sustainable. Hence, the appellant is entitled to necessary relief on these transactions.”

With these observations the Ld. FAA reduced the demand to Rs.1,058.00 for the material year which is now challenged by the State in shape of second appeal before the Tribunal.

6. During the course of hearing, the ld. Standing Counsel (C.T.) for the State vehemently argued against the appeal order passed by the ld. FAA claiming it as wrong, illegal, arbitrary and prejudicial to the interest of the Revenue as per grounds appended to the memorandum of appeal.

7. Per contra, the ld. Counsel for the dealer-respondent argued in favour of the appeal order passed by the ld. FAA, citing different case laws and relevant provisions of the statute.

8. The moot question for consideration in the above mentioned appeal filed by the Revenue-State is:

“whether, in the facts and the circumstances of the case, the order passed by the ld. FAA in deleting the levy of surcharge on the tax

calculated when admittedly the goods i.e. Ferro Alloys and Ferro Silicon have been sold under inter-State sale against submission of declaration form 'C' claiming concessional rate of tax U/s.8(5) of the CST Act issued by the State of Orissa Vide Notification No.14701-CTA-23/2002(Pt.)-F.(SRO No.161/2001) dtd.31.03.2001 is justified as per provisions of law with cited case laws?"

It would now be profitable and reasonable to set out the relevant provisions of the CST Act vis-à-vis cited case laws in order to understand the scope and implications of the same so as to arrive at a logical and judicious conclusion on the issue.

“Section-8. Rate of tax on sales in the course of inter-State trade or commerce. –

(1) Every dealer, who in the course of inter-State trade or Commerce-

- (a) Sells to the Government any goods; or
- (b) Sells to a registered dealer other than the Government goods of the description referred to in sub-section (3), [shall be liable to pay tax under this Act, which shall be [four per cent] of his turnover [or at the rate applicable to the sale or purchase of such goods inside the appropriate State under the sales tax law of that State, whichever is lower].]

The tax payable by any dealer on his turnover in so far as the turnover or any part thereof relates to the sale of goods in the course of inter-State trade or commerce not falling within sub-section (1)-

- (a) in the case of declared goods, shall be calculated [at twice the rate] applicable to the sale or purchase of such goods inside the appropriate State; []
- (b) in the case of goods other than declared goods, shall be calculated at the rate of [ten per cent] or at the rate applicable to the sale or purchase of such goods inside the appropriate State, [whichever is higher; and]
- (c) in the case of goods, the sale or, as the case may be, the purchase of which is, under the sales tax law of the appropriate State, exempt from tax generally shall be nil, and for the purpose of making any such calculation under clause (a) or clause (b), any such dealer shall be deemed to be a dealer liable to pay tax under the sales tax law of the appropriate State, notwithstanding that he, in fact, may not be so liable under that law.

Explanation.-

For the purposes of this sub-section, a sale or purchase of any goods shall not be deemed to be exempt from tax generally under the sales tax law of the appropriate State if under that law the sale or purchase of such goods is exempt only in specified circumstances or under specified conditions or the tax is levied on the sale or purchase of such goods at specified stages or otherwise than with reference to the turnover of the goods.]]

(2A) Notwithstanding anything contained in sub-section (1A) of Section 6 or sub-section (1) or clause (b) of sub-section (2) of this section, the tax payable under this Act by a dealer on his turnover in so far as the turnover or any part thereof relates to the sale of any goods, the sale or, as the case may be, the purchase of which is, under the sales tax law of the appropriate State, exempt from tax generally or subject to tax at a rate which is lower than four per cent (whether called a tax or fee or by any other name), shall be nil or, as the case may be, shall be

Explanation-

For the purposes of this sub-section, a sale or purchase of any goods shall not be deemed to be exempt from tax generally under the sales tax law of the appropriate State if under that law the sale or purchase of such goods is exempt only in specified circumstances or under specified conditions or the tax is levied on the sale or purchase of such goods at specified stages or otherwise than with reference to the turnover of the goods.]

(5): Notwithstanding anything contained in this section, the State Government may, [on the fulfillment of the requirements laid down in sub-section (4) by the dealer,] if it is satisfied that it is necessary so to do in the public interest, by notification in the Official Gazette, and subject to such conditions as may be specified therein, direct,-

- (a) that no tax under this Act shall be payable by any dealer having his place of business in the State in respect of the sales by him, in the course of inter-State in respect of the sales by him, in the course of inter-State trade or commerce, [to a registered dealer []] from any such place of business of any such goods or classes of goods as may be specified in the notification, or that the tax on such sales shall be calculated at such lower rates than those specified in sub-section (1) [] as may be mentioned in the notification;
- (b) that in respect of all sales of goods or sales of such classes of goods as may be specified in the notification, which are made, in the course of inter-State trade or commerce, [to a registered dealer []] by any dealer having his place of business in the State or by any class of such dealers as may be specified in the notification, no tax under this Act shall be payable or the tax on such sales shall be calculated at such lower rates than those specified in sub-section (1) [] as may be mentioned in the notification.]

