BEFORE THE DIVISION BENCH-I : ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 907 of 1996-97

(Arising out of order of the learned ACST, Ganjam Range, Berhampur, in Sales Tax Appeal Case No. AA- 1006/1993-94, disposed of on dt. 24.06.1995)

Present : **Smt. Suchismita Misra**, **Chairman**
&
Shri Prabhat Ch. Pathy, Accounts Member-I

M/s. Madras Cement Ltd.,
(Now- M/s. Ramco Cement Ltd.)
Goods Shed Road, Berhampur,
Dist. Ganjam. . . . Appellant

- V e r s u s –

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

For the Appellant … Mr. J.B. Sahu, Sr. Advocate &
Ms. Kajal Sahu, Advocate
For the Respondent … Mr. M.S. Raman, Addl. S.C. (CT)

Date of hearing: 16.12.2019 **** Date of order: 23.12.2019

O R D E R

This appeal is directed against the order dated 24.06.1995 passed by the Asst. Commissioner of Sales Tax, Ganjam Range, Berhampur (in short, "first appellate authority") in Sales Tax Appeal Case No. AA- 1006/1993-94 confirming the assessment done by the Sales Tax Officer, Ward-A, Ganjam-I Circle, Berhampur (in short,

'assessing officer') u/S. 12(4) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act') in respect of the dealer-assessee for the tax period 1992-93.

2. The facts as revealed from the case record are as follows :

The dealer-assessee M/s. Madras Cement Ltd. now known as "Ramco Cement Ltd." is a registered Company of Tamil Nadu and it has a sale depot at Goods-Shed Road, Berhampur in the State of Odisha. It carries on the business of cement by manufacturing the same in the State of Andhra Pradesh. It started its business in Berhampur after registration under the OST Act on 02.04.1992. Pursuant to a notice issued u/S. 12(4) of the OST Act the authorized officer of the dealer-Company produced the books of account before the assessing officer which were examined by the latter with reference to the returns furnished by the dealer as well as with reference to the Fraud Case Report (FCR) received against it. As revealed from the record, in course of inspection of its business premises, the field officer had found shortage of 946 bags of cement after comparing its physical stock with the stock reflected in its account. In course of assessment proceeding the dealer could explain the shortage in respect of 760 bags of cement only for which the assessing officer concluded that there was a suppression of sale so far as the remaining 186 bags of cement worth `60,740.00 is concerned and thus estimated the annual suppression by

the dealer on that count to the tune of `2,00,880.00. Accordingly he (the assessing officer) rejected the books of account of the dealer and completed the assessment to the best of his judgment by adding `2,00,880.00 to the gross turnover of the dealer. Then after allowing deductions towards exempted sales to SSI Unit on the strength of ID declaration and towards sales tax collected (STC), he (the assessing officer) determined the taxable turnover of the dealer at `2,86,44,285.52. He made necessary break up for the purpose of levy of tax at appropriate rate and determined the tax to be paid by the dealer at `34,22,457.11. At that point the assessing officer took notice of the fact regarding issuance of credit notes by the dealer on sales on account of price difference and off take incentives as well as the credit notes on tax which were treated as discount allowed by the dealer. The dealer had disclosed the annual gross turnover at `3,19,53,664.43 against the sales of `3,27,66,789.75 and the difference between the two figures amounting to `8,33,125.32 was explained by the dealer before the assessing officer as issuance of credit notes which were treated as discount allowance by the dealer-Company. The assessing officer, however, concluded that the dealer was not entitled to get remission

from its liability in respect of the tax collected by it amounting to `65,873.24 as that was collected towards discount sales by the dealer in course of its transactions and was withheld by it (the dealer) in view of its reduction in sales turnover by grant of credit notes on sales. The aforesaid amount i.e. a sum of `65,873.24 being collected by the dealer towards tax from the purchasers was added towards its tax liability on account of its not being authorized to hold the same without depositing in the State exchequer. Further the dealer could not have also granted refund of the said amount since it (the dealer) was not authorized to do so under the provision of the Act excepting in the cases falling u/R. 4-A of the OST Rules. In this regard the assessing officer followed the decision of Hon'ble Court rendered in the case of M/s. Tangudu Gopalam & Sons Vs. State of Orissa, reported in [1993] 90 STC 481. He thus held that the total tax due of the dealer came to `34,88,330.00. After adding surcharge @ 10% on tax due he sent a demand notice to the dealer requiring it to pay a sum of `1,00,876.00 as the dealer had already paid `37,36,287.00 u/R. 36 of the OST Rules towards its tax dues for that tax period.

Being aggrieved by this order the dealer preferred an appeal against the same before the first appellate authority. However,

the first appellate authority confirmed the order of assessment for which the dealer had carried an appeal before this Tribunal on the grounds that the order passed by the first appellate authority was bad in law since he (the first appellate authority) misinterpreted the returns filed by the dealer and drew an adverse inference to the effect that the dealer had paid less tax although it collected the same from its purchasers. The dealer had allowed discounts to its purchasers by way of credit notes which represented cash discount, off take incentives, price difference and return of goods. All these forms of discounts are allowed for deduction from the gross turnover while determining the taxable turnover of the dealer. In the instant case the dealer had produced all the evidence regarding issue of credit notes towards its aforesaid discount sales but the first appellate authority did not consider its claim and further did not accept the dealer's explanation regarding shortage of 186 bags of cement in its physical stock position as a mistake in counting of the cement bags.

The Tribunal considering all the above points as raised by the dealer-Company confirmed the findings of the first appellate authority in respect of shortage of 186 bags of cement found in its actual stock position and also shortages found in transit at rail head equivalent to 160 bags of cement which resulted in enhancement of the gross turnover of the dealer. So far as issuance of credit notes by the

dealer is concerned it was held by this Tribunal that there was no justification for a registered dealer to withhold payment of sales tax which it collected on behalf of the State. In the result the dealer's appeal before the Tribunal was also dismissed confirming the order of the first appellate authority.

3. The dealer-Company then filed a revision petition before the Hon'ble High Court of Orissa i.e. STREV No. 147 of 2004 challenging the aforesaid order dated 24.04.2004 passed in S.A. No. 907 of 1996-97 for the assessment year 1992-93 which was disposed of by the Hon'ble Court along with STREV No. 148 of 2004 filed by this dealer-Company challenging the order dated 24.04.2004 passed in S.A. No. 2489 of 1996-97 for the assessment year 1993-94 bearing the similar issue involved therein by a common order in the aforesaid STREVs which is quoted here :

Quote : "3. By way of these revisions, the assessee-petitioners have challenged the order dated 24.04.2004 passed by the Orissa Sales Tax Tribunal in S.A. No. 2489 of 1996-97 for the year 1993-94 [in STREV No. 148 of 2004] and order dated 24.04.2004 in S.A. No. 907 of 1996-97 of the year 1992-93 [in STREV No. 147 of 2004].

4. This Court, while admitting STREV No. 148 of 2004, has taken into consideration the following questions of law framed by the assessee :

"(a) Whether in the facts and circumstances of the case, the disallowance of claim of deduction towards discount by the petitioner by way of credit note is just and proper ?

(b) Whether in the facts and circumstances of the case, the Tribunal in absence of any material is justified in law to hold that the Sales Tax realized is withheld by the petitioner to disallow the claim of deduction towards discount allowed by issuance of credit notes ?

(c) Whether in the facts and circumstances of the case, the Tribunal is justified to sustain the findings of the first appellate authority and whether the decisions referred to by the Tribunal are applicable to justify its conclusion for disallowance of the claim of the petitioner ?" Unquote.

On these points Hon'ble Courts were pleased to observe that the issue is covered but evidence is required to be reappreciated by the Tribunal. Therefore, in view of the decision of the Hon'ble Supreme Court in the case of M/s. Maya Appliances (P) Ltd. now known as Preethi Kitchen Appliances Pvt. Ltd. Vs. Additional Commissioner of Commercial Taxes and Co. (Civil Appeal Nos. 357-367 of 2018 disposed of on 06.02.2018) the orders passed by the Tribunal was quashed and set aside. The matter was thus remitted back to the Tribunal for hearing afresh.

4. In view of the aforesaid order of Hon'ble Courts this second appeal was heard afresh. In course of hearing learned Counsel for the dealer raised only a single issue pertaining to the credit notes issued by

the dealer to take care of the fluctuating price of cement as an off take incentive. It is submitted by the learned Counsel that the forums below though allowed such incentive given on the basic price of the cement which is a first point tax paid goods to be deducted from the gross turnover and taxable turnover of the dealer, however, denied it (the dealer) to get such deduction in respect of the tax collected by it thereon from its purchasers by rejecting the assertion of the dealer that it had also refunded the tax so collected to its buyers in shape of the credit notes. It was submitted on behalf of the dealer that the assessing officer after scrutinizing all the connected documents and evidence produced before him became very clear that the discrepancy noticed in its annual gross turnover at `3,19,53,664.43 against the gross sales of `3,27,86,789.75 i.e. a difference of `8,33,125.32 was due to dealer's issuance of credit notes on sales as well as on tax on account of discount allowed by the dealer due to price difference, as off take incentives as well as cash discount and cancellation of an invoice. Then on close scrutiny of the claims advanced by the dealer the assessing officer held that the sale invoice being cancelled by the dealer within a month refund of tax due alongwith the sale proceeds were to be deducted from the gross sales turnover of the dealer u/R. 4-A of the OST Rules. Similarly the cash discount allowed by the dealer as ordinary

trade practice was also allowed to be deducted from the sales turnover of the dealer. But so far as credit notes issued towards "price difference" and "off take incentives" the assessing officer expressed his reservation in dealer's reducing the sales turnover assigning his (the assessing officer) reasons that the sale invoices were raised by the dealer as and when the sales took place without showing any discount therein allowed by it. At a later time credit notes were issued in favour of its stockist/distributors who had already lifted stocks beyond certain limit which were called as sales incentives for promotion of sales and also towards stabilization of price of "Ramco brand cement" (product of the Company) in the market compared with the other brands of cement. Both these cases mean cash awards to the stockists/distributors because the account of the dealer when debited, the account of the purchaser-cum-stockists/distributors is credited. By this process the dealer reduced the sales turnover and simultaneously reduced the tax which it had already collected on invoices raised thereon but withheld the same without making payment to the State exchequer. Learned Counsel on behalf of the dealer-Company, therefore, contended that such presumption on the part of the assessing officer was not only incorrect but also illegal because he (the assessing officer) himself after verifying the documents of the dealer

came to a conclusion that cash awards given in the shape of credit notes were credited to the accounts of the stockists/distributors.

5. Learned Counsel for the dealer further submitted that in the instant case the Hon'ble Courts have been pleased to observe that the issue raised by the dealer pertaining to disallowance of claim of deduction towards discount given by the dealer in shape of credit notes is just and proper by opining further that this case is covered by the decision of the Hon'ble Apex Court rendered in the case of M/s. Maya Appliances (P) Ltd. now known as Preethi Kitchen Appliances Pvt. Ltd. Vs. Additional Commissioner of Commercial Taxes and Co. (supra). Learned Counsel then pointed out that in the instant case the assessing officer had already allowed deduction of the amount reflected in the credit notes on sales wherein discounts on account of price difference and off take incentives were given. There is absolutely no bar in the statute as to why the tax already refunded to the purchasers, stockists and distributors by a dealer in course of their business transactions should not be deducted from the gross turnover as well as taxable turnover. Learned Counsel for the dealer cited a decision of the Hon'ble Apex Court rendered in the case of Southern Motors Vs. State of Karnataka and others (Civil Appeal Nos. 10972-10978 of 2016 decided on 18.01.2017) and the decision rendered in the case of M/s. Maya Appliances (P) Ltd. (supra). He also cited the decision rendered in the

case of State of Orissa Vs. M/s. Hindustan Agency (S.J.C. No. 86 of 1975 decided on 26.04.1976) and order of the Hon'ble Court passed in W.P. (C) No. 1566 of 2006 and W.P. (C) No. 1567 of 2006 on 14.08.2019 and an order passed by this Tribunal in S.A. No. 732 of 1997-98 decided on 04.03.2004 between the same parties relating to the assessment period 1994-95 involving similar issue in support of its contention and to fortify his argument that there is actually no necessity for the dealer to mention the amount of discount to be given on its sales bills or invoices because depending on certain eventualities credit and debit notes are issued and as a consequence of this fluctuation the tax liability is either reduced or enhanced accordingly which is determined on the basis of the declaration made by the assessee in its returns. In the instant case the assessing officer had verified the books of account alongwith the returns submitted by it. He could exactly find out the difference of `8,33,125.32 which the dealer could explain in clear terms by producing credit notes for his (assessing officer) verification. There is absolutely no reason for the assessing officer who had allowed the credit notes amounting to `5,48,943.75 on account of discount given towards price difference and off take incentives to reject the credit notes on tax amounting to `65,873.24 when the dealer had consistently submitted that it also refunded this amount of tax to its

purchasers (stockists/distributors) during the tax period. Therefore, without verifying the genuineness of this submission of the dealer the assessing officer should not have added this amount in its turnover for levy of tax. The assessing officer denied such allowance in respect of credit notes pertaining to tax on the ground that the same was payable by it and it could neither withhold the admitted tax collected from the purchasers nor grant refund of the same on account of its not being authorized to do so under the provision of the Act excepting in the cases falling under Rule 4-A of the OST Rules. This conclusion on the part of the assessing officer appears to be too fallacious because at the same time he simply lost sight of the fact that the statute does not bar a dealer to issue credit note on tax in course of general trade practice when it gives discounts to the purchasers. Therefore, in the present case the dealer deserves to get the benefit of deduction in respect of the credit notes issued on tax amount as well while issuing credit notes as an off take incentives and also on account of price difference in the goods.

6. Learned Addl. Standing Counsel (CT) appearing on behalf of the State in reply to the aforesaid submissions of learned Counsel for the dealer submitted that as understood by now the dealer-appellant has confined its grievance to a limited issue i.e. disallowance of ‘off take incentives’ and further it construed the said ‘off take incentives’ as trade

discount. Thus relying on the decisions rendered in the cases of M/s. Maya Appliances (P) Ltd. (supra), M/s. Southern Motors (supra) etc. it (the dealer) seeks consideration of its claim for deduction. However, this Tribunal must appreciate that 'off take incentives' could not be an allowable deduction from the turnover in view of the statutory difference contained in the OST Act where "sale price" has been defined in Sec. 2(h) in the following manner :

Quote : "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." Unquote.

Therefore, the statute only provides allowance of cash discount and not any other sort of trade discount. Since 'cash discount' and 'trade discount' are different concepts as propounded by the Hon'ble Supreme Court the dealer cannot claim 'quantity discount' which is given to the buyer after completion of sale transaction as allowable deduction from its turnover. Learned Addl. Standing Counsel (CT) for the State also quoted a number of decisions rendered in the cases of Deputy Commissioner of Commercial Taxes Vs. MRF Limited, reported in [2008] 14 VST 126 (WBTT); Orient Paper Mills Ltd. Vs. State of Orissa, reported in [1975] 35 STC 84 (Ori.); Deputy

Commissioner of Sales Tax Vs. Advani Oerlikom Pvt. Ltd., reported in [1980] 45 STC 32 (SC); Cape Brandi Syndicate Vs. Inland Revenue Commissioner, reported in [1921] 1 KB 64, Canadian Eagle Oil Co. Vs. R, [1946] SC 119; Commissioner of Income Tax Vs. Ajax Products Ltd., reported in AIR 1965 SC 1358; Commissioner of Income Tax Vs. Kharwar, reported in AIR 1969 SC 812; Calcutta Jute Manufacturing Co. Vs. CTO, reported in [1997] 106 STC 433 (SC); Assessing Authority-cum- Excise and Taxation Officer Vs. East India Cotton Manufacturing Co. Ltd., reported in [1981] 48 STC 239 (SC); Commissioner of Trade Tax Vs. Ankit Traders, reported in [2008] 18 VST 149 (All.) and many others as mentioned in his written note of submission to apprise this Bench that Sec. 2(h) of the OST Act mentions about cash discount only and not special cash discount or quantity discount. Therefore, as propounded by the Hon'ble Supreme Court the dealer cannot claim 'quantity discount' which is given to the buyers after completion of sale transaction as allowable deduction from its turnover. As held by the Hon'ble Supreme Court cash discount should not be confused with trade discount as these two concepts are wholly distinct and separate. Therefore, when the statute only provides allowance of cash discount and not any other sort of trade discount the dealer cannot claim the aforesaid discounts besides the cash discount taking cue from the decision rendered in the case of Maya Appliances.

7. Learned Addl. Standing Counsel (CT) for the State also submitted that taxable event in respect of levy of sales tax under the OST Act is transfer of property in goods. Definition of 'sale price' in Sec. 2(h) contemplates consideration. Transfer of property in goods occurs at the point when delivery is effected to the buyer and the price agreed upon between the purchaser and the seller in exchange of the goods. In the present case, the consideration has been agreed to by the buyer(s) at the time of taking delivery/issue of invoice. At the very juncture whatever discount being allowed by the selling dealer-appellant, is entitled for deduction u/S. 2(h). Nothing which is not made known to the purchasers at the time of removal of goods qualifies for entitlement under the said clause. The tax being deducted on the consideration at the time of removal of goods by the purchasers and burden is shifted to the consumers/customers, the 'off take incentives' which is claimed to have arisen in future may not be allowed as deduction from the turnover. If the same is done then it would tantamount to unjust enrichment in the hands of the appellant-Company which is not permissible in law. He further urged before the Bench that since the Hon'ble Court in STREV No. 147 & 148 of 2004 have been pleased to observe clearly that evidence is required to be reappreciated by the Tribunal, the dealer-assessee is now required to furnish evidence of incentive given with reference to each transaction made by it vis-à-vis

the books of account since allowance of deduction for off take incentive after sale being effected and concluded i.e. after taxable event occurred might have provided occasion to the dealer to retain sales tax which it had collected from the buyers.

8. After hearing the argument and counter argument advanced on behalf of the dealer and the State respectively and on a thorough scrutiny of the orders passed by the assessing officer, first appellate authority alongwith the decisions cited by the learned Counsel for both the parties it is felt that in the instant case the State has no reason to agitate that the deductions allowed in favour of the dealer towards discounts offered by it in the shape of credit notes on account of price difference and off take incentives were not proper because the State has not preferred appeal against the order of first appellate authority who had confirmed the order of assessment in this case. Now the State's objection asserting that those (the off take incentives, price difference etc.) were not allowable deductions in view of Sec. 2(h) of the OST Act seems to be redundant because in their cross-objection the Revenue has admitted that the order of the first appellate authority is justified and legal and further the confirming order of the first appellate authority be treated as their cross-objection. This itself limits their (State's) objection to the extent of credit notes given only on tax

qualifying the discounts given by the dealer on account of "price difference and off take incentives".

9. Apart from the above from the xerox copies of the documents filed by the dealer-assessee it could be gathered that as per Company's policy cash discount, rail head discount, off take discount in respect of some districts were approved for the year 1992-93 in favour of the dealers of Odisha. In such circumstances the actual sale price received by the dealer has to be determined on consideration of the credit notes issued by it on sales wherein discount was given as difference in price and off take incentives and further also on tax after correlating the relevant transactions with the credit notes in which discounts were given because taxable turnover of the dealer can be arrived at by subtracting the deduction allowed under law from the total turnover. In this regard following the ratio of the decisions of the Hon'ble Apex Court rendered in the cases of Maya Appliances (P) Ltd. and Southern Motors (supra) and the facts and circumstances involved in this case we feel that when the assessing officer in the instant case had allowed the deductions accepting the credit notes on sales in respect of the amounts given as discount on account of price difference and off take incentives from the gross turnover and taxable turnover of the dealer he should have at least enquired into as to what happened with the credit notes on tax related to the aforesaid accounts and then

should have come to a definite conclusion that the dealer had actually withheld the tax already collected by it in respect of the transactions wherein it allowed the aforesaid discount. It is the duty of the assessing officer to find out the taxable turnover of a dealer appropriately. He cannot act upon a presumption that the dealer must have withheld the tax it had collected from its purchasers. The assessing officer is nowhere authorized to levy tax by adding some amount to the sale turnover of a dealer with a flimsy explanation like the dealer can neither refund nor return the tax collected because he is not authorized to do so except in cases falling under Rule 4-A of the OST Rules. It is his duty to find out as to what was the actual taxable turnover of the dealer during that relevant period.

10. Considering all these circumstances it is felt that this is a fit case to be remanded to the assessing officer to give his finding specifically as to whether the dealer had withheld the tax collected by it in respect of the sale transactions in which it (the dealer) subsequently allowed discount on account of price difference and off take incentives, of course, only on verification of the documents to be produced by the dealer before him justifying its assertion that it had refunded the tax so collected to the dealers concerned. The assessing officer is instructed to complete such reassessment within a period of four months from the date of receipt of this order.

11. In the result the appeal is allowed. The order passed by the first appellate authority is hereby set aside. The matter is remitted to the assessing officer for reassessment as per the observations made by this Bench above in accordance with the provisions of law. Cross-objection is disposed of accordingly.

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

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