BEFORE THE JUDICIAL MEMBER-I: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 67(C) of 2017-18
(Arising out of the order of the ld. Addl. CST (Appeal), Odisha, Cuttack, in Appeal Case No. AA-JCST-JR-211/2014-15, disposed of on dtd.04.07.2017)

P r e s e n t: **Shri S. Mohanty,**
1st Judicial Member

M/s. Pawan Kumar Ahluwalia,
At/P.O.- Barbil, Dist. Keonjhar. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2010 to 31.03.2011

For the Appellant ... Mr. P.K. Harichandan, Advocate
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 20.07.2019 ******** Date of order: 20.07.2019

O R D E R

The moot question raised for decision in this appeal preferred by the dealer is, whether the first appellate authority has committed wrong in confirming the order of assessing authority by denying the claim of exemption to penultimate sale by the dealer is wrong in the facts and circumstances of the case discussed herein below.

2. The assessee-dealer is the appellant. He was assessed u/r.12(3) of the Central Sales Tax (Orissa) Rules, 1957 (hereinafter referred to as, the CST(O) Rules) for the assessment period 01.04.2010 to 31.03.2011 on the basis of Audit Visit Report (in short, the AVR).

Though, there was many allegations brought in by the audit team in the AVR relating to the defective declaration forms, non-submission of declaration forms but, in ultimate analysis, the assessing authority disallowed the exemption of Rs.1,46,13,822.00 for non-submission of declaration form 'H' against the export sale and exemption and disallowed the claim of exemption of goods valued at Rs.8,25,485.00 against declaration form 'H' bearing No.K-0398782 and for Rs.33,56,154.00 against declaration form 'H' bearing No.K-039907 since the dealer could not produce the other connected documents besides declaration form 'H'. In the result, the assessing authority raised balance tax liability for the dealer at Rs.7,71,558.00. In addition to that, penalty i.e. twice of the tax due at Rs.15,43,116.00 was imposed as per Rule 12(3)(g) of the CST(O) Rules and interest to the tune of Rs.3,83,973.00 was also imposed u/s.8 of the CST(O) Rules. Though the dealer had already paid towards payment of interest of Rs.3,24,112.00, the balance amount of tax, penalty and interest totalling at Rs.23,74,535.00, raised against the dealer.

3. Being dissatisfied, the dealer knocked door of the first appellate authority who is impugned confirmed the order of assessment so far as the exemption for non-furnishing of declaration form 'H' and non-furnishing of other evidences in support of his penultimate sale against two declaration form 'H' furnished before the assessing authority but deleted the penalty as, in the result the tax due become reduced to Rs.8,31,419.00.

4. In spite of the reduction in demand, felt aggrieved by the order of first appellate authority the dealer preferred this appeal. The rejection of declaration form 'H' by the assessing authority and thereafter by the first appellate authority is against the principle of law laid down u/s.5(3)(4) of the CST Act read with Rule12(10)(a) of the CST (R&T) Rules. Once the declaration form 'H' is filed in original supplied by the exporter, rejection of the same is not within the jurisdiction of the assessing authority. It is also contended that, imposition of interest

in the case in hand to the tune of Rs.59,861.00 is arbitrary, excessive and bad in law.

5. Revenue contested the appeal by filing Cross Objection. Resultantly, the grounds in appeal taken by the dealer, inter alia, Revenue has contended that, in support of claim of exemption the dealer could produce declaration form 'H' only but failed to produce evidence for movement of goods before the date of shipment, so disallowance of the exemption by the fora below is as per law. Production of challan in support of movement of goods before the date of shipment is necessary to ensure that, such penultimate sale have been taken place after the agreement with foreign buyer and the last purchase have been made for the purpose of complying with the pre-existing agreement. Here, in this case no documents were produced except declaration form 'H', so the dealer is not entitled to exemption as claimed.

6. **Findings:-**

At the outset, it is pertinent to mention here that, the dealer has filed the tax invoice with copy of the challan against the claim of penultimate sale relatable to two declaration form 'H' furnished earlier. So, before delving into the merit of the appeal it only can be said that, the requirements of the document as held by both the fora below is also fulfilled here in this second appeal on production by the dealer. Now, delving into the merit of the appeal so far as it relates to disputed question, law is well settled that, exemption to penultimate sale is subject to the condition like, the sale is for purpose of complying with agreement or order in relation to export and such sale is made after the agreement or order in relation to export and some same goods which were sold in penultimate sale should be exported though may not be in same form. In other words, the final exporter should be in possession of the export order from foreign buyer and should take delivery of the goods from the supplier making penultimate sale solely for execution of such export order and export the same goods though not in same form.

In other words, when the movement of goods were preceded by existence of a foreign buyer contract, in compliance of which the goods were sold by dealer to exporter and the goods were ultimately exported out of the territory of India by the merchant exporter, then the requirement of the provision u/s.5(3) of the CST Act is treated to be fully complied with in consonance to Rule 6D of the CST(O) Rules which speaks of movement of goods in a sale. For the purpose we can place reliance in the matter of **Consolidate Coffee Ltd. v. Coffee Board, Bangalore [1980] 164 STC 46**. Similarly, in K. Gopinath Nayer v. State of Kerala (1997) Vol. 10 SCC 1, it was held that, Sec.5(3) applies to penultimate sale, if such sale satisfies two conditions (a) that such penultimate sale must take place after agreement or order under which the goods are to be exported and (b) it must be for complying with such agreement or export order.

Further, dealing with a similar case, the Hon'ble Apex Court in **State of Madras V. Radio and Electricals (1966) 18 STC 222 (SC)** has held :

> "Indisputably the seller can have in these transactions no control over the purchaser. He has to rely upon the representations made to him. He must satisfy himself that the purchaser is a registered dealer, and the goods purchased are specified in his certificate : but his duty extends no further. If he is satisfied on these two matters, on a representation made to him in the manner prescribed by the Rules and the representation is recorded in the certificate the selling dealer is under no further obligation to see to the application of the goods for the purpose for which it was represented that the goods were intended to be used. **If the purchasing dealer misapplies the goods he incurs a penalty under section 10. That penalty is incurred by the purchasing dealer and cannot be visited upon the selling dealer.** The selling dealer is under the Act authorized to collect from the purchasing dealer the amount payable by him as tax on the transaction, and he can collect that amount only in the light of the declaration mentioned in the certificate. He cannot hold an enquiry whether the notified authority who issued the certificate of registration acted properly, or ascertain

> whether the purchaser, notwithstanding the declaration, was likely to use the goods for a purpose other than the purpose mentioned in the certificate. **There is nothing in the Act or the Rules that for infraction of the law committed by the purchasing dealer by misapplication of the goods after he purchased them, or for any fraudulent misrepresentation by him, penalty may be visited upon the selling dealer".**

7. In the present case, the assessing officer had the occasion to verify the agreement between the exporter and the foreign buyer. The purchase order placed by the exporter before the assessee-dealer, if these documents are quite sufficient to form opinion that, any goods sold in compliance to the above purchase order is necessarily inextricably linked with the export of goods and the movement of goods on such purchase order necessarily took place on the basis of the pre-determined contract between the exporter and the foreign buyer. In that case exemption as per Sec.5(3) of the CST Act is found justified even though the bills are raised at a later period which is a covenant method adopted by the dealers involving sale and purchase.

8. In application of the principle above to the case in hand, it is found that, the assessing authority and thereafter the first appellate authority has felt to appreciate the requirement of law and rejected the original declaration form 'H' arbitrarily. Moreover, at the cost of repetition, it is mentioned here that, the dealer also filed the tax invoice and challan relatable to both these declaration form 'H' and export sale in the hearing of this appeal, hence there is no escape from the ultimate conclusion that, the exemption claimed as a penultimate seller against export sale to the tune of Rs.41,81,639.00 is necessarily available to the dealer.

Be that as it may, the matter needs to be remanded back to the assessing authority only for calculation of the actual demand after giving the exemption and to raise the same along with interest as per law. It is ordered.

9. The appeal is allowed on contest. The matter is remitted back to the assessing authority by setting aside the impugned order with a direction to calculate the tax liability and raise demand as per the observation hereinabove.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

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