BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 261 (VAT) of 2018

(Arising out of order of the learned Additional CST (Appeal),
Balasore in Appeal Case No. AA- 99/MB-2016-17 (OVAT)
disposed of on dated 28.07.2018)

Present: Shri R.K. Pattanaik,
Chairman

M/s. G.M. Iron & Steel Co. Ltd.,
Near Railway Level Crossing,
Rairangpur, Mayurbhanj. ... Appellant

-Versus-

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

For the Appellant : Sri B.B. Panda, Advocate
For the Respondent : Sri D. Behura, Standing Counsel (CT)

Date of hearing: 03.02.2021 ***** Date of order: 24.02.2021

O R D E R

Briefly stated, instant appeal under Section 78 of the Odisha Value Added Tax Act, 2004 (hereinafter referred to as 'the Act') is at the behest of the dealer assessee assailing the impugned order dated 28.07.2018 promulgated in Appeal Case No. AA-99/MB-2016-17 (OVAT) by the learned Additional Commissioner of Sales Tax (Appeal), Balasore (in short, 'FAA') confirming the order of assessment dated 18.12.2013 passed under Section 42 of the Act by the learned

Deputy Commissioner of Sales Tax, Mayurbhanj Circle, Baripada (hence called 'AA') on the grounds inter alia that it is liable to be set aside for being not tenable in law.

2. As is made to realise from the record, the dealer assessee purchases iron ore lumps and fines from its sister concern, namely, M/s. Lal Traders & Agencies (P) Ltd. and the iron ore fines are exported, whereas, lumps are sold in course of intra & inter-State. It is also revealed that some irregularities were detected by the Vigilance Wing in course of verification of export sales by M/s. MAP Mines and Minerals Ltd, Rairangpur, Mayurbhanj (in short, 'the exporter') and accordingly, a fraud case report was submitted vis-a-vis the dealer assessee for the tax period from 01.04.2010 to 31.03.2011 and for the alleged evasion of tax, statutory notice in Form VAT 307 was issued. In response to it, the dealer assessee appeared and produced books of accounts for examination and verification by the AA, who ultimately concluded that the alleged sale, in fact, preceded the export agreement and hence, exemption cannot be allowed and resultantly, by treating the same as a VAT turnover, raised additional demand with penalty of ₹65,526.00, which was later affirmed by the FAA. Being unsuccessful, the dealer assessee preferred the present appeal by claiming that it was indeed a penultimate sale of goods in order to honour the export. In the facts and circumstances of the case, now the question is, whether, the alleged sale by the dealer assessee in favour of the exporter was really a penultimate transaction in accordance with Section 5(3) of the CST Act? Further question is, if at all, impugned order dated 28.07.2018 vis-a-

vis the assessment dated 18.12.2013 and additional demand raised by the AA to the tune of ₹65,526.00 is justified?

3. The learned Counsel for the dealer assessee contended that the foreign buyer's contract with the exporter is dated 07.02.2011 which has erroneously been treated as 07.04.2011 and as to the penultimate sale, it was held on 28.02.2011 and was in compliance of the said contract and as such, Section 5(3) of the CST Act was fully satisfied, the fact which was not duly taken cognizance of by the authorities below. The jurisdiction of the AA is also challenged by referring to the order dated 18.12.2013 claiming that it was purportedly a proceeding under Section 42 of the Act and not for the escaped assessment. In course of argument, the learned Counsel for the dealer assessee cited an order dated 14.11.2017 passed by the Tribunal (FB) in S.A. Nos. 23(C) and 31(C) of 2009-10 contending that when 'H' form and bill of lading were furnished and accepted, there was no need for further examination of foreign buyer's agreement and to disbelieve the transaction as a penultimate sale. It is lastly contended that when the goods were exported complying an order and was supported by proper documentation and the fact that the alleged transaction was inextricably linked with the contract in question occasioning export, it was not at all justified for the authorities below to deny exemption to the dealer assessee, who is otherwise eligible in view of Section 5(3) of the CST Act.

4. On the other hand, the State not only supported the action, but also strongly justified the decision of the authorities below in raising additional demand against the dealer assessee, who utterly failed to prove and establish the alleged penultimate sale for the purpose of complying the export order. The learned Standing Counsel (CT) for the State by referring to the export agreement available in the record contended that it is dated 7th April, 2011 which runs counter to the claim of the dealer assessee. It is further contended that since the export order is subsequent to the alleged sale, it cannot be said that the latter was in compliance of the former and therefore, rightly the authorities below included it in the VAT turnover and demanded the additional tax.

5. As is understood, in case of a penultimate sale, it must be in consonance with Section 5(3) of the CST Act. There is no tenebrosity in the settled principle of law that the goods which are purchased for the purpose of complying the agreement or order for export must also be the same goods exported out of India, inasmuch as, the essential conditions are to the effect that (i) there must be an agreement with the foreign buyer and on that basis, the exporter purchased goods from others in order to comply the export contract; (ii) the transaction of last sale or purchase must take place after the agreement or order received from the foreign buyer by the exporter; (iii) the last purchase preceding the export which is termed as penultimate sale must have taken place after the agreement with the foreign buyer; and (iv) the transaction of penultimate sale was entered into for the

purpose of complying said agreement or order received by the exporter. As a corollary, a penultimate sale shall be so treated provided before it was being held, an agreement or order for export must be in place. In the present case, the dealer assessee claims that there is such a contract dated 07.02.2011. Interestingly, a copy of the alleged contract between the exporter and the foreign buyer is in record made available by the dealer assessee which is dated 07.02.2011. The alleged document comprised of two sheets (1st and last) and on the front page of the 1st sheet, the date is mentioned as 07.02.2011 referring to which the learned Counsel for the dealer assessee claims that there was an agreement or order existed in compliance of which the penultimate sale was held. The contents of said copy of the alleged contract though are not clearly legible, however; it is clearly shown to have been dated 07.02.2011. But then, the learned Standing Counsel (CT) for the State placed reliance on the export agreement as at Annexure C/3 which finds place in the Tax Evasion Record shows that it was entered into between the exporter and the foreign buyer on 7th April, 2011. Indeed, on a bare perusal of export agreement, i.e. Annexure-C/3, it is clearly made to understand that the same saw light of the day on 7th April, 2011. The said fact was revealed by the Vigilance Wing while verifying the export sales of the exporter. The entire of the export agreement is perused by the Tribunal. The copy which is relied upon by the dealer assessee not only comprises of two sheets but curiously enough indicates a different date as to the execution of the export agreement. Moreover, no plausible

explanation is coming forth from the dealer assessee as to the difference in date in juxtaposition to the export agreement available in the Tax Evasion Record. No material is either produced by the dealer assessee to substantiate its claim to the effect that the export agreement really came into being on 07.02.2011 instead of 07.04.2011. Accepting the export agreement, as relied upon by the State, at its face value, it is to be held that the same was executed on 07.04.2011 being a contract between the exporter and foreign buyer. Having held so, the Tribunal, thus, reaches at a definite conclusion that the alleged sale which was effected between the dealer assessee and exporter was not subsequent to the export agreement and therefore, it cannot be treated as a penultimate sale for the purpose of exemption.

6. As to the contention of the dealer assessee with respect to the export agreement and whether, its production to be insisted upon with reference to the Tribunal's order dated 14.11.2017 supra, it is no doubt true that a penultimate sale may be proved only by submission of 'H' form accompanied with bill of lading or such other similar documents, and for that, production of export agreement or order is not to be insisted upon when the dealer assessee is not an exporter. It is equally true to say that in case of any doubt or suspicion, export agreement or order may be examined for the purpose of enquiry. In the case at hand, however, the situation is different for the fact that the dealer assessee was not compelled to or asked to produce the export agreement or order, rather, said document was collected by the Vigilance Wing during and in course of verification

of the export sales of the exporter and in fact, had to be confronted to the dealer assessee before initiating action under Section 43 of the Act. Since, it was brought to the notice of the dealer assessee that the export agreement or order was subsequent to the alleged sale, it definitely owed an explanation to clarify the position. If the alleged sale did not follow the export order or agreement, it cannot be treated as a penultimate sale claiming exemption as per Section 5(3) of the CST Act. Thus, in the considered view of the Tribunal, said contention of the dealer assessee must have to be rejected outrightly.

7. There is no denial to the fact that the assessment was initiated under Section 43 of the Act, but inadvertently or on account of a mistake, the AA mentioned it to be a proceeding under Section 42 of the Act and for such a mistake by inadvertence, the proceeding cannot be invalidated. Rightly, on the advent of fresh material and after the export agreement or order dated 07.04.2011 was retrieved, the AA, receiving the Tax Evasion Report, correctly proceeded against the dealer assessee invoking Section 43 of the Act and that apart, as previously discussed, the alleged sale since was carried out earlier to the export agreement or order, justifiably the authorities below could not have treated it as a penultimate sale in terms of Section 5(3) of the CST Act. Thus, for the above reasons, the Tribunal does not find any legal infirmity in the impugned order dated 28.07.2018 which, therefore, cannot be disturbed.

8. Hence, it is ordered.

9. In the result, the appeal stands dismissed. As a logical sequitur, the impugned order dated 28.07.2018 passed in Appeal No. AA- 99/MB-2016-17 (OVAT) is hereby confirmed.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman