BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 279 (VAT) of 2018

(Arising out of order of the learned JCST (Appeal), Territorial Range, Cuttack-II, Cuttack, in First Appeal Case No. AA /04/OVAT/CUII/18-19 disposed of on 18.09.2018)

Present: Shri R.K. Pattanaik,
Chairman

M/s. Mahavir Associates,
Plot No. 79, Phase-III,NIE,
Jagatpur, Cuttack ... Appellant

-Versus-

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

For the Appellant : Sri M.V.S.R. Pantulu & Sri D.K. Hazra, Advocates
For the Respondent : Sri D. Behura, Standing Counsel (CT)

Date of hearing: 19.01.2021 ***** Date of order: 04.02.2021

O R D E R

Instant appeal is under Section 78(1) of the Odisha Value Added Tax Act, 2004 (hereinafter referred to as 'the Act') is at the behest of the dealer assessee directed against impugned order dated 18.09.2018 promulgated in Appeal Case No. AA/04/OVAT/CUII/18-19 by the learned Joint Commissioner of Sales Tax (Appeal), Territorial Range, Cuttack-II, Cuttack (in short, 'FAA'), who confirmed the order of assessment dated 01.05.2018 passed under Section 43 of the Act by the learned Sales Tax Officer, Cuttack-II Circle, Cuttack (hence called, 'AA') with a direction to consider levy of penalty on the tax additionally assessed in

view of Section 43(2) of the Act on the grounds inter alia that it is bad in law and thus, liable to be set aside.

2. The dealer assessee is engaged in manufacturing of fly ash bricks by utilizing sand, cement and other raw materials. For the said purpose, the dealer assessee effects purchase of goods from within and outside the State and sale within the State of Odisha only. In fact, a Tax Evasion Report dated 26.09.2017 was received vis-a-vis the dealer assessee with an observation that it has to pay purchase tax to the tune of ₹3,57,327.00 on ₹71,46,540.00 as per Section 12 of the Act. Later to the above, the AA issued notice in Form VAT-307 to the dealer assessee. In response, the dealer assessee entered appearance and finally, the assessment was held. The AA resultantly raised additional demand of ₹3,57,327.00 @ 5% on ₹71,46,540.00. The said order of assessment dated 01.05.2018 was challenged before the FAA who not only confirmed the additional demand, but also directed the AA to consider imposition of penalty on the tax assessed and to record reasons therefor. The dealer assessee being aggrieved of the impugned order dated 18.09.2018, preferred the present appeal on multiple grounds, such as, assessment under Section 43 as untenable since no assessment under Section 39 of the Act had been completed and a glaring defect in the notice issued vide Form VAT-307 in respect thereof and that the purchase tax had been paid while lifting sand on payment of royalty and non-refund of ITC to the tune of ₹2,42,229.00 as per Section 20 of the Act. The contention of the dealer assessee is to be examined

by the Tribunal in order to consider the validity of the impugned order dated 18.09.2018.

3. State by way of cross-objection justified the decision of the FAA as to confirmation vis-a-vis levy of purchase tax directed on account of assessment carried out in terms of Section 43 of the Act. According to the State, such assessment under Section 43 of the Act cannot be challenged on the ground that there was no assessment under Section 39 and that, the sand purchased since used in manufacture of fly ash bricks which is an exempted goods, no purchase tax would be leviable under Section 12 of the Act. In fact, according to the State, after completion of assessment under Section 39 of the Act and later to the receipt of the Tax Evasion Report, action under Section 43 was initiated and as such, there is no illegality committed by the authorities below. It is alleged that the dealer assessee admitted about procurement of sand of ₹71,46,540.00 from unregistered sources without payment of tax which was detected and later on taxed by the authorities below. In so far as non-levy of duty on sand for the finished product being exempted goods, as per the State, it is not at all sustainable in view of the fact that such levy of tax is permitted under Section 12(b) of the Act. More or less, the State defended the assessment and additional demand raised by the AA and later confirmed by the FAA including the direction in appeal to consider imposition of penalty.

4. The defect in the notice issued in Form VAT-307 was considered by the FAA. It was admitted that there was no date of assessment

under Section 39 of the Act mentioned in the notice which was by inadvertence, as according to the FAA. As a matter of fact, the FAA examined the assessment record and learnt that assessment under Section 39 of the Act for the tax period from 01.04.2013 to 31.03.2017 had been completed on 02.11.2027 which was before reassessment being commenced. According to the FAA, inadvertently, the date of assessment was not mentioned in the notice. Since there was self- assessment under Section 39 of the Act which was revealed on examination of the assessment record, it can, therefore, be said that the action under Section 43 to be valid. A defect in notice issued by the AA cannot be a ground to invalidate the reassessment under Section 43 of the Act. Moreover, there has been assessment under Section 39 of the Act, the fact which was duly ascertained upon verification of the assessment record. In such view of the matter, the first limb of argument advanced by the learned Counsel for the dealer assessee as to the defect in the notice and absence of evidence vis-a-vis assessment under Section 39 of the Act and hence, for that matter, reassessment under Section 43 of the Act to be invalid must have to fail.

