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

S.A. No. 70(V) of 2013-14

(Arising out of the order of the ld. DCST, Ganjam Range, Berhampur, in First Appeal Case No.AA. (VAT) 71/2006-2007, disposed of on dtd.21.01.2013)

Present: Smt. Suchismita Misra, Chairman,
Sri Subrata Mohanty, 1st Judicial Member
&
Sri P.C. Pathy, Accounts Member-I

M/s. Industrial Development Corporation of Orissa Ltd., IDCOL House, Ashok Nagar, Bhubaneswar-751009. ... Appellant

- V e r s u s -

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

For the assessment period: Nil

For the Appellant ... Mr. C.R. Das, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 19.07.2019 ******** Date of order: 19.07.2019

O R D E R

A confirming order of assessment u/s.45 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) passed by first appellate authority is under challenge in this appeal at the behest of unsuccessful assessee-dealer before the both the fora below as not sustainable on the questions of law like,

(i) whether the first appellate authority has committed wrong in confirming order of assessing authority by treating a registered dealer appellant like as casual dealer;

(ii) whether the first appellate authority has committed wrong in confirming the order of assessing authority by treating the assessment an undated assessment order for unspecific period as sustainable in the eye of law.

And whereas, on the question of fact like

(iii) whether the first appellate authority has committed wrong in confirming the order of assessing authority by treating the transaction entered into between the dealer and M/s. George Distributor Pvt. Ltd. towards sale of plant and machinery as is where it to is a sale covered under Sales of Goods Act of moveable goods exigible to local tax under VAT.

2. The backdrop of the questions above, arised out of rival pleas runs as follows.

M/s. ABS Spinning Mill, Orissa Ltd. consisting three units at different places including Aska Spinning Mill is a subsidiary of IDC of Orissa Ltd. As the spinning mills defunct of production activities in pursuance to the provision of BFIR to the Hon'ble Court of Orissa, the wind up proceeding of the industry was initiated and in the said process present appellant M/s. IDCO, Orissa has taken over the unit for sale of its assets. As per the order of the Hon'ble Court, the offer to purchase given by one M/s. Rajashree Vanijya Pvt. Ltd. for Rs.1,56,50,00,000.00 it was fixed to sale the assets of all three units of the ABS Spinning Mill, Orissa. Accordingly, a tripartite agreement was executed among the assessee-dealer (assignee), the purchaser and the selling dealer. As per the agreement for sale three units were to transfer on 'as is where is basis' with a condition that, the purchaser will revitalize the business and will run the manufacturing units as per the terms of the agreement. Acting upon the agreement, the purchase

on payment took physical possession of the entire industrial unit but, when the matter stood thus, Sales Tax Officer, Bhanjanagar initiated assessment proceeding u/s.45 of the OVAT Act against the present dealer covering an unspecified period and vide its undated order, levied VAT of Rs.15,76,750.00 as it was raised on the basis of demand notice dtd.07.02.2017. In an exparte order of assessment, the assessing authority held that, the goods 53 in number as mentioned in the agreement to sale is liable to be taxed on sale @12.5% u/s.45(1)(a) of the OVAT Act. The assessment order was challenged before the first appellate authority as initiated without notice and disposed of without extending proper opportunity of being heard thereby, principle of natural justice was not extended to the dealer treating the dealer as an casual dealer is unfounded, the determination of value of goods was in higher side, the machine and plants sold do not cover under the definition of "goods" and the demand raised is bad. But, the first appellate authority in the impugned order, by reiterating the findings of the assessing authority confirmed the demand.

3. Being aggrieved, the dealer knocked the door of this Tribunal by way of second appeal. On the basis of contention in appeal and Cross Objection filed by the Revenue i.e. pleading in support of the sustainability of the first appellate order, the questions raised for decision in this appeal are mentioned above for adjudication.

Findings:-

(i) the dealer has challenged the maintainability of the proceeding u/s.45 of the OVAT Act claiming himself as a registered dealer and argued that, being a registered dealer there was no reason for treating him as casual dealer and assessment u/s.45 is bad in law.

4. To appreciate the question, the provision u/s.45 of the OVAT Act is reproduced herein below-

"***45. Assessment of a casual dealer.-***

(1) Every casual dealer shall be liable to pay tax on all his-
   (a) sales, within the State, of taxable goods purchased or received by him; and
   (b) purchases of taxable goods within the State, which are liable to be taxed under Section 12.

(2) A casual dealer shall furnish to the assessing authority including the officer-in-charge of any check-post or barrier referred to in Section 74, voluntarily or immediately when called upon to do so by a notice in the prescribed form, a return of estimated turnover in the form prescribed.

(3) If a casual dealer does not furnish the return as required under sub-section (2) or if the return furnished by him appears to the assessing authority or the officer-in-charge of the check-post or barrier to be incorrect or incomplete, such authority or the officer-in-charge shall, after giving the casual dealer a reasonable opportunity of being heard, assess him to the best of his judgment.

(4) The assessing authority or the officer-in-charge of the check-post or barrier shall, if he is satisfied after making such scrutiny of the accounts of the casual dealer and such enquiry as he may consider necessary that the return furnished under sub-section (2) is correct and complete, provisionally assess the amount of tax due from him on the basis of such return.

(5) The provisional and the final assessment of a casual dealer shall be made in the manner prescribed.

(6) No order under sub-section (3) or (4) shall be passed after the expiry of six months from the date the notice calling upon the casual dealer to furnish is served on him or the date on which such return is voluntarily filed."

5. Here, in this case, it is not disputed that, the dealer M/s. IDCO is a registered dealer. It is an unit of Government of Odisha, in no case the dealer can be treated as casual dealer. Drawing attention of the forum to the definition clause u/s.2(9), learned Addl. Standing

Counsel, Mr. Raman made an unsuccessful attempt to treat the present dealer as casual dealer by his argument that, since the IDCOL is not a regular trader of goods, the present deal/sale though in pursuance to the order of Hon'ble Court and Court of Company Law by taking over possession of the sick unit it should be treated as a sale as casual sale covered under the definition of "casual dealer". Bare reading of the definition clause, in no case, it covers the instant dealer as a casual dealer, for the simple reason that, the dealer is a registered dealer under the Act. The present sale is done in that capacity of a registered dealer. One cannot be a casual dealer for particular sale and a regular dealer for other kind of sale. This argument just to support and to standby, both fora below has no sanction under law, hence it can safely be held that, treating the dealer as a casual dealer for the purpose of particular Act and assessment u/s.45 of the OVAT Act in this case is not in accordance to law and illegal, hence should be annulled on this score itself.

6. The next question i.e. the order was undated, the assessment was for an unspecified period, whereas, proper opportunity of being heard was not extended to the dealer by even not giving notice of hearing. If no notice was given and no opportunity of being heard was given, then necessarily it is a case of violation of principle of natural justice.

7. Learned Addl. Standing Counsel in his witty and cunning piece of argument conceded to the argument for the learned Counsel for the dealer and urged for remand of the case for fresh disposal by extending proper opportunity of being heard to the dealer.

Per contra, learned Counsel for the dealer strenuously argued that, since this is the highest fact finding authority and the case is to be decided in presence of both the parties for the first time in the second appeal, no need to remand the matter back and the dealer is ready to not press this ground for the sake of final and complete adjudication of dispute on all points.

Argument advanced by the learned Counsel for the dealer is quite conceivable. This being the highest fact finding authority and when, the question of dispute can be taken up and decided without any further inquiry that too in presence of both the sides and particularly when the dealer's submission is, no prejudice will be caused if the appeal is taken up on merit on other questions, then it is held that, even though proper opportunity of being heard was not extended still the question is taken up in the appeal on consent of appellant for complete adjudication of the dispute in hand.

8. The assessment order as it revealed, it is an undated one. The same covers an unspecified period. On the other hand, if we look at the provision u/s.45 of the OVAT Act, sub-clause (6) of Sec.45 specifies a particular period for completion of the assessment. Here, it only can be said that, the assessment proceeding has been conducted very casually, by remaining callous to the mandate of the statute and in consequence thereof, it is bad in law.

To decide the question of fact based on law framed above, when we delve into the merit of the case in hand, it is found that, the dealer has facilitated the sale of the unit in favour of the purchaser on the strength of tripartite agreement as per the direction of the Hon'ble Court. The argument of the learned Counsel for the dealer is, there was sale of entire unit including the machines fitted to the earth.

So, it was a sale of immovable property as the entire unit was put to sale. There was no sale of machinery parts severing it from the terms of the agreement to sale clearly indicates machineries were not put to sale after dismantling or severing from the respective plant site, whereas, it was sold as it is attached to civil foundation which can be successfully conceived from the term sold on "as is where is basis" mentioned in the Clause No.1 of the agreement. The machineries attached permanently to the earth at the plant site were not separately sold the entire establishment, one unit as a whole was sold, so that the

purchaser will revitalize and run the plant again. Thus, the property under sale never can be treated as movable goods.

9. To fortify his argument, learned Counsel for the dealer draws the attention of the Tribunal to the definition of the 'goods' as per sec.2(21) of the OVAT Act, definition of sale as per sec.2(45) of the OVAT Act and definition of immovable property as per sec.2(26) of the General Clauses Act. Learned Counsel strenuously argued that, the nature and kind of sale is to be gathered from the terms of sale agreement particularly when it is not violative to any statutory provision. The agreement says, entire unit embedded to earth was put to sale and the establishment will run as it was before. There was no scope given to the purchaser to dismantle the unit in consequence to such sale. Such sale was never resulted in severing of the machinery spare parts from the plant site. The term as is where is basis is a manifest the very intention of the parties to the sale/purchase. Learned Counsel has capitalized his line of argument on the authorities like **Duncans Industries Ltd. v. State of U.P. & Others, AIR 2000 9SC) 355**, it is held that:

> "The question whether a machinery which is embedded in the earth is movable property or an immovable property, depends upon the facts and circumstances of each case. Primarily, the court will have to take into consideration the intention of the parties when it decided to embed the machinery whether such c was intended to be temporary or permanent. A careful perusal of the agreement of sale and the conveyance deed along with the attendant circumstances and taking into consideration the nature of machineries involved clearly shows that the machineries which have been embedded in the earth to constitute a fertilizer plant in the instant case, are definitely embedded permanently with a view to utilize the same as a fertilizer plant. The description of the machines as seen in the Schedule attached to the deed of conveyance also shows without any doubt that they were set up permanently in the land in question with a view to operate a fertilizer plant and the same was not embedded to dismantle and remove the same for the purpose of sale as machinery at any point of time. The facts as could be found also show that the

purpose of which these machines should be treated as movable cannot be accepted."

In the case of **Municipal Corporation of Greater Bombay & Others v. Indian Oil Corporation Ltd., 1999 (Suppl.-2) SCC 18**, it is held that:

"**33.** The petroleum products are being stored through pipes and are taken out by mechanical process. The operational mechanization also though relevant, is not conclusive. The rateable is based on the rent, which the building or land is capable to fetch. Due to erection of the tanks whether the value of the demised property had appreciated or not, is also yet another consideration. Undoubtedly, when the tanks are erected and used for commercial purposes, the value of the demised property would get appreciated. The annual letting value is capable of increase. However, the rate of increase is a question of fact but the fact remains that the value of the land gets increased by virtue of erection of the storage tanks. Considering from this perspective we have no hesitation to hold that the petroleum storage tanks are structures or things attached to the land within the definition of Sections 3(s) and 3I of the Act. Thereby they are exigible to property tax."

In the case of **Shapporji Pallonji & Co. v. Union of India, 2005 (192) E.L.T. 92 (Bom.)**, it is held that:

"Test of permanency is paramount to hold it to be immovable property – However, if affixation is for its beneficial user/enjoyment, it is not immovable property – Section 2 (f) of Central Excise Act, 1944.

In the case of **C.T.O. v. Sadulshahar Krai Vikrai Sahakari Samiti, 2004 (135) STC 90, Rajasthan**, it is held that:

"45. The argument of the learned counsel for the Revenue is not convincing. "Sale" as defined in section 2(38) of the Rajasthan Sales Tax Act means sale of "goods" defined in section 2(20) of the Act. By creating a fictional definition of plant and machinery imbedded to earth makes the whole factory. The whole factory having been given on lease, for taxing purposes, it is sought to be fragmented. Thus, sought to be subjected to taxation as goods. This cannot be treated to be proper exercise of jurisdiction by the taxation as goods. This cannot be treated to be proper exercise of jurisdiction by the taxation authorities. Thus,

following the law laid down in Duncans Industries Ltd. AIR 2000 SC 355; (1999) 9 JT 421; (2000) 1 SCC 633, I am of the definite opinion that if the Tax Board has come to the conclusion that plant and machinery has to be treated as immovable property, no different view can be taken while exercising revisional jurisdiction. That being the position, the revision petitions are meritless and hence, dismissed."

10. The ratio in the case of **CST v. Prahlad Industries (1992) 112 STC 548 (All.)** is squarely application to the case in hand. In the reported case the respondent leased its factory premises along with plant and machinery. On the question whether or not the lease rental was taxable, the High Court held that the plant and machinery were attached to the earth and were immovable property and, therefore, were not goods within the meaning of the Act. There was no agreement between the parties that the lessee shall be entitled to sever the goods fastened to the earth. The subject matter of the lease was the woolen factory and the same was leased out as a unit and not as an individual piece of plant and machinery. Therefore, there was no transfer of right to use goods.

11. Giving regard to the authoritative pronouncements of the Hon'ble Court and Apex Court discussed above and the definition of "immovable property" as per General Clause Act in one hand with the definition of "goods" as per OVAT Act in other, here the irresistible conclusion is, the plant and machineries as a fixed attachment to the earth when sold as one unit without severing the machineries from earth, without any specific price of each machinery, on such sale but at a price of entire unit as a whole, the sale transaction is nothing but a sale of immovable property which does not cover under the definition of "goods" on which Value Added Tax is leviable under law. Therefore, it is held that, the confirming order of first appellate authority under challenge in this appeal is interceptable both in law and fact. It cannot withstand and in the result it is hereby reversed. Accordingly, it is ordered.

12. The appeal is allowed on contest. The impugned order is set aside.

Dictated & corrected by me,

Sd/-
(Subrata Mohanty)
1st Judicial Member

Sd/-
(Subrata Mohanty)
1st Judicial Member

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

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