

**BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.  
S.A.No. 179(V)/2016-17**

(Arising out of order of the Id.Addl.CST(Appeal), North Zone, Odisha,  
Sambalpur, in Appeal No. AA-112/13-14,  
disposed of on dtd. Nil)

**Present: Sri S. Mohanty & Sri P.C. Pathy**  
**2<sup>nd</sup> Judicial Member Accounts Member-I**

M/s. Goldwin Sales Corporation  
Farm Road,  
Dist. Sambalpur. ... Appellant

**-Versus-**

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

For the Appellant : Mr. U. Behera, Advocate

For the Respondent : Mr. S.K. Pradhan, Addl. Standing Counsel (C.T.)

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Date of Hearing: 31.05.2018 \*\*\* Date of Order: 11.06.2018

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**ORDER**

Being unsuccessful before both the fora below, the appellant has preferred this second appeal challenging the sustainability of the order passed by the FAA confirming thereby, the demand of tax in a proceeding u/s.43 of the OVAT Act initiated on the basis of Vigilance report with the allegation of escapement of turnover.

2. The appellant is a C&F Agent of M/s. Lafarge India Pvt. Ltd. dealing in Lafarge cement. Appellant's unit was visited by Vigilance squad on 14.01.2010 at 11.30 A.M. On examination of the documents produced by the dealer, the squad found that there was discrepancy between the actual receipt of the cement at appellant's end and the cement delivered by Railway racks at the Railway sliding site. As per the documents seized and the report by the Vigilance wing, a proceeding u/s.43 of the OVAT Act was initiated by Deputy Commissioner of Sales Tax, Sambalpur. The Assessing Officer (AO) did not accept the explanation of the dealer and enhanced the suppression to the tune

of Rs.10,00,000/, then calculated tax and imposed penalty thereupon as per Sec.43(2) of the OVAT Act. Consequently, the total demand raised to Rs.3,75,000/-.

3. Being aggrieved with such assessment, the dealer preferred first appeal. The FAA declined the claim of the dealer like the dealer is not responsible for any escapement of turnover or suppression for the reason that, it has acted as a C&F agent only. The FAA has held that, the instant dealer though acted as an C&F agent but he is liable to pay the tax as he is liable to discharge liability on behalf of his principal i.e. M/s. Lafarge India.

4. Being aggrieved by the order of FAA, the dealer has preferred this appeal with the contentions like:- the re-assessment proceeding u/s.43 of the OVAT Act is not permissible in absence of any proceeding u/s.39, 40, 42 or 44 of the OVAT Act. The re-opening of the assessment was done mechanically without forming an opinion about the justification of re-opening the assessment, hence, the re-opening is bad in law. It is also contended that, the dealer-appellant has acted as a clearing and forwarding agent having no relationship with the purchase and sale by his principal M/s. Lafarge India Pvt. Ltd. So, the appellant cannot be liable u/s.43 of the OVAT Act but his liability is only restricted to the provision u/s.76 of the OVAT Act.

5. The appeal is heard with the cross objection from the side of the Revenue supporting thereby the impugned order.

6. The questions to be determined in this appeal are: (i) Whether the FAA was wrong in confirming the order of AA on the question like the initiation of proceeding u/s.43 without having any proceeding u/s.39, 40, 42 and 44 of the Act preceded to it as illegal, (ii) Whether the FAA has gone wrong in confirming the order of the AA by initiating the proceeding u/s.43 of the OVAT Act without forming any opinion as required under law and as decided by many of the authorities, (iii) Whether the FAA has gone wrong in confirming the order of the AO by treating the appellant as a dealer dealing with the sale-purchase of schedule goods like cement, (iv) Whether the FAA has gone wrong

in confirming the order of the AO treating the dealer as responsible for any escapement of turnover or suppression of his principal M/s. Lafarge India.

7. Learned Counsel for the dealer argued that, the initiation of proceeding u/s.43 has no legs to stand, since there was no proceeding u/s.39, 40, 42 or 44 of the OVAT Act preceded or prior to the present proceeding.

Answering to it, learned Addl. Standing Counsel argued that, it is the dealer has stated that, he had been furnishing return regularly showing nil figure as a C&F agency. Now such being the fact that, the dealer is treated to have self-assessed u/s.39 of the OVAT Act and in absence of any communication u/s.38, it is held that, the assessment u/s.39 was accepted, then there is no illegality in initiating proceeding u/s.43, if it is otherwise lawful. Reliance is placed in the matter of **M/s. Nelachal Ispat Nigam Ltd. Vrs. State of Orissa in W.P.(C) no.22343/dtd.01.12.2016.**

8. The next plunk of argument of the appellant is, the AO is bound under law to form any opinion or justification for re-opening the assessment. In support of his argument, learned Counsel placed reliance in the matter of **M/s. Anjure Ltd. Vrs. Commissioner of Sales Tax & Others 148 STC Page 61 (Orissa)**. It is pertinent to mention here that, the consistent plea of the appellant before both the fora below is, he has acted as a clearing and forwarding agency under the principal M/s. Lafarge India Pvt. Ltd. He has not acted as a dealer and any suppression in sale or purchase, the Lafrage India is responsible for that but not the appellant. Such stand is mutually inconsistent with the argument that, re-opening is baseless or without forming any opinion as required under law. When appellant claims he is no way responsible for the discrepancy/suppression detected, then there is no scope in his hand to take this stand that, re-opening was done mechanically. One cannot blow hot and cold at the same time. Either he is to stick to his stand that, he should not have held answerable for any discrepancy in stock or he is to take the stand that, he is answerable but the proceeding is initiated mechanically. Otherwise it can safely be said that, taking part in the hearing before both the fora below

the dealer has waived the question of maintainability, which became an abstract question of law at this stage of second appeal.

