BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. Nos.10 & 11 (C) of 2008-09
&
S.A. Nos.21 & 22 (C) of 2008-09

(Arising out of order of the learned Addl.CST, South Zone, Odisha, Cuttack, in Appeal Case No. AA. 244 & 246/ACST (Assmt)/ 2005-06, disposed of on 14.11.2007)

Present : **Shri Sashikanta Mishra**, **Chairman**
Shri Subrat Mohanty, 2nd Judicial Member
&
Shri Prabhat Chandra Pathy, Accounts Member-I

S.A. Nos.10 & 11 (C) of 2008-09

M/s. Aerocom Private Limited,
At/PO- Satasankha, Dist. Puri. . . . Dealer

- V e r s u s –

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

S.A. Nos.21 & 22 (C) of 2008-09

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

- V e r s u s –

M/s. Aerocom Private Limited,
At/PO- Satasankha, Dist. Puri. . . . Dealer

For the Dealer … Mr. G.N. Naik, Advocate &
Mr. R.K. Kar, Advocate
For the State … Mr. M.S. Raman, Addl. S.C. (CT)

Date of hearing: 07.06.2018 **** Date of order: 11.06.2018

O R D E R

All the four appeals are directed against the common order passed by the Addl. Commissioner of Sales Tax, South Zone, Odisha, Cuttack (in short, 'first appellate authority') in respect of orders of assessment for the years 2002-03 and 2003-04. The issues involved in all the appeals are identical and hence, for convenience, all the appeals were taken up together for hearing and are being disposed of by this common order.

S.A. No. 10(C) of 2008-09 –

2. The dealer assails order dt. 14.11.2007 passed by learned first appellate authority whereby the demand of `27,64,089.00 raised by Asst. Commissioner of Sales Tax, Puri Range, Bhubaneswar (in short, 'assessing authority') u/r.12(4) of the Central Sales Tax (Odisha) Rules, 1957 (in short, 'CST (O) Rules') for the year 2002-03 vide order of assessment dt. 20.02.2006, was reduced by `2,64,000.00.

S.A. No. 11(C) of 2008-09 –

3. In this appeal, the dealer has assailed order dt. 14.11.2007 passed by learned first appellate authority whereby the demand of `27,07,378.00 raised by assessing authority u/r. 12(4) of the CST (O) Rules for the year 2003-04 vide order of assessment dt. 20.02.2006, was reduced by Rs.2,64,000.00.

S.A. No. 21(C) of 2008-09 –

4. Revenue has preferred this appeal assailing the order dt. 14.11.2007 of the first appellate authority in respect of assessment order dt. 20.02.2006 passed by the assessing officer for the year 2002-03.

S.A. No. 22(C) of 2008-09 –

5. In this appeal, Revenue has assailed the aforesaid order of the first appellate authority relating to assessment year 2003-04.

6. Basing on a report submitted by the STO, Investigation Unit, Bhubaneswar alleging evasion of tax by the dealer in the guise of branch transfer, proceedings for the periods 2002-03 and 2003-04 were initiated. In both the proceedings, the issue involved was the same inasmuch as it was alleged that the dealer had effected inter-State sales in the guise of branch transfer only to evade tax liability. After scrutinizing the transactions in question, learned assessing authority disallowed the dealer's claim of branch transfer to the tune of `2,09,40,067.00 for the year 2002-03 and `2,05,10,443.00 for the year 2003-04. The tax liability being thus determined, a demand of `27,64,089.00 was raised for the year 2002-03 and `27,07,378.00 for the year 2003-04. The dealer preferred appeals against both the orders of assessment, which were heard analogously. Learned first appellate authority observed that the assessing authority had taken into account some of the transactions randomly and had attempted to establish a linkage between the same and requisitions received by the Head Office. Learned first appellate authority held that there was no clear

cut finding that the transactions in question had resulted in actual movement and sale to the parties concerned against their orders and that the so-called orders would remain as agreements of sale, but not completed sales so as to attract tax liability as inter-State sales. Further, noting that only some of transactions could be linked to definite orders placed by buyers prior to movement of goods, learned first appellate authority held that 90% of the transactions are clear cases of branch transfer as contemplated u/s.6A of the CST Act. On such findings, the claim of branch transfer was allowed to the extent of 90% for both the years and direction was issued for revision of GTO and NTO accordingly.

Being aggrieved, both the dealer as well as the Revenue have approached this Tribunal.

7. The main ground of challenge urged by the dealer to the impugned order is that the first appellate authority could not have adopted a speculative method of determination of the quantum of branch transfer and CST sales. Further, the documents and record seized by the investigating team clearly show that there was no definite linkage between the so-called orders/requisition and movement of goods from the factory to the branch office at Kolkata.

8. Revenue, on the other hand, has assailed the impugned order on the ground that the first appellate authority mechanically brushed aside solid and cogent evidence on record showing movement of goods in

pursuance of pre-existing orders and hence, allowance of the claim of branch transfer to the extent of 90% cannot be sustained in the eye of law.

