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IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV No.111 of 2009

Unit Canteen, NCC Group, Head *Petitioner*
Quarters, Sakhipara, Sambalpur

Mr. Madhab Lal Agarwal, Advocate
-versus-

State of Orissa, represented by the *Opposite Party*
Commissioner of Sales Tax, Cuttack

Mr. Sunil