

**BEFORE THE FULL BENCH : ODISHA SALES TAX TRIBUNAL:
CUTTACK.**

S.A. No. 82(C) of 2008-09
&
S.A. No. 83(C) of 2008-09

(Arising out of order of the learned Addl.CST (Revenue), Odisha, Cuttack, in Case Nos. AA- 37 & 38/VAT/ACST/Koraput/2007-08, disposed of on dt. 20.11.2008)

Present : **Smt. Suchismita Misra, Chairman**
 Shri Subrat Mohanty, 2nd Judicial Member
 &
 Shri Prabhat Ch. Pathy, Accounts Member-I

M/s. J.K. Paper Ltd.,
Jaykaypur, Rayagada. . . . Appellant

- V e r s u s -

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

For the Appellant ... Mr. P.K. Jena, Advocate
For the Respondent ... Mr. M.S. Raman, Addl. S.C. (CT)

Date of hearing: 21.01.2019 **** Date of order: 18.02.2019

O R D E R

These two appeals are directed against the order dated 20.11.2008 passed by the Addl. Commissioner of Sales Tax (Revenue), Odisha, Cuttack (in short, "first appellate authority") in Case Nos. AA-37 & 38/VAT/ACST/Koraput/2007-08 reducing the assessments made by the Asst. Commissioner of Sales Tax (LTU), Koraput Range, Jeypore (in short, 'assessing officer') u/R. 12(3) of the Central Sales Tax

(Odisha) Rules, 1957 (in short, 'CST (O) Rules') for the periods 01.07.2006 to 30.09.2006 and 01.10.2006 to 31.12.2006. These two appeals are disposed of by this common order for the sake of convenience since the facts and law involved in them are same.

2. The facts as revealed from the case record are that the dealer-assessee named and styled as "M/s. J. K. Paper Limited, Jaykaypur" is a Limited Company registered under the Companies Act. This Company carries on business of manufacturing paper and paper products for sale inside the State of Odisha as well as outside the State and abroad. It files monthly returns pertaining to its business. During the periods under scrutiny, the assessing officer found that the dealer had not filed required statements, declarations and certificates in support of its claim towards deductions/exemptions as shown in its returns. Rule 7A of the CST (O) Rules requires every registered dealer filing returns under the said rule in respect of transactions made in each quarter must furnish statements in Form A, B, C, D, E and F to the assessing authority showing particulars of transactions made by it u/Ss. 3, 5 6, 6A and 8 of the CST Act alongwith the declaration forms and certificates in support of such transactions relating to the quarter in question within three months after the end of such quarter. Since in this case the dealer-Company had not filed such documents within the stipulated period the returns submitted by it were not accepted as

correct and complete returns u/R.7. Further as the deduction/exemption claimed by the dealer-assessee in the returns were not found to be verifiable to find out its genuineness and proper tax compliance an Audit Team headed by the Sales Tax Officer was formed and then the books of account of the dealer-assessee were verified. The said Audit Team suggested for audit assessment of the dealer-assessee's business concern u/R. 12(3) of the CST (O) Rules and after receiving the Audit Visit Report (AVR) from the concerned authority proceedings u/R. 12(3)(a) of the CST (O) Rules were initiated for assessment of the dealer-appellant by the Sales Tax Officer, Koraput Range, Rayagada. The assessment for the period 01.07.2006 to 30.09.2006 was completed raising a tax demand of `7,70,43,079.00 inclusive penalty of `5,13,62,052.88 and also a tax demand of `8,43,42,772.00 including penalty of `5,62,28,514.52 therein was raised for the period 01.10.2006 to 31.12.2006 vide his orders dated 19.12.2007. The orders of assessment were challenged by the dealer-Company before the Hon'ble High Court of Orissa on the ground that the Sales Tax Officer, Koraput Range, Rayagada had no jurisdiction to assess the dealer-Company which is a Large Tax Payer's Unit, TIN dealer and as such the said assessments were not maintainable. Thereafter pursuant to orders of the Hon'ble Court the said assessments were quashed and as per the

orders of the Hon'ble Court the dealer-assessee had appeared before the appropriate assessing officer i.e. Asst. Commissioner of Sales Tax, Koraput Range to participate in the fresh assessment proceedings in respect of the aforesaid periods. The dealer-assessee was also given opportunity to rectify and meet the defects and deficiencies at that time. Its (the dealer-appellant's) books of account as well as other statutory declaration forms pertaining to the relevant periods were examined and then it was ascertained that against the export sale made u/S. 5 of the CST Act the dealer had made certain sale transactions but could not furnish correct 'C' declaration forms in respect of some transactions. The dealer-Company during the periods under assessment had despatched goods to its different branches such as Delhi, Kolkata, Chennai, Mumbai, Sahibabad and Songarh and submitted 'F' declaration forms at the stage of assessment from which the assessing officer could gather excess transactions for '2,49,68,888.00 for the quarter ending 9/2006 and '2,51,36,754.00 for the quarter ending 12/2006. On being questioned the dealer-assessee explained that the excess amount as detected in the aforesaid transactions was due to inclusion of freight charges and other incidental charges in the value of 'F' forms but could not justify the same with any documentary evidence for which the aforesaid amount was treated as unaccounted for sales in course of inter-State

trade and commerce not disclosed in the accounts by the dealer. Further on verification of branch transfer statements, learned assessing officer found no evidence regarding return of goods by the branches and as such he treated the turnover to be inter-State sale of the dealer-assessee for the relevant periods. Finding some anomalies on verification of the books of account as well as the statutory declarations alongwith the returns furnished thereof by the dealer-assessee with regard to its claim of concessions and exemption, learned assessing officer completed the assessments directing the dealer-Company to pay a sum of `98,65,011.00 and penalty of `1,97,30,022.00 thus in total `2,95,95,033.00 for the Q/e. 9/2006 and further a sum of `1,00,44,826.78 as balance tax with penalty of `2,00,89,653.55, in total `3,01,34,480.00 for the Q/e. 12/2006 as per the terms and conditions of the demand notices issued respectively.

Being aggrieved with the said orders, the dealer-assessee preferred appeals before the first appellate authority. After considering all the relevant documents as well as keeping in view the decisions cited by the party concerned the first appellate authority held that the addition of excess amount to the turnover without any supporting evidence of suppression was not sustainable on the ground that the discrepancy between the amount indicated in the 'F' form and

the stock transfer/consignment sale amount was due to inclusion of freight and transit insurance charges which had been explained by the dealer-assessee. Further learned first appellate authority observed that the defects in the 'C' and 'F' forms having been rectified by the dealer-Company those were accepted. However, as the dealer-assessee failed to submit 'C' forms for the Q/e. 9/2006 and 12/2006 it was held liable to pay the differential tax @ 6% by the first appellate authority. Then upon considering the applicability of the provisions of Sec. 5(3) of the CST Act in respect of some transactions of the dealer-assessee learned first appellate authority held that S.S. Maplitho paper and printed books made out of S.S. Maplitho paper being two distinct commercial commodities upheld the disallowance of exemption and confirmed imposition of tax done by the assessing officer for an amount of `22,62,289.00 and `7,72,513.00 for the Q/e. 9/2006 and 12/2006 respectively. Further learned first appellate authority while observing that no penalty should be imposed for non-submission of 'C' declaration forms as the dealer-appellant could not furnish the same despite its best efforts, reduced the penalty amounting to `4,52,458.00 and `1,54,502.00 for the Q/e. 9/2006 and 12/2006 respectively which ultimately resulted in reduction of assessments for the relevant periods in the impugned order.

