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

P r e s e n t: **Shri A.K. Dalbehera, O.S.J.S.**
M.A., LL.M.
1st Judicial Member

S.A. No. 263(V) of 2017-18

(Arising out of the order of the learned JCST (Appeal), Sambalpur Range, Sambalpur, in First Appeal Case No. AA 72/SAI/VAT/2016-17, disposed of on dtd.24.06.2017)

M/s. Nagareeka Hydrocarbons (P) Ltd.,
(Goyal Coaltar (P) Ltd.)
Jharmunda, Ganesh Nagar,
Rengali, Dist.- Sambalpur. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. U. Behera, Advocate
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 19.02.2020 ******** Date of order: 11.03.2020

O R D E R

This appeal is directed against the order dtd.24.06.2017 passed by the learned Joint Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur (hereinafter referred to as, the learned JCST) in First Appeal Case No. AA 72/SAI/VAT/2016-17, wherein he reduced the demand from Rs.18,49,762.00 to Rs.17,25,630.00 as raised by the learned Sales Tax Officer, Sambalpur I Circle, Sambalpur (hereinafter referred to as, the learned STO) for the assessment period 01.04.2011 to 13.03.2014 u/s.43 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act).

2. The brief facts of the case are that, the appellant-dealer is carrying on business of manufacturing and sale of goods such as liquid coaltar pitch, creosote oil, naphthalene etc. by using raw materials coaltar. On the basis of the Fraud Case Report (in short, the FCR) submitted by the Sales Tax, Vigilance Wing, Sambalpur, the Accountant of the appellant-dealer company produced some registers. In course of checking some registers, files, notebooks and loose sheets containing business transactions were recovered from the office premises and were seized. Further, the Manager of the appellant-dealer produced the books of account of the firm before the inspecting officials. It was found that there was shortage of 4.07 MT of coaltar, 38.07 MT of pitch, 26.06 MT of cresosite oil and excess of 14.34 MT of naphthalene. On receipt of the FCR, the learned STO estimated coaltar at 305.10 MT, finished goods at 167.80 MT of pitch and creosote oil at 100.68 MT along with naphthalene. On verification of tax invoices, the learned STO estimated the sale price of pitch per MT as Rs.48,847.00 and creosote oil per MT as Rs.37,000.00. So the learned STO calculated Rs.86,15,042.00 towards unaccounted sale of 205.87 MT of pitch and Rs.46,89,380.00 towards unaccounted sale of 126.74 MT of creosote oil. Accordingly, the learned STO calculated the total sale suppression at Rs.1,84,97,614.00 and taxed @ 5% calculated at Rs.9,24,881.00. So tax along with one time penalty came to Rs.18,49,762.00.

3. Being aggrieved by the order of the learned STO, the appellant-dealer preferred an appeal before the learned JCST who reduced the demand to Rs.17,25,630.00. Being further aggrieved by the order of the learned JCST, the appellant-dealer preferred this second appeal.

4. The respondent-Revenue has filed cross objection supporting the order of the learned JCST.

5. Heard both the sides. Perused the case record and the grounds of appeal. Also perused the materials available on record and the plea taken in the cross objection. I also perused the orders of both the fora below.

6. From the materials available on record it is seen that the vigilance officials alleged the stock discrepancies of the goods namely coaltar, pitch, creosote oil and naphthalene. There was shortage of stock of the first three goods whereas there was excess of the last mentioned goods namely naphthalene. The vigilance officials also reported that the appellant-dealer had not added an amount of Rs.51,93,192.00 received by way of freight charges from its customers which had not been added to the sale price. Therefore, the vigilance officials suggested for levying of tax on the said amount being part of the sale price received in the hands of the appellant-dealer. On such allegations the assessment of the appellant-dealer was reopened by the learned STO. The appellant-dealer in response to notice had produced the books of account and explained the alleged discrepancies mentioned in the report to the learned STO. However, the learned STO made additional demand of tax of Rs.9,24,881.00 and imposed penalty equal to that amount u/s.43(2) of the OVAT Act. Against the said order when the appellant-dealer had preferred the first appeal, it had got partial relief as the learned JCST had reduced the demand. During the course of hearing the learned Counsel for the appellant-dealer expressed dissatisfaction on the findings of the learned JCST who had upheld the demand made by the learned STO on account of freight charges, taxing turnover of Rs.13,38,949.00 not covering the period under assessment and imposing penalty of two times of the tax determined. The learned Counsel contended that the procedure adopted by the learned STO was unfair, illegal, prejudicial and calculated undermine the confidence of the appellant-dealer.

7. It is seen that though the appellant-dealer was assessed for the period from 01.04.2011 to 31.03.2014 but the learned STO as well as the learned JCST had considered turnover of Rs.13,88,949.00 received towards freight charges during the financial year 2010-11. This is indicative of non-application of mind of both the fora below while passing orders. Therefore, the assessment orders are vitiated. It is settled by the Hon'ble High Court of Orissa that each assessment period being separate and distinct, materials relating to one tax period cannot be considered for assessment of another tax period. In this connection, reference may be had to State of Orissa Vrs. J.P. Sikaria (1987) 67 STC 101 (Ori.) and Chandrakanta M. Joshi Vrs. State of Orissa (1999) 116 STC 89 (Ori.)

