BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.
S.A.No. 319/2007-08

(Arising out of order of the ld.ACST, Sambalpur Range, Sambalpur, in Appeal No. AA.(O)CUIA-III)OST/2006-07, disposed of on dtd.23.12.2006)

Present: Sri S. Mohanty & Sri P.C. Pathy
2nd Judicial Member Accounts Member-I

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

-Versus-

M/s. Rishi Gases (P) Ltd., Sanjob, Brajarajnagar, Dist. Sambalpur ... Respondent

For the Appellant : Mr. M.L. Agrawal, Standing Counsel
For the Respondent : Mr. U. Behera, Advocate

Date of Hearing: 31.05.2018 *** Date of Order: 01.06.2018

ORDER

This appeal is preferred by the State against a reversing order of the First Appellate Authority/Asst. Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, FAA/ACST) whereby the tax liability levied on the 'collection charges'/freight charges towards collection of the gas cylinders by the dealer assessed in a proceeding u/s.12(8) of the OST Act for the assessment year 2003-04 is deleted.

2. The assessee-dealer was subjected to assessment u/s.12(4) of the Odisha Sales Tax Act, 1947 (in short, OST Act) for the assessment period but at a latter period as per the reports by the AG, the assessment was re-opened invoking provision u/s.12(8) of the OST Act on the limited question of under assessment of tax to the tune of Rs.43,446/- resulted due to exemption of tax on collection charges of empty cylinders. The AO accordingly levied tax @12% on the collection charges of the empty cylinders amounting to Rs.3,29,135.11.

As a result, the tax due with surcharge determined at Rs.1,08,578.79 for the assessment period after adjusting the tax and surcharge already paid in accordance to the assessment u/s.12(4) of the Act dtd.16.02.2004. The balance tax due was determined at Rs.43,445.82 as suggested by the Audit wing.

3. Being aggrieved with such re-opening of assessment and levy of tax on "cylinder collection charges", the dealer had preferred first appeal before the FAA whereby and wherein the FAA accepted the argument of the dealer and taking cue from Sec.5(2)(a)(iii) and provision u/s.2(h) of the OST Act, held that, the "cylinder collection charges" was not exigible to tax and accordingly deleted the extra demand raised by the AO.

4. When the matters stood thus, State being aggrieved has preferred this appeal on the contentions like as per law, sale is completed at the point of delivery. So, the customers are in no way connected to the handing over of empty cylinders and its exchanged with filled cylinders. As such, the State has prayed for restoration of the assessment order by reversing the impugned order under challenge.

5. Here in the case in hand, it is to be held that, what should be the sale value of the cylinders supplied by the dealer to the customers for the purpose of levy of tax under OST Act. Sale price as it defines u/s.2(h) is as follows :

> "(h) **"Sale Price"** means the amount payable to a dealer as consideration for the sale or supply of any goods, less any sum allowed as cash discount according to ordinary trade practice, but including any sum charged for anything done by the dealer in respect of the goods at the time of, or before delivery thereof".

6. Learned Standing Counsel argued that, sale price always includes freight charges. As it is contemplated under the provision the sale price includes any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof. In the case in hand, whatever price collected from the customer is a consolidated amount. So there must be

levy of tax on that consolidated amount. Learned Standing Counsel also drawn the attention of the Court to the provision u/s.5(2)(A)(a)(iii).

> "[(iii) The cost of outward freight or of delivery or the cost of installation for the purpose of sale or supply of goods by the dealer when such cost is separately charged.]"

Further, he has drawn attention to the provision u/s.2(B) of the OST Act. In respectful agreement with the contentions raised by him it is held that, there should not be any quarrel on the proposition of law that the cost of freight or handling charges if not charged separately, then the dealer is not entitled to any benefit. On the contrary, learned representing counsel for the dealer argued that, it is not the delivery charges but the collection charges. The outward freight or delivery as envisaged in the provision is different from the expenses towards collection of the cylinders from the customers back to the dealer. The chart shown by the dealer available in the LCR revealed the dealer has prepared a chart to show the collection charges but there is no evidence to show that, it was separately charged from the customers to attract the provision above. At this juncture, learned Counsel for the dealer vehemently argued that, the FAA has verified the documents in proof of the collection charges separately from the sale price and accordingly he has reflected the same in the impugned order. Besides he has argued that, it is the dealer dealing with the same item as furnished return for different assessment periods and the authorities has accepted the dealer's return by not imposing tax on the collection charges. In support of his argument, he has advanced copies of assessment different assessment period. No doubt rule of *res judicata* is not applicable in the matter of taxation. But when it is the admitted principle that the consistency is the rule in taxation law.

7. In the matter of **Pranakrishna Satpathy and Another Vrs. State of Orissa (1992) STC Vol. 87 Page 526** it is held that,

> "On a perusal of sections 2(h) and 5(2)(A)(a)(iii) of the Orissa Sales Tax Act, 1947, the legislative intent is crystal clear that freight cannot be included in the taxable turnover unless it is part of the goods sold. What was the intention of the parties relating to freight has to be gathered from the background facts to be placed by the parties. Since the dealer claimed that it is entitled to a permissible deduction, the onus is on it to prove its entitlement. In order to be entitled to the deduction under section 5(2)(A)(a)(iii), the dealer is required to prove that the cost of freight or of delivery for the purpose of sale or supply of goods was separately charged. Therefore, materials are required to be placed by the dealer to prove its stand"
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> xxx xxx xxx xxx
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> "(iii) that, however, the conclusion of the Tribunal that since a consolidated payment was made, it could be inferred that there was no intention to pay transport charges separately, was not correct. Merely because there was consolidated payment, it could not lead to an irresistible conclusion that the parties had not agreed to any bifurcation".

Regard being had to the ratio above in mind, adverting to the impugned order, it is found that, the FAA has mentioned as follows:

"The bills of the dealer shall go clearly to prove that the collection charges were part of the outgoing freight charges which is to be excluded from the taxable turnover of the appellant".

Here in this case, the impugned order is explicit that the AO has verified the documents showing collection charges separately then, since this being a subjective satisfaction by the FAA, which is an extended forum of assessment, it will be unsafe to hold that, the FAA has passed order mechanically and malafidely. There is no reason to disbelieve that, the FAA has not perused any document but mentioned the same in the impugned order. The AO on the other hand has not spelt anything regarding the investigation by him to ascertain the fact that, the dealer had separately collected the collection charges or not ? The order of the AA if compared to the order of the FAA, then it is found that, the FAA has categorically mentioned that, he had the occasion to verify the document indicating separate collection charges. In the totality of the facts

narrated above, here I am of the view that, even though the argument advanced by the learned Standing Counsel has got considerable force so far as the application of the provisions of law is concerned, but the findings on fact by the FAA cannot be doubted without cogent and trustworthy rebuttal evidence. Accordingly, it is held that, the findings of the FAA calls for no interference.

The appeal by the State sans merit, hence dismissed.

Dictated and Corrected by me,

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

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

I agree,

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