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

S.A. No. 346 (VAT) of 2014-15

(Arising out of order of the learned Addl. CST, Central Zone, Odisha, Cuttack, in Appeal No. AA. 332/ JCST (Asst)- Cuttack-I/ 2014-15, disposed of on 23.12.2014)

Present : **Shri Sashikanta Mishra**, **Chairman**
Shri Subrat Mohanty, 2nd Judicial Member
&
Shri Rabindra Ku. Pattnaik, Accounts Member-III

M/s. VIP Industries Ltd.,
Bajrakabati Road, Cuttack-753001. . . . 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.C. Beura, Advocate &
Mr. B.B. Panda, Advocate
For the Respondent … Mr. M.L. Agrawal, S.C. (CT)

Date of hearing: 05.06.2018 **** Date of order: 08.06.2018

O R D E R

The dealer assails order dt. 23.12.2014 passed by Addl. Commissioner of Sales Tax, Central Zone, Odisha, Cuttack (in short, 'first appellate authority') in Appeal Case No. 332/JCST (Asst)- Cuttack-I/2014-15 whereby the order of assessment dt.28.08.2014 passed by Joint Commissioner of Sales Tax, Cuttack-I Range, Cuttack (in short, 'assessing authority') u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT

Act') for the period from 01.04.2011 to 31.03.2013 in raising a demand of `2,06,30,476.00 was confirmed.

2. The dealer is a Limited Company engaged in manufacture of molded luggage and soft luggage under the brand name of 'VIP' having its factory outside the State of Odisha. The finished goods are brought into Odisha by way of branch transfer for sale inside the State. Some stocks are also transferred to outside the State. On the basis of tax audit for the period 01.04.2011 to 31.03.2013, a proceeding u/s. 42 of the OVAT Act was initiated. The audit objection, inter alia, related to decrease of output tax by the dealer. In course of the assessment proceeding, it was found that the dealer had decreased output tax to the tune of `11,15,295.00 and `57,61,758.00 during the periods 2011-12 and 2012-13 respectively by issuing credit notes in favour of its purchasing dealer against "return of goods" but without receiving corresponding debit notes from them. The dealer's explanation that there was no sale but the invoices were raised only to meet sales target, was not accepted and by referring to the provisions u/s. 23(3), learned assessing authority held that the aforementioned decrease of output tax is illegal. On such finding and other findings which are not within the purview of the present dispute, the assessment proceeding was concluded by raising the demand as aforesaid.

The dealer carried the matter in appeal. Learned first appellate authority, by referring to the relevant provisions under the OVAT

Act and Rules held that having issued tax invoice, it is to be deemed that a sale had taken place which makes the dealer liable to pay tax. Moreover, there was no evidence of sales return nor rejection of goods, but it was a case of unilateral cancellation of invoice, which was held to be not permissible. On such finding, the order of assessment was confirmed.

Being further aggrieved, the dealer has approached this Tribunal.

3. Sri U.C. Beura, learned Counsel appearing for the dealer has forcefully argued that the authorities below have committed manifest error in applying the provisions of Sec. 23(3) and 11(4)(b) of the OVAT Act despite the fact that no sale within the meaning of OVAT Act had ever taken place.

4. Per contra, Sri M.L. Agrawal, learned Standing Counsel (CT) appearing for the Revenue in terms of cross-objection filed, submits that by adopting a novel procedure not contemplated in law, the dealer cannot escape its liability to pay tax having raised the tax invoices at the first instance.

5. Sri Beura submits that the authorities under the OVAT Act can impose tax only on sale (or purchase). Therefore, unless the basic ingredient is satisfied, no liability under the Act can accrue. Sri Beura has referred to the definition of ‘sale’ occurring in Sec. 2(45) of the OVAT Act to contend that unless there is actual transfer of property in goods by one

person to another on payment of consideration, a transaction would not amount to sale. In the instant case, the dealer acting in line with normal trade practices, issued certain tax invoices and credit notes against purported sales solely with the intent of meeting sales target, but there was no physical movement of goods from it to the purchasing dealer. Further, there being no provision in the electronic system to cancel a tax invoice, the dealer, therefore, decreased the output tax in the succeeding return by issuing credit notes. Therefore, according to Sri Beura, this is not a case of return or rejection of goods by the purchasing dealer so as to apply the provisions u/s. 23(3) of the OVAT Act nor a case where the provision u/s. 11(4)(b) would apply inasmuch as the concept of deemed sale referred to therein cannot be applied. In support of his contention, Sri Beura has referred to a decision of the Hon'ble Madras High Court in the case of ***Peico Electronics & Electricals Ltd. Vs. State of Tamil Nadu***, reported in ***[1990] 78 STC 88 (Mad.)***.

Per contra, Sri Agrawal has argued that once a tax invoice is raised, the provision of Sec. 11(4) automatically comes into play and, therefore, regardless of actual movement of goods, the dealer becomes liable to pay tax. Sri Agrawal further argues that there is no provision of cancellation of tax invoice for which credit notes were issued, but the statute provides for adjustment in case of return or rejection of goods by issue of corresponding debit notes against each credit note as per Sec. 23(3) of the

Act so as to rule out the possibility of the purchasing dealer availing ITC on such score. Therefore, the dealer ought to have obtained debit notes from the purchasing dealer against each of the credit notes issued by it.

6. It is observed at the outset that Revenue does not dispute the factual position that the goods relating to the transaction in question had physically not moved from the selling dealer to the purchasing dealer though tax invoice and credit notes were issued. The AVR, which we have perused, clearly states that no discrepancy could be detected with regard to stock position. Such being the position, it is difficult to accept as to how the provisions under sub-section (3) of Sec. 23 can apply. For immediate reference, the said provision is quoted herein below :-

> "23. Credit notes and debit notes –
>
> (i) xx xx xx
>
> (ii) xx xx xx
>
> (iii) In case of goods returned or rejected by the purchaser, a credit note shall be issued by the selling dealer to the purchaser and a debit note shall be issued by the purchaser to the selling dealer containing the requisite particulars as may be prescribed." (Emphasis supplied)

A bare reading of the above provision and particularly, the highlighted portion thereof would make it abundantly clear that "return or rejection of goods by the purchaser" would arise only if the goods have been physically received by it. In other words, if the goods have not actually been

received, the question of returning them or rejecting them obviously does not arise. On the same analogy, the decision cited by Sri Beura in the case of ***Peico Electronics & Electricals Ltd.*** (supra) is also found to be not applicable to the facts of the present case because in the said case there was unfructified sales, i.e. goods had been returned to the seller because of non-retiring of documents by the purchaser from the bank to enable him to take delivery of the goods from the carrier. In the instant case, however, the goods in question had not moved at all.

7. Now, the provisions u/s. 11(4) of the OVAT Act, are extracted herein below for immediate reference :-

> "11. Levy of tax on sale –
>
> (i1) xx xx xx
>
> (2) xx xx xx
>
> (3) xx xx xx
>
> (4) (a) Notwithstanding anything contained in the Sale of Goods Act, 1930 (3 of 1930), but subject to clause (b) and (c), the sale of goods shall, for the purposes of this Act, be deemed to have taken place when title or possession of the goods is transferred or, in the case of works contract, when the goods are incorporated in the course of execution of the works contract, whether or not there is receipt of payment for such sale.
>
> (b) Where, before the time applicable under clause (a), the dealer selling the goods issues a tax invoice in respect of such sale, the sale shall, to the extent it is covered by the invoice or payment, be deemed to have taken place at the time the invoice is issued or the payment is received, whichever is earlier.

(c) Where a dealer issues a tax invoice in respect of any sale not falling under clause (b) within fourteen days from the time specified under clause (a), the sale shall be deemed to have taken place at the time the invoice is issued."

8. From the above provisions, it is clear that a sale would be deemed to have taken place – (i) when title or possession of goods is transferred; (ii) a selling dealer has issued tax invoice; and (iii) payment is received. In the case at hand, the title or possession of the goods had not been transferred to the purchasing dealer. Secondly, as regards the time of deemed sale, the same is stated to be the date of issue of tax invoice or receipt of payment, whichever is earlier. Implicit in the above provision is the idea that there must be actual and physical movement of goods as well as receipt of consideration thereof. So, mere issuance of a tax invoice without corresponding transfer of title or possession or receipt of payment cannot amount to deemed sale.

9. It is further seen that learned first appellate authority has referred to Rule 7 of the OVAT Rules, which deals with adjustment of sale price or tax in relation to taxable sale, issue of credit note and debit note. Sub-rule (3) of Rule 7 refers to adjustment of sale price and tax where a sale is cancelled, goods are returned etc. We fail to understand as to how this provision can be applied inasmuch as firstly, there is no sale as already held herein before and secondly, there is no return of goods by the purchaser and acceptance of such return by the seller within three months of the sale.

Therefore, the observation of learned first appellate authority that issue of tax invoice and issue of credit notes/debit notes are to be regulated according to the statutory provisions is at best ambiguous and without any logic. It is further observed that learned first appellate authority has found fault with the audit observation that the credit note should have been cancelled by the dealer by holding that a document generated in the system cannot be cancelled, but subsequently entry has to be made as a contra voucher in any name. We do not understand where from such procedure was imported by the first appellate authority. But significantly, fact remains that the first appellate authority also accepts that a tax invoice cannot be cancelled in the system. That apart, all transactions relatable to registered dealers are presently system-based and hence, can be verified to see whether the purchasing dealer had availed any ITC on the basis of credit notes issued by the dealer or not. There is no finding to such effect.

10. For the foregoing reasons, therefore, we find considerable force in the contentions put forth by the dealer that it is not liable to pay tax despite having issued tax invoice and credit notes. Apart from our findings herein before, we are also fortified by the fundamental principle of taxation under the OVAT Act that only a sale is exigible to tax as per Sec. 11 and that 'sale' means a valid sale within the meaning of Sec. 2(45) of the said Act.

11. Before parting with the case, however, we are constrained to observe that the dealer on its part also did not deal with the situation

properly and adopted an apparently novel procedure not contemplated in law. But, be that as it may, the bottom line is, tax cannot be levied on improper adoption of procedure or only on technicality when the fundamental charging section under the statute does not permit so. Therefore, despite the dealer's apparently improper conduct, there is no way by which a transaction that has not actually matured into sale, be brought under the tax net. Thus, we are persuaded to hold that the impugned order warrants interference.

12. In the result, the appeal is allowed. The impugned order is hereby set aside. The order of assessment is quashed. Cross-objection is disposed of accordingly.

Dictated & Corrected by me,

Sd/-
(Sashikanta Mishra)
Chairman

Sd/-
(Sashikanta Mishra)
Chairman

I agree,

Sd/-
(Subrat Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Rabindra Ku. Pattnaik)
Accounts Member-III