8. The appellant-dealer also disputed on the levy of tax on freight charges which do not form part of the sale price and also on levy of two times penalty on the tax determined. It is observed that the learned JCST erroneously calculated the freight charges at Rs.51,93,192.00 by including therein the freight charges of Rs.13,88,949.00 relating to the financial year 2010-11. When there is express stipulation by the parties to the contract that separate payments had to be made to the supplier for supply and transportation, the sale price excludes such freight charges when charged separately. It is well settled that transportation charges are to be included in the sale price. But when there is a bifurcation of the price as agreed upon by the parties to the contract towards sale of goods and towards transportation, different Hon'ble High Courts and Hon'ble Apex Court have held that the taxable turnover is the price for which the goods has been agreed to be sold and no freight or other charges can be added to it in determining the 'sale price'. The Hon'ble High Court Orissa in the case of P.K. Satapathy 116 STC 494 have held that when there is evidence to show that the price sale of ballast transportation and stacking has been agreed separately, the price

received towards transportation and stacking are to be excluded while determining the sale price. In the present case both the learned STO and learned JCST have committed error by including an amount of Rs.51,93,192.00 being price towards transportation while determining the sale price. The appellant-dealer had maintained the books of account showing sale price and freight charges separately which were produced before both the fora below showing that separate price had been aggrieved upon for sale and transportation.

In the case of Orient Paper Mills Ltd. v. State of Orissa (1975) 35 STC 84 (Orissa), the Hon'ble Court observed as follows:-

> "When the goods are sold, delivery is normally given by the seller at his own place of business or godown. In order to accommodate the customer's convenience, the seller may also agree to send the goods to the former's place, but on the condition that the former would pay to the latter such cost as the latter may incur in so sending the goods. When the seller's bill or invoice for sale shows any "cost of freight" charges separately from the price of goods, the presumption is that there have been two contracts, one for the sale of goods and the other for their transportation and it is only the first which earns the "sale price" excluding the latter therefrom."

9. It is seen from the record that the visiting officials were supposed to provide the mode of measurement of physical stock which constituted nearly 1500 MT of extremely hot commodity kept inside the cylinders in liquid form. The learned JCST at page-2 of the appeal order mentioned as follows:

> "On verification of the physical stock of goods with the books of account the Vigilance Officials found on dt.13.3.2014 that book balance at the time of visit of Vigilance Official in case of Coal Tar was 468.91 MT, Pitch 52.32 MT, Creosote oil 912.7 MT and Naphthalene 38.63 MT. Further, they found actual stock available in the business premises on the same date were that Coal Tar 464.84 MT, Pitch 14.25 MT, Creosote oil 886.64 MT and Naphthalene 53 MT. Accordingly, the Vigilance officials estimated shortage of 4.07 MT Coal Tar, shortage of 38.07

> MT Pitch, shortage of 26.06 MT Creosote oil and excess of 14.34 MT Naphthalene."

It was next to impossible for the inspecting team to maintain huge stock of goods physically stored in boiling temperature. The officials should have recorded a plausible method which they or the staff of the appellant adopted in measuring the stock. In the case of Commissioner of Income Tax Vrs. Utkal Alloys (2009) 319 ITR 399 (Orissa), the Hon'ble High Court relying upon the judgment in the case of Haribhagat Agarwalla v. State of Orissa 51 STC 355 held that a sampling method of verification might be useful for certain purposes but could not be utilized as the basis for imposition of tax particularly when the investigation officer, the assessing officer or the appellate authority had not been able to detect any discrepancies in the books of account of the appellant-dealer. Hence levy of tax on shortage of goods is without any basis.

10. The learned STO did not dispute that the appellant-dealer maintained regular books of account including stock book. No discrepancy was found in the books of account of the appellant-dealer. There was also no corroborating evidence on suppression of purchase or sale. The findings of the learned STO at page-4 & 5 of the assessment order relating to suppression of sales conclusively proves that the findings are hypothetical which is evident from the findings such as:

> "of Naphthalene 14.34 MT must have been obtained by the dealer under report out of clandestine manufacturing; Page 5, 2nd para "the dealer under report must have used 305.10 MT Coaltar. Because 4.7% of 305.10 MT is 14.34 MT; again Page 5, 2nd para "by using this 305 MT Coaltar for manufacturing the dealer under report must have obtained pitch and creosote oil in the following quantity"

Thus, the learned STO has applied guess work to arrive at sale suppression.

11. In view of the aforesaid discussion, the matter needs to be remitted to the learned STO for fresh assessment. If after assessment it is found that the appellant-dealer shall have to pay some tax, then one time of the tax should be imposed as penalty which was done by the learned STO. The same view has been set at rest by this Tribunal in a Full Bench in the case of M/s. Zenith v. State of Orissa vide S.A. No.102(V) of 2011-12. The averments made in the cross objection are nothing but reproduction of the findings of the lower fora below. In the cross objection the Revenue has urged that the Tribunal should instruct the appellant-dealer to produce the total sale transaction as reflected in the C.A. audited accounts including manufacturing account u/s.65 of the OVAT Act read with Rule 73 of the OVAT Rules for better appreciation of facts. However, the learned Standing Counsel did not press this matter during the course of argument. The appellant-dealer may be at liberty to produce such documents before the learned STO if required by him.

12. In the result, the appeal is allowed and the impugned order is set aside. The matter is remanded to the learned STO for fresh assessment in view of the observations made above. The cross objection is disposed of accordingly.

Dictated & corrected by me,

Sd/-
(A.K. Dalbehera)
1st Judicial Member

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