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

S.A. No. 2489 of 1996-97

(Arising out of order of the learned ACST, Ganjam Range, Berhampur, in Sales Tax Appeal No. AA- 406/1995-96, disposed of on dt. 26.07.1996)

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 26.07.1996 passed by the Asst. Commissioner of Sales Tax, Ganjam Range, Berhampur (in short, "first appellate authority") in Sales Tax Appeal No. AA. 406/1995-96 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 1993-94.

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. Pursuant to a notice issued u/S. 12(4) of the OST Act the authorized officer of the dealer-Company alongwith their Counsel appeared before the assessing officer and produced the books of account of their business establishment pertaining to the year 1993-94 before him. The assessing officer examined the books of account alongwith the return filed by the dealer-assessee for that relevant period. The assessing officer came across certain discrepancies in the transactions held by the dealer-assessee during that relevant period and as such the dealer was found to have paid less tax on the plea that the corresponding sale price of `20,29,585.00 was covered by the credit notes issued to the dealers of this brand of cement. However, the assessing officer disallowed the claim of the dealer and raised a tax demand. The assessing officer had also disallowed the claim advanced by the dealer on export sales and limited the excess claim of deduction towards credit sales. As a result of this the dealer-assessee was found liable to pay tax of `69,96,817.86

towards its tax dues. Surcharge payable on the tax dues @ 10% came to `6,99,681.78. In that way the total tax and surcharge payable by the dealer for the year under assessment was calculated at `76,97,499.64. Since the dealer had already paid `74,08,992.00 (inclusive of surcharge) u/R. 36 of the OST Rules the assessing officer issued a demand notice requiring it to pay the balance amount of `2,88,508.00 for that relevant period.

Being aggrieved by this order of assessment the dealer-assessee preferred an appeal before the first appellate authority contending that the assessing officer did not allow certain deductions in favour of the dealer-assessee which was wrong as per law. The first appellate authority on examining the grounds of appeal as well as the order of assessment and other connected documents held that though it was revealed from the record that the dealer had allowed deduction to the purchasers towards adjustment of credit notes worth `20,29,584.57 during that relevant period as per ordinary trade practice yet he was not entitled to have that benefit of deduction because Sec. 2(h) of the OST Act provides only cash discount which is to be deducted from the sales turnover of the dealer and not any other sort of discount as happened in the present case i.e. concession to the customers which

were allowed by the dealer in the shape of credit notes with a view to promote sales. Therefore, the first appellate authority confirmed the finding of the assessing officer in this regard. Similarly the first appellate authority also confirmed the finding of the assessing officer disallowing deduction of `3,44,709.50, claimed by the dealer due to some export sales effected by it during the relevant period, because from the records he could notice that the goods were actually sold by the dealer inside the State of Odisha. Ultimately, he confirmed the entire order of assessment passed by the assessing officer.

3. The dealer then preferred an appeal before this Tribunal on the ground that the orders passed by the assessing officer as well as by the first appellate authority were wrong both on facts and law. The dealer also contended that the credit notes which represented cash discount and off take incentives for purchase of the goods should have been deducted from its gross turnover and then ultimately it confined its dispute before the Tribunal pertaining to disallowance of deduction in its favour on account of its aforesaid trade discount.

4. This Tribunal considering all the above stated contentions as raised by the dealer-Company confirmed the findings of the first appellate authority while quoting a portion of the impugned order and observing that there is no evidence on record regarding return of goods as contended in the grounds of appeal and further the position of credit

notes cannot be equated with that of cash discount which is given at the time of purchase on the purchase bill itself.

For better appreciation of the facts and circumstances the aforesaid relevant portion of the impugned order is also quoted here.

Quote : "On perusal of the Section 2(h) of the OST Act it is revealed that cash discount can only be allowed to the customers at the time of effecting sales. Hence the deduction claimed by the appellant is not at all admissible. I have carefully gone through the decisions cited by the Learned Advocate but that decisions were not identical in the case of the appellant. Further in view of the decision of Hon'ble Supreme Court of India in the case of Bharat Steel Ltd Vrs. State of Haryana (1988) 70-STC-122 it has been held by the Hon'ble Court that the dealer who collected sales tax on behalf of State there is no justification for him to withhold payment of tax so collected. The same view has also been taken by our own High Court in the case of Tangudu Gopalam & Sons Vrs. State of Orissa 90-STC-481. Hence the credit note allowed by the appellant cannot be allowed and the LAO rightly disallowed the same." Unquote.

5. The dealer-Company then filed a revision petition before the Hon'ble High Court of Orissa i.e. STREV No. 148 of 2004 challenging the aforesaid order of the Tribunal dated 24.04.2004 passed in S.A. No. 2489 of 1996-97 for the assessment year 1993-94 which was disposed of by the Hon'ble Court alongwith STREV No. 147 of 2004 filed by this dealer-Company challenging the order dated 24.04.2004 passed in S.A.

No. 907 of 1996-97 for the assessment year 1992-93 bearing 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.

6. 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 appeared on behalf of the dealer that the forums below did not allow deduction in respect of such incentive given to the purchasers, distributors and stockists of the dealer-assessee though as per the settled position of law 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) and in the case of M/s. Southern Motors Vs. State of Karnataka and others (Civil Appeal Nos. 10972-10978 of 2016 decided on 18.01.2017), taxable turnover of a dealer can only be arrived at after making permissible deductions from the total turnover and further this permissible deductions include all amounts allowed as discounts in

accordance with the regular trade practice of the dealer or the contract or agreement entered into a particular case. Learned Counsel of the dealer-assessee also cited another 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) besides the above decisions in support of his contention. He submitted that depending upon certain eventualities credit and debit notes are usually issued and as a consequence thereof the tax liability is either reduced or enhanced accordingly which is determined reasonably on the basis of declaration made by the assessee in its return.

7. 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 case 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 Oerlikon 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 Indian 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.

8. 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 Nos. 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-a-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.

9. 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 after the settled position of law regarding the concept of trade discount and how deductions pertaining to such discounts should be allowed in favour of the dealers [as decided in the case of Maya Appliances (P) Ltd. (supra) and Southern Motors (supra)] the argument advanced on behalf of the State that those off take incentives and price difference cannot be considered as just and proper for affording certain allowable deductions in favour of the dealer is a justified or correct proposition.

In this regard we think it would be appropriate to quote certain portions of the judgments of the Hon'ble Apex Court rendered in the case of Maya Appliances (P) Ltd. as well as Southern Motors for better appreciation of the facts involved in the present case. It is clearly held in the case of Maya Appliances that –

Quote : "12. The liability to pay tax is on the taxable turnover. Taxable turnover is arrived at after making permissible deductions from the total turnover. Among them are "all amounts allowed as discounts". Such a discount must, however, be in accord with the regular trade practice of the dealer or the contract or agreement entered into a particular case. The expression "the tax invoice or bill of sale issued in respect of the sales relating to such discount shows the amount allowed as such discount" is not happily worded. The words "in respect of the sales relating to such discount" cannot be construed to mean that the discount would be inadmissible

as a deduction unless the tax invoice pertaining to the goods originally issued shows the discount. This is a matter of ascertainment. The assessee must establish from its accounts that the discount relates specifically to the sales with reference to which it is allowed. In the first part of the proviso, Rule 3(2)(c) recognizes trade practice or, as the case may be, the contact or agreement of the dealer. The latter part which provides a methodology for ascertainment does not override the earlier part. Both must be construed together. Above all, it must be remembered that taxable turnover is turnover net of deductions. All trade discounts are allowable as permissible deductions." Unquote.

It is also held by the Hon'ble Apex Court in the case of M/s. Southern Motors (supra) as follows :

Quote : "40. On an overall review of the scheme of the Act and the Rules and the underlying objectives in particular of Sections 29 and 30 of the Act and Rule 3 of the Rules, we are of the considered opinion that the requirement of reference of the discount in the tax invoice or bill of sale to qualify it for deduction has to be construed in relation to the transaction resulting in the final sale/purchase price and not limited to the original sale sans the trade discount. However, the transactions allowing discount have to be proved on the basis of contemporaneous records and the final sale price after deducting the trade discount must mandatorily be reflected in the accounts as stipulated under Rule 3(2)(e) of the Rules. The sale/purchase price has to be adjudged on a combined consideration of the tax invoice or bill of sale as the case may

> be along with the accounts reflecting the trade discount and the actual price paid. The first proviso has thus to be so read down, as above, to be in consonance with the true intendment of the legislature and to achieve as well the avowed objective of correct determination of the taxable turnover. The contrary interpretation accorded by the High Court being in defiance of logic and the established axioms of interpretation of statutes is thus unacceptable and is negated." Unquote.

10. Therefore, following the ratio of the decisions of the Hon'ble Apex Court rendered in the cases of M/s. Maya Appliances (P) Ltd. and M/s. Southern Motors (supra) and the facts and circumstances involved in the instant case we feel that the order of assessment as well as the order of the first appellate authority confirming the said order of assessment are not correct. They were supposed to have allowed 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 for the relevant period because it is the duty of the assessing officer to find out the taxable turnover of the dealer correctly. Therefore, we set aside the order passed by the first appellate authority in the instant case and remand the case to the assessing officer to make fresh assessment taking into account the transactions made by the dealer wherein it allowed discount by examining relevant documents pertaining to those transactions with credit notes issued by the dealer for that relevant

period. The assessing officer is instructed to complete the reassessment within four months from the date of receipt of this order following the observations of this Tribunal as aforesaid. He must allow the deduction in favour of the dealer if it is found that the dealer had actually issued credit notes to the purchasers which were relatable to those relevant transactions.

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

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

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