

BEFORE THE ODISHA SALES TAX TRIBUNAL (FULL BENCH), CUTTACK

S.A.No. 261(V)/2010-11

(From the order of the Id.JCST, Balasore Range, Balasore, in
Appeal No. AA-165/BAC-2007-2008, dtd.29.01.2010,
confirming the assessment order of the Assessing Officer)

P R E S E N T :

Sri Sashikanta Mishra Sri S. Mohanty & Sri R.K. Rout
Chairman Judicial Member-II Accounts Member-II

M/s. Eastern Hatcheries Pvt.Ltd.,
Jashipur, Mayurbhanj.

... Appellant

-Versus -

State of Orissa, represented by the
Commissioner of Sales Tax,
Orissa, Cuttack

... Respondent

Appearance :

For the Appellant ... Mr. B.N. Sahu, Advocate

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

(Assessment period : 01.04.2005 to 31.12.2006)

Date of Hearing: 22.06.2018

Date of Order: 23.06.2018

ORDER

This Second Appeal is preferred by the dealer against a confirming order of the learned First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Balasore Range, Balasore (in short, FAA/JCST).

2. Facts in brief leading to this appeal are :- The taxing authority proceeded with the audit assessment u/s.42 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act) for the assessment period 01.04.2005 to 31.12.2006 relating to the appellant-dealer's unit on the basis of report submitted by Audit team with seven numbers of allegations including non-payment in appropriate rate of tax suppression and wrong claim of ITC. The dealer-appellant was engaged in the business of poultry chicken feed and

poultry having four numbers of poultry hatcheries and two manufacturing units of poultry feed meant for sale as well as consumption of the chicken kept in hatcheries. On the basis of the allegations in Audit Visit Report (AVR) (morefully mentioned herein below), the Sales Tax Officer Mayurbhanj Circle, Baripada proceeded with the assessment proceeding u/s.42 of the OVAT Act. In confrontation of the allegations in the AVR to the dealer and then, in consideration of the documents as well as the arguments advanced by the dealer, Id.STO found the dealer guilty of non-payment of tax on the purchase of broken rice and maize from unregistered dealers inside and outside of the State, non-payment of tax on sale of grinded maize, non-disclosure and non-payment of tax on sale of manure, non-payment of tax at appropriate rate on the sale of old and used gunny bags, illegal claim of ITC and non-payment of tax on sale of miscellaneous goods. In ultimate analysis, the AO found the allegation in the AVR as established, the dealer was held guilty of tax evasion, sale suppression and payment of tax in low rate. Thereafter, he determined the total tax due from the dealer at Rs.8,00,386/-. Besides he imposed penalty u/s.42(5) of the OVAT Act i.e. twice the tax due resulting the total demand of Rs.24,01,158/-.

3. The dealer carried the matter before the FAA, who in turn, declined the prayer of the dealer and confirmed the order of the AO by reiterating the reasonings and views in both law and facts as taken by the AO.

4. On the above backdrop, the dealer has preferred this second appeal *inter alia* contending that, the assessment is liable to be set-aside since it was passed by the AO having no territorial jurisdiction. It is contended that, the dealer had never suppressed the purchase. He has not sold the grinded maize as alleged, but used the same for hatching purpose. The dealer used to sell poultry dung as manure at times and during the assessment period in question it had effected sale of poultry as manure worth of Rs.9,185/- only whereas, the authority has taken much more amount. Similarly the authority has gone wrong in imposing tax @12.5% on the sale of gunny bags though it was coming under the category of packing materials only. It is further

contended that, the dealer has wrongly shown the claim of ITC of Rs.2,267/- in the return. It was not ITC but the tax paid by the dealer at the checkgate. The dealer has also disputed the findings of the fora below levying tax on miscellaneous sale i.e. parts of bro layar chicken sold in the counter.