3. In the second appeals preferred by the dealer-assessee it put forth only the following issues to be considered by this Tribunal :-

- (i) Whether disallowance of export sale u/S. 5(3) of the CST Act made against declaration in Form-H to M/s. Card Box Company, Hyderabad involving `22,62,289.00 and declaration in Form-H of M/s. Kala Jyothi Process Ltd., Hyderabad involving `7,72,513.00 and levy of tax thereon for the Q/e. 9/2006 and 12/2006 respectively is the correct proposition of law on the ground that paper and printed books cannot be considered as same commodity/goods or the said view needs to be rectified in the impugned order ?
- (ii) Whether on the facts and circumstances of the case imposition of penalty u/R. 12(3)(g) of the CST (O) Rules is permissible under law ?

4. Learned Counsel appearing on behalf of the dealer-assessee filed written notes of submission mentioning elaborately as to why levy of tax in respect of export sale to the Companies namely M/s. Card Box Company, Hyderabad and M/s. Kala Jyothi Process Ltd., Hyderabad are legally untenable. He contended with regard to declaration in Form-H relating to M/s. Card Box Company, Hyderabad

(the exporter) for `22,62,289.00 that M/s. J.K. Paper Ltd. had sold paper to the purchasing dealer but the purchasing dealer had exported printed books as per the order of foreign buyer. The assessing officer while concluding that paper and books are not same commodity did not extend the benefit u/S. 5(3) of the CST Act to the dealer-assessee whereas law is well settled that Sec. 5(3) of the CST Act will apply to penultimate sales if those sales satisfy two conditions namely that such penultimate sale must take place after the agreement or order under which the goods are to be exported and secondly it must be for the purpose of complying with such agreement or export order. He then urged before the Court to peruse the purchase order dated 19.07.2006 placed by Book of Hope INTL, 3111 SW 10th Street, Pompano Beach, FL 33069- USA to exporter i.e. M/s. Card Box Company, 10-2-289,120/7, Masabtank, Hyderabad, A.P. for printing and supply of religious books, text on J.K. S.S. Maplitho (paper). Similarly he requested the Tribunal to see the purchase order dated 26.05.2006 placed by the Thinakkural Publications (Pvt.) Ltd., No.68, Ellie House Road, Colombo-15 before the exporter i.e. M/s. Kala Jyothi Process (Pvt.) Ltd. 1-1-60/5, RTC X Roads, Hyderabad-500020, A.P., India for printing some books on 80 GSM Maplitho paper. This J.K. S.S. Maplitho is the registered trade mark of J.K. Paper Ltd. only and not manufactured by any other manufacturers of paper in India.

Thus when Sec. 5(3) of the CST Act has been enacted to extend the exemption from tax liability not to any kind of penultimate sale but only to such penultimate sale which satisfies the conditions such as (a) that such penultimate sale must take place (i.e. become complete) after the agreement or order under which the goods are to be exported; and (b) must for the purpose of complying with such agreement or order; learned Counsel appearing on behalf of the dealer-assessee cited decisions rendered in the cases of Consolidated Coffee Ltd. Vs. Coffee Board, [1980] 46 STC 164 (SC); Chowgule & Co. P. Ltd. Vs. Union of India, [1981] 47 STC 124 (SC); Sterling Foods Vs. State of Karnataka and another, [1986] 63 STC 239 (SC); Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Shiply International, [1988] 69 STC 325 (SC); State of Tamil Nadu Vs. Mahi Traders and others, [1989] 73 STC 228 (SC); Calcutta Label Works and another Vs. Commercial Tax Officer, Monohar Katra Charge and others, [1994] 95 STC 122 (WBTT); State of Karnataka Vs. Azad Coach Builders P. Ltd., [2006] 6 Revenue Cases 320 (SC); T. Azeezur Rahman & Company Vs. State of Tamilnadu, [1991] 82 STC 355 (Mad); Iqra Traders Vs. State of Tamilnadu, [2003] 132 STC 471 (TNTST) and M/s. J.K. Paper Ltd. Vs. State of Orissa in S.A. No. 11 (C) of 2006-07 relating to the period 2004-05 to fortify his argument as aforesaid.

5. The State-respondent has not filed cross-objection in this case. However, learned Addl. Standing Counsel (CT) appearing for the State in his written note of submission cited the decisions rendered in the cases of Sterling Foods Vs. State of Karnataka, [1986] 63 STC 239 (SC); Vijaylaxmi Cashew Company Vs. DCTO, [1996] 100 STC 571 (SC); Shafeeq Shameel and Company Vs. ACCT, [2003] 129 STC 1 (SC) and State of Karnataka Vs. Goa Granites, [2007] 5 VST 434 (Kar.) in the context of interpretation of the words "those goods" as employed in Sec. 5(3) of the CST Act. Similarly, he also relied on the decisions rendered in the cases of State of Orissa Vs. Jagannath Industries, [2000] 117 STC 355 (SC) and Nav Bharat Prakashan Vs. CST, [1989] 73 STC 220 (All.) in the context of manufacturing and processing of different goods. Further, the decisions rendered in the cases of Union of India Vs. Dharamendra Textile Processors, [2008] 18 VST 180 (SC); R.S. Joshi, Sales Tax officer Vs. Ajit Mills Ltd., [1997] 40 STC 497 (SC); Jindal Stainless Ltd. Vs. State of Orissa, [2012] 54 VST 1 (Ori.) and others were also cited by the State with regard to imposition of penalty in cases of this nature.

6. In these appeals the dealer-Company has virtually raised two issues as mentioned below :-

- (i) Whether sale of paper with registered trade mark "S.S. Maplitho" to the exporter who has supplied the same to the

foreign buyer by printing, sizing and binding papers for the purpose of complying with the export orders i.e. purchase orders placed by the foreign buyer with the exporter would tantamount to manufacture so that different commercial commodity comes into existence other than paper and, therefore, the claim of the dealer-assessee for exemption u/S. 5(3) of the CST Act has rightly been rejected by the authorities below ?

- (ii) Whether the first appellate authority was justified in retaining penalty imposed u/R. 12(3)(g) of the CST (O) Rules so far as it related to sustenance of rejection of exemption claimed u/S. 5(3) of the CST Act ?

7. So far as the claim advanced by the dealer-assessee u/S. 5(3) of the CST Act is concerned, learned Addl. Standing Counsel (CT) for the State submitted that the Company namely Book of Hope INTL, 3111 SW 10th Street, Pompano Beach, FL 33069- USA had placed purchase order dated 19.07.2006 to the merchant exporter M/s. Card Box Company, 10-2-289/120/7, Masabtank, Hyderabad, A.P. for printing and supply of religious book text on J.K. S.S. Maplitho. However, on scrutiny of 'H' form issued by M/s. Card Box Company, Hyderabad the assessing officer found that the dealer-assessee had sent paper to the said Company for sale in course of export and that exporter

had exported the printed books as revealed from the bill of lading submitted in the case. Sec. 5(3) of the CST Act provides that the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in course of such export which means that goods must be sold in the same form in course of export u/S. 5(3) which was purchased from the first seller. But in the instant case the dealer-assessee had sold papers to exporter and the exporter in turn exported printing books to the foreign buyer. Therefore, 'H' form connected to this transaction was rightly rejected by the authority concerned and the said sale transaction attracted 10% tax to be levied as inter-State transaction between the parties. Similarly, Thinakkural Publications (Pvt.) Ltd., 68, Ellie House Road, Colombo had placed purchase order dated 26.05.2006 to merchant exporter M/s. Kala Jyothi Process (Pvt.) Ltd., Hyderabad, A.P., for printing and supply of some text books on 80 GSM Maplitho paper. On scrutiny of 'H' form issued by M/s. Kala Jyothi Process (Pvt.) Ltd., Hyderabad the same situation/position as in the case of M/s. Card Box Company, Hyderabad was noticed. Therefore, the dealer-assessee in the instant case did not clarify his stand to get the exemption as envisaged u/S. 5(3) of the CST Act since the goods i.e. paper sold by it cannot be termed as printed books which were exported by the purchasers of papers in this case. He also cited the decisions

rendered in the cases of Empire Industries Ltd. Vs. Union of India, [1987] 64 STC 42 (SC); Brown Leather Co. Vs. State of TN, [1993] 91 STC 1 (Mad.); KAK Anwar & Co. Vs. State of TN, [1998] 108 STC 258 (SC) and Pallava Granites (India) Pvt. Ltd. Vs. CTO, [2002] 125 298 (AP) in support of his contention.

8. On a thorough reading of these citations, it can be gathered that 'papers' and the 'printed books' certainly cannot be termed as same commodity but at the same time keeping in view the guidelines given by the Hon'ble Apex Court in the case of State of Karnataka Vs. Azad Coach Builders P. Ltd., (supra), it can be safely opined that Sec. 5(3) of the CST Act will apply to penultimate sales if such sales satisfy two conditions namely (a) that such penultimate sale must take place after the agreement or order under which the goods are to be exported; and (b) it must be for the purpose of complying with such agreement or export order. In such a case the penultimate sale would be deemed to be a 'sale' in the course of export. Therefore, it is to be seen whether the dealer-assessee could furnish proper evidence to come to a conclusion that the abovenamed foreign buyers had intended to purchase printed books from the exporters as named above to be prepared by using the papers supplied by this dealer-Company.

9. In the instant case, the dealer-assessee filed some documents such as purchase order placed with M/s. Card Box Company,

Hyderabad by the Book of Hope INTL, 3111 SW 10th Street, Pompano Beach, USA and the transaction undertaken by the M/s. Card Box Company for export of books. The said purchase order reveals that the Book of Hope INTL, 3111 SW 10th Street, Pompano Beach, USA had placed order involving this dealer. Similarly the dealer-assessee has also filed some documents pertaining to its transaction with M/s. Kala Jyothi Process (Pvt.) Ltd., Hyderabad from which it can be gathered that the Thinakkural Publications (Pvt.) Ltd., 68, Ellie House Road, Colombo had placed purchase order dated 26.05.2006 with the exporter in India to supply printed books using the papers i.e. 80 GSM Maplitho manufactured by this dealer-firm. The dealer-assessee has filed 'H' forms in respect of its supplying aforesaid papers to both the exporters using which they both complied their export orders placed by the foreign buyers. Thus the transactions between the dealer-assessee with M/s. Card Box Company, Hyderabad and M/s. Kala Jyothi Process (Pvt.) Ltd., Hyderabad are found to be penultimate sales which deserve exemptions as envisaged u/S. 5(3) of the CST Act.

10. The dealer-assessee submitted that he had filed requisite 'H' forms in respect of his aforesaid transactions while claiming exemptions u/S. 5(3) of the CST Act. It seems that both, the assessing officer as well as the first appellate authority, did not take those 'H' forms into consideration for the sole reason that the papers supplied by

the dealer-assessee and the books printed using those papers were not same commodity and as such the sale of papers did not qualify for exemption u/S. 5(3) of the CST Act. However, in view of the above observation of this Tribunal that the transactions in question between the dealer-assessee and the abovenamed exporters are exempted sales it is felt that this is a fit case which requires to be remitted back to the assessing officer to make fresh assessment in accordance with law.

11. In the result, the appeals pertaining to the assessments for the Q/e. 9/2006 and Q/e. 12/2006 are allowed. The impugned order of the first appellate authority is hereby set aside. The assessments for the Q/e. 9/2006 and Q/e. 12/2006 are remitted back to the assessing officer for fresh assessment keeping in view the observations made supra within a period of four months from the date of receipt of this order.

Dictated & Corrected by me,

**Sd/-
(Smt. Suchismita Misra)
Chairman**

**Sd/-
(Smt. Suchismita Misra)
Chairman**

I agree,

**Sd/-
(Subrat Mohanty)
2nd Judicial Member**

I agree,

**Sd/-
(Prabhat Ch. Pathy)
Accounts Member-I**