On bare reading of above provisions of the Statute conjointly, we observe that section 8(5) of the CST Act empowers the State Govt. either to reduce the rate of tax or to declare that no tax to be payable by a dealer having his place of business within that State in respect of any inter-state sales of such goods or classes of goods as may be specified in the notification issued for the purpose. The State of Orissa, in exercise of power conferred by clause (b) of sub-section (5)

of Section-8 of CST Act, 1956 issued notification bearing no.14701-CTA-23/2002(Pt.)-F(SRO No.161/2001) dtd.31.03.2001 wherein it is directed that w.e.f. the 1st April, 2001, the tax on the sale of following goods that includes Ferro Alloys and Ferro Silicon in the course of inter-State trade or commerce by a dealer, having his place of business in the State of Orissa shall be calculated @2 % subject to the condition of production of declaration in form 'C'. The power of the State Govt. under Section 8(5) is wide enough to reduce the rate of tax either under sub-section (1) or (2) in respect of any dealer or in respect of sales of goods of any class by the issuance of a notification in the public interest, subject to conditions specified therein apart from the power to exempt payment of tax in respect of inter-State sales. It indicates that the rate of tax payable whether it be under sub-section (1) or (2) of section-8 shall be calculated at the lower rate of 2%.

Now, coming to cited case law of Hon'ble Apex Court in the case of Deputy CST Vrs. Aysha Hosiery Factory (P) Ltd. reported in (1992) 85 STC 106 on which the LAO has totally relied on in charging surcharge on tax calculated at concessional rate of 2% against form 'C' submitted, we reasonably observe that in the said judgment, the Hon'ble Apex Court has held that additional sales tax (surcharge) under the Kerala Additional Sales Tax Act, 1978 could be levied on inter-State sales or purchases of goods (other than declared goods) in regard to which no notification has been framed u/s.8(5) of the CST

Act fixing a specific lower rate of tax in the public interest. However, in the case at hand, the State Govt. has brought notification under section 8(5) of the CST Act effective from 01.04.2001 so as to tax Ferro Alloys and Ferro Silicon at concessional rate of 2% on submission of valid form 'C'.

Moreover, the Id. Counsel for the assessee drew our attention to another two cited case laws as under:

- a. The Hon'ble Apex Court in the case of Assistant Commissioner (Assessment), ST Vrs. Janatha Expeller Co. reported in (1992) 85 STC 105 in which it is held that Section 8 of the CST Act and the notification SRO No.117 of 1966 dtd.08.03.1966 issued by the Kerala Govt. u/s.8(5) were absolutely clear and additional sales tax under the Kerala Additional Sales Tax Act, 1978 was not leviable in respect of inter-State turnover of oil and Cake, which were covered by the notification.
- b. The Hon'ble Madras High Court in the case of Sree Ayyanar Spinning and Weaving Mills Ltd. Vrs. State of Tamil Nadu reported in 1998 109 STC 205 has taken into consideration above two decisions emerging from the Apex Court namely Janatha Expeller Co. (1992) 85 STC 105 and Aysha Hosiery Factory Pvt. Ltd. (1992) 85 STC 106 has held in Para 39 at page 223 as under:
"39.In this view of the matter, the order of the Tribunal adding the rate of levy of two percent, by way of additional sales tax to the lower rate of levy at two percent imposed, pursuant to the

notification issued by the State Govt. under sub-section 5 of Section 8 of the CST Act as noticed earlier cannot at all be stated to be sustainable in law and therefore, such imposition deserves to be set-aside.”

Taking into consideration the facts and case laws stated above, we are of the considered opinion that surcharge is not leviable on concessional rate of tax of two percent against valid ‘C’ forms produced by the assessee.

9. Hence, it is ordered.

The appeal filed by the appellant-State is rejected, being devoid of any merit and the order passed by the ld. FAA for the impugned year is confirmed.

Dictated & corrected by me,

Sd/-
(Srichandan Mishra)
Accounts Member-II

Sd/-
(Srichandan Mishra)
Accounts Member-II

I agree,

Sd/-
(A.K. Das)
Chairman

I agree,

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