9. Before delving into the rival contentions in detail, it would be profitable to refer to the relevant statutory provisions and the settled position of law governing the field. In this context, Sec. 6A of the CST Act is relevant, which is quoted herein under for immediate reference :-

> "6A. Burden of proof, etc. in case of transfer of goods claimed otherwise than by way of sale-
>
> (1) Where any dealer claims that he is not liable to pay tax under this Act, in respect of any goods, on the ground that the movement of such goods from one State to another was occasioned by reason of transfer of such goods by him to any other place of his business or to his agent or principal, as the case may be, and not by reason of sale, the burden of proving that the movement of those goods was so occasioned shall be on that dealer and for this purpose he may furnish to the assessing authority, within the prescribed time or within such further time as that authority may, for sufficient cause, permit, a declaration, duly filled and signed by the principal officer of the other place of business, or his agent or principal, as the case may be, containing the prescribed particulars in the prescribed form obtained from the prescribed authority, along with the evidence of dispatch of such goods, and if the dealer fails to furnish such declaration, then, the movement of such goods shall

be deemed for all purposes of this Act to have been occasioned as a result of sale.

(2) If the assessing authority is satisfied after making such inquiry as he may deem necessary that the particulars contained in the declaration furnished by a dealer under sub-section (1) are true, and that no inter-State sale has been effected, he may, at the time of, or at any time before, the assessment of the tax payable by the dealer under this Act, make an order to that effect and thereupon the movement of goods to which the declaration relates shall, subject to the provisions of sub-section (3), be deemed for the purposes of this Act to have been occasioned otherwise than as a result of sale."

10. From the above provision, it is clear that a dealer effecting movement of goods from one State to another is not liable to pay tax if such movement is not by reason of sale, but otherwise. In the instant case, the dealer claims that the goods in question had moved from its factory situated at Satasankha in the State of Odisha to its branch office situated in Kolkata in the State of West Bengal not by way of sale, but for onward sale by the said branch independently. Further, the initial burden of proving the above lies on the dealer, which it can discharge by submitting the required declarations in Form-F consequent upon which, the onus shifts to the Revenue to satisfy itself as to the correctness of the dealer's claim by making necessary inquiry. It is the settled position of law that a claim of branch transfer shall fail if there is any nexus between a pre-existing

contract/order and the movement of goods because, in normal business practice, a branch office may be in the process of collecting orders from the market on continuous basis and similarly the factory may also be dispatching its goods to the different branches routinely irrespective of the existence of any order. However, onus lies on the Revenue in this regard, i.e., to show the inextricable link between a pre-existing contract and the movement of goods. Stated differently, every movement of goods cannot be presumed to be against a pre-existing contract. This linkage has to be positively established before a claim of branch transfer is rejected.

11. Viewed in the above backdrop, it is seen that there are several materials/evidences on record to suggest that the goods had moved pursuant to definite orders with specification also. Similarly, there are also materials and evidences on record to show that the goods being standard goods had moved prior to receipt of orders. The above fact has been noted by the first appellate authority and has apparently weighed upon his mind to segregate such transactions as 10% as CST sales and the remaining 90% as branch transfer. We cannot, however, uphold the above view because the same, on the face of it, is vague and speculative in nature. It goes without saying that in a fiscal statute liability can be fixed only on concrete and solid evidence, but not on surmises and conjectures, which learned first appellate authority appears to have unfortunately lost sight of. This is a case where each of the transactions in question need to be

examined in detail. We find learned assessing authority to have undertaken such an exercise which is evident from the tabular depiction of the details of transactions in question. But the findings do not appear to be commensurate therewith inasmuch as it is observed that in several cases, the name of the so-called buyer is missing and has been stated as 'no name'. It is also contended by learned Counsel for the dealer that in some cases, the transport documents and checkgate documents show that the goods had moved prior to the date of receipt of the so-called requisition/order.

Without delving any further into the factual aspects, it would suffice to state here that the claim of branch transfer raised by the dealer has to be considered afresh by examining each and every transaction so as to see whether there is any link between a particular requisition/order and a particular instance of movement of goods.

12. For the foregoing reasons, therefore, we are constrained to hold that the matters were not decided properly by the first appellate authority in the manner required by the provisions of Sec. 6A(2) of the CST Act. Therefore, the impugned order need to be set aside and the matters are to be decided afresh.

13. In the result, all the appeals are, therefore, allowed. The impugned order is hereby set aside. The matters are remanded to the assessing authority for de novo assessment in the light of observations made in this order within a period of four months from the date of receipt

of this order. Accordingly, the dealer is directed to appear before the assessing authority on 25.06.2018 along with relevant documents for receiving further instructions.

Dictated & Corrected by me,

Sd/-
(Sashikanta Mishra)
Chairman

Sd/-
(Sashikanta Mishra)
Chairman

I agree,

Sd/-
(Subrat Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Prabhat Chandra Pathy)
Accounts Member-I