9. On the next point i.e. the liability of the appellant as a C&F Agency here, on the basis of the allegation of the fraud case report, learned Counsel for the appellant vehemently argued that, the appellant has acted as an C&F agency of the principal dealer Lafarge India. His liabilities are contemplated u/s.76 of the OVAT Act. So he cannot be held responsible for any discrepancy in stock or for any suppression committed by M/s. Lafrage India. Learned Counsel for the appellant has drawn the attention of the Court to the agreement entered into between the appellant and M/s. Lafarge India and argued that, the agreement itself manifest the role played by the appellant. On the contrary, learned Addl. Standing Counsel draws the attention of the Court to the statement of the appellant's representative given before the Vigilance authority. The statement of the representative as it reveals, the appellant has tried to explain the reasons for the shortage took place at the railway sliding site. The statement was prepared by any of the member of the Vigilance Wing and it carries only the signature of the agent of the appellant hence carries less credence. When the term and conditions on which the relationship between the appellant and M/s. Lafarge India were reduced to ink and paper, the parties *inter se* are bound by those terms and the authority proceeding under the Act is required to verify and scrutinize the role, duty and liability of the appellant on the basis of that agreement. Here in the case in hand, the AO found to have not discussed this aspect though it was raised by the dealer arguing that, it had acted as an C&F agent only. The FAA dealt this question and decided in negative to the dealer with the view that, the appellant has acted as an agent of the Lafarge India and an agent, the appellant is responsible and liable for his principal. Law is well settled that, Principal is responsible for any act and conduct of his Agent. The FAA has treated the appellant as agent acted as C&F agent but held that, the appellant should be responsible for the discrepancy in stock.

The term dealer defined u/s.2(12) of the OVAT Act reads as follows :

(12) "DEALER" means any person who carries on the business of buying, selling, supplying or distributing goods, executing works contract, delivering any goods on hire-purchase or any system of payment by instalments, transferring the right to use any goods or supplying by way of or as part of any service, any goods directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration and includes –

(a) a casual dealer ;

(b) a commission agent, a broker or a del credere agent or an auctioneer or any other mercantile agent, by whatever name called;

(c) a non-resident dealer or an agent of a non-resident dealer, or a local branch of a firm or company or association or body of persons whether incorporated or not, situated outside the State;

(d) a person who, whether in the course of business or not,-

(i) sells goods produced by him by manufacture, agriculture, horticulture or otherwise; or

(ii) transfers any goods, including controlled goods whether in pursuance of a contract or not, for cash or for deferred payment or for other valuable consideration;

(iii) supplies, by way of or as part of any service or in any other manner whatsoever, goods, being food or any other articles for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration;

10. C&F Agent is no way defined under the Act. However, Section 76 speaks of the role and liability of clearing, forwarding or booking agent. The provision also contemplates the penalty on the C&F agent. Learned Standing Counsel Mr. Agrawala placing his reliance in the matter of **Mcleod & Co. Ltd. Vrs. State of Odisha & Others STC Vol.56 (1984) Page 123** argued that, a non-resident dealer or agent is also liable for the principal and should be treated as dealer. But the fact remains the clearing and forwarding agency has a role to play limited to the terms and conditions entered in between the agency and principal.

Adverting to the case in hand, it is found that the appellant is a registered dealer also, but the argument of the appellant is, though his registration certificate was not cancelled or not surrendered but he is not engaged in sale-purchase save and except the work of clearing and forwarding as agent. It is a fact that, the appellant files periodical return. The claim of the dealer is, he used to file Nil return since no sale or purchase was effected by

him. The agreement entered into between the appellant and the principal Lafarge India Ltd. is a determining factor and as per the agreement it is found that, the dealer is engaged by the principal for storing, handling, clearing, forwarding as well as realization of sale patts produced by the company i.e. as per Clause-b of the agreement. The stock discrepancy detected by the Vigilance Wing is the stock receipt by the dealer only as a clearing or forwarding agency or as a dealer in independent capacity for sale-purchase is a question of fact and with that effect the subjective satisfaction of the FAA is, the appellant, in course of his job as a C&F agent had the domain over the stock in his godown. The FAA has held that agent is liable for principal and he can be assessed on behalf of the principal and the agent can be imposed with tax liability and penalty for any escapement of turnover on behalf of principal. Referred decision relied by the learned Counsel for the dealer can be distinguishable. On the other hand, we have failed to understand, under what circumstances the appellant or his principal were not subjected to tax liability for sale of cement inside the State. If the appellant is liable for escaped turnover, then why not he is liable for entire turnover during the tax period. He has not paid any tax then how the authority could determine only escaped turnover but not the entire quantity of goods sold through him. In that case, we are constrained to accept the view that, the appellant had acted as an agent only and when he is no way liable to pay tax for transactions during entire assessment period then he can't be found guilty of suppression or escapement. Here escaped turnover is always related to principal's turnover. The authority has not directed his investigation to the assessee-principal. In that view of the matter, we are of the view that, both the fora below have gone wrong in imposing tax liability on the appellant, who acted as an C&F agency and as per law, they are liable u/s.76 of the OVAT Act and their assessible turnover relates to their commission towards service charges accessible to service tax. They are not liable under VAT Act.

In view of the decision above, it is held that, the impugned order can't withstand in law and fact. Hence, ordered.

The appeal by the dealer allowed on contest. The impugned order is reversed accordingly.

Dictated and Corrected by me,

Sd/-  
(S. Mohanty)  
2<sup>nd</sup> Judicial Member

Sd/-  
(S. Mohanty)  
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I agree,

Sd/-  
(P.C. Pathy)  
Accounts Member-I