5. For better appreciation of the disputed question involved in this appeal, the allegations and decisions of fora below pointwise is mentioned as follows :

Point No.1: The allegation was, the dealer had not paid tax on broken rice and maize purchased from unregistered dealers inside and outside the State. The AO has held that, the dealer has purchased broken rice and maize from the unregistered dealer to the tune of Rs.2,99,84,722.70 in total. It was taxed as per Sec.12 of the OVAT Act and the decisions of the AO levying tax on these goods is confirmed by the FAA in the impugned order. The dealer has failed to dispute the findings but argued for sympathetic consideration against the imposition of penalty as levied with a plea that, he was unaware of provisions under law relating to the tax liability against purchases from unregistered dealer. It is a well settled principle of law that, ignorance of law is no excuse. Here the dealer has failed to advance any cogent and reliable evidence to believe that the act of the dealer was bona-fide. On the contrary, provision u/s.42(5) of the OVAT Act being mandatory in nature whenever there is a case of tax evasion as detected in the case is, penalty is the consequential result of the tax due calculated. Such being the well settled principle it is held that, the findings of FAA on this point confirming the tax due and penalty as calculated by the AO calls for no interference.

Point No.2: Non-payment of tax on inter-state purchase of maize, broken rice and soyabean, the AO invoking the provision u/s.12 of the OVAT Act arrived at a conclusion that, these purchases being inter-state purchases has already suffered with tax, it does not entail levy of tax. This view of the AO was also accepted by the FAA and the findings on this point of allegation is remained unchallenged by either side.

Point No.3: Non-payment of tax on sale of grinded maize, the AO has accepted the report of the Audit team like the dealer has not paid tax on grinded maize valued at Rs.22,260/- and calculated tax on it at Rs.890/-. The argument of the dealer is, such grinded maize was not sold but used for consumption of the chicken of the hatchery. The argument of the dealer is, grinded maize was consumed by chicken in the hatchery was rejected by the AO stating therein that, the dealer has shown sale of grinded maize to the tune of Rs.22,260/- during 2005-06. Once the dealer has sold the same numbers of sale of grinded maize without the plea like it was consumed by the parent chicken is purely an afterthought. Hence, the findings of both the fora below treating the same as sale and taxing the same at 4%, calls for no interference. Hence, confirmed.

Point No.4: It is alleged that the dealer has not disclosed the total of the amount collected from sale of manure (chicken dung). The AVR has suggested a particular quantity in consideration of the number of chicken, days, month and years and then calculated the quantity. This is a pure question of fact that, the Audit team on due verification of the details by applying reasonable guess work has suggested the quantity of manure procured by the dealer from it's hatchery which is accepted by both the fora below. This finding on factual aspect cannot be disputed, unless there is any rebuttal and cogent evidence advanced by the side of the dealer. Thus, it is held that, the facts and figures of non-disclosure of sale of manure as determined by the AO, which was confirmed by the FAA need not be disturbed. Hence, confirmed.

Point No.5: Non-payment of tax at appropriate on sale of gunny bags is raised by Audit team. Admittedly, the dealer has purchased the goods/cattle feed which are tax free. The dealer has sold the gunny bags separately though it was purchased with cattle feed. But when it is sold separately it necessarily attracts the tax liability. A bona-fide question arises here that, if the dealer's Registration Certificate authorises for trade of that particular item? This aspect has not been taken into consideration by both the fora below and even not raised by the Revenue. However, both the sides confined their argument what

should be the appropriate tax rate on the sale of those gunny bags treating the same as “packing materials”. Entry Sl.No.8 of Schedule-B of the OVAT Act contains the packing materials which includes gunny bags as treated in this case. Such entry came into existence from 01.06.2007 with tax rate at 4%.

The assessment order as it reveals, the AO on due application of relevant entry apportioned the total sale amount against the gunny bags and levied tax @12.5% for the period prior to 01.07.2005 and @4% for the period subsequently 01.07.2005. The plea of the dealer is since the gunny bag is taxable @4%, the sale covering entire period should be considered as per Entry No.83 for the purpose of rate of tax. The period prior to the date relevant entry came into force also should be treated in the same way taking cue from the subsequent period when the packing materials is included within the slab of 4%. The argument of the counsel for the dealer has no sanction under law since Entry Sl.No.83 with tax rate @4% has come into force with effect from a particular date, it cannot be stretched for any period prior to that date. However, here when the dealer is not guilty of any suppression of sale and has paid the tax on the sale of gunny bags covering entire period @4% in his return filed in the period when the tax rate is fixed at 4%, we are of the view that the dealer should not be burdened with any penalty for such unintentional mistake.

Thus, the findings of both the fora below on this point to the extent of tax due as calculated remained undisturbed whereas the penalty as imposed is hereby set-aside.

Point No.6: Illegal adjustment of ITC : It is found that the dealer has adjusted an amount of Rs.2,267/- paid at checkgate from the tax due showing the same as ITC in its return, the AO denied the same invoking the provision u/s.20(8) (k) of the OVAT Act. The FAA has accepted the view of the AO but the fact remains, when the authority has found that, the dealer has actually paid tax at the checkgate, then said tax amount should have been adjusted in the tax of entire period. Here, the dealer sales finished products are tax exempted goods but he has paid the tax against the purchase at checkgate, so it will be not at

wrong in adjusting the same in the total tax due. So, even though the dealer has made a wrong claim of ITC, but the dealer is entitled for such adjustment otherwise.

Point No.7: Non-payment of tax on sale of miscellaneous goods : It is alleged that the dealer had not paid any tax on the sale of miscellaneous goods like parts of bro layered chicken. When the chicken is not taxable, then the parts of the chicken also cannot be a taxable goods. The view of both the fora below on this allegation is erroneous. We are of the view that, miscellaneous goods i.e. the body of the chicken cannot be treated as a separate goods and any amount collected by the dealer on sale of those goods cannot be taxed. Thus, the findings of both the fora below on this point is illegal and unsustainable.

Besides the above factual aspects, the dealer has raised another point i.e. the jurisdiction of the AO. According to the dealer, the STO, Mayurbhanj Circle, Baripada is neither competent under law nor has the territorial jurisdiction to assessment. Reliance is placed in the matter of **Dash Agency Vrs. Sales Tax Officer (2007) 9 VST 482.**

In reply, the learned Addl. Standing Counsel Mr. Pradhan advanced Gazette Notification of the CCT vide SRO No.145/2005, whereby Mr. R. Mohanty was authorized to exercise the jurisdiction of Circles of Balasore Range. It is argued, when the dealer participated in the assessment proceeding without objecting to the jurisdiction of AA, he is stopped from raising the question at this belated stage. Learned Addl. Standing Counsel advanced the decision of Full Bench of this forum in S.A.No.16(VAT) of 2006-07. The Full Bench comprising we three as members, then in consideration of the provision u/s.3(3) of the OST Act read with Sub-section (2)(b) of Sec.106 of OVAT Act has arrived at a conclusion that, even though the AO affixed his designation as STO, but keeping in view his territorial jurisdiction as authorized by the competent authority under the Notification, the AO has exercised jurisdiction i.e. fixed on him in the case in hand. As such the proceeding cannot be vitiated as argued by the learned Counsel for the dealer.

With the observation above, it is hereby ordered.

The appeal preferred by the dealer is allowed in part and modified to the extent that, the penalty imposed for non-payment of tax at appropriate rate calculated at Rs.1,12,616/- against the sale of gunny bags as determined by the fora below is deleted. The tax and penalty on sale of miscellaneous good is deleted. The claim of ITC should be adjusted in the tax due. However, the tax due and penalty calculated on all other points of allegations as determined by the AO which are confirmed by the FAA are confirmed hereby. The demand be raised accordingly.

Dictated & corrected by me,

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

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

I agree,

Sd/-
(Sashikanta Mishra)
Chairman

I agree,

Sd/-
(R.K. Rout)
Accounts Member-II