5. Regarding levy of purchase tax, an attempt has been made by the learned Counsel for the dealer assessee to show that it is not leviable as because the finished product which is fly ash brick is an exempted goods as per Entry 39A of the Schedule A of the Act. The learned Standing Counsel for the State contended that notwithstanding the production relates to exempted goods, the dealer assessee is liable to pay duty on purchase of sand in view of Section 12(b) of

the Act. On a bare perusal and reading of Section 12 of the Act, it would suggest that every dealer in course of business, if purchases or receives any taxable goods within the State (i) from a registered dealer, in the circumstances in which no tax under Section 11 is payable on such goods; or (ii) from any person other than registered dealer shall be liable to pay tax on the purchase price or prevailing market price of such goods, in case it is not sold within the State or in course of inter-State trade or commerce or export, but are (a) disposed of otherwise; or (b) consumed or used in the manufacture of goods declared to be exempt from tax under the Act; or (c) the manufactured goods after such consumption in the manufacture are disposed of otherwise than by way of sale in the State or in course of inter-State trade or commerce or export; or (d) used or consumed otherwise and such tax shall be at the same rate taxable under Section 11 of the Act which would have been levied on the sale of such goods within the State on the date of such purchase or receipt. Hence, even when an exempted goods is manufactured out of the raw material, there shall be levy of purchase tax on such raw material in view of Section 12(b) of the Act. So, in the considered view of the Tribunal, the authorities below did not commit any wrong or error in demanding purchase tax from the dealer assessee in respect of the tax period.

6. According to the learned Counsel for the dealer assessee, tax or royalty was paid while lifting the sand and therefore, additional demand under Section 12 of the Act cannot be sustained. It is claimed by the dealer assessee that sand was lifted by paying tax to the auctioneer and any such additional demand

would amount to double taxation. The State contends that the purchase of sand was effected from an unregistered source. It is also alleged that while purchasing sand, no tax was paid by the dealer assessee. But, then the dealer assessee claims that tax or royalty was paid to the auctioneer, while lifting sand. Is royalty a tax? If at all purchase tax was paid by the dealer assessee? If sand was lifted by the dealer assessee, whether, it was from registered source? As it seems, the State alleges that the dealer assessee has purchased sand for the purpose of manufacturing fly ash bricks from unregistered sources. If from an unregistered dealer, a taxable goods is purchased which is then consumed or used in the manufacturing goods declared to be exempt from tax under the Act, in such a case, duty under Section 12 of the Act is leviable. If the dealer assessee whether lifted or purchased sand from an auctioneer or unregistered dealer, it is not clearly discernable from the record. It is also not explained, as to if assuming the sand to have been lifted from an unregistered dealer, whether, on payment of royalty, tax liability vis-a-vis the dealer assessment is said to be discharged. The aforesaid aspect of the matter deserves a little bit of attention and examination by the AA. However, it is made clear that the view of the authorities below needs confirmation to the effect that in case of sand which is a raw material being purchased from sources as specified in clauses (i) and (ii) and utilized in the manufacture of goods declared to be exempt shall be liable to purchase tax under Section 12 of the Act.

7. As per the dealer assessee, it is entitled to ITC worth of ₹2,42,229.00. The AA referred to Section 20(3)(b) of the Act and concluded that as

fly ash brick is an exempted goods and though input used in its manufacturing is taxable other than sand for which the dealer assessee has paid VAT, but the claim of ITC cannot be allowed. In other words, according to the AA, since the conditions as appearing in Section 20(3)(b) of the Act could not be fulfilled or satisfied, the dealer assessee was not entitled to the claim of ITC. The said aspect has not been elaborately considered by the FAA. Since the matter has suffered a remand, the Tribunal is also of the considered view that a threadbare examination on the claim of ITC is necessary keeping in view the conditions stipulated in Section 20(3)(b) of the Act.

8. Hence, it is ordered.

9. In the result, the appeal stands allowed in part. As a logical sequitur, the impugned order dated 18.09.2018 passed in Appeal Case No. AA/04/OVAT/CUII/18-19 is modified to the extent indicated above. Consequently, the AA is directed to consider as to if besides imposition of penalty, whether, the dealer assessee is liable to pay the purchase tax and also entitled to the claim of ITC and to take a decision thereon in the light of the observations of the Tribunal and to complete the entire exercise as per and in accordance with law preferably within a period of three months from the date of receipt of the above order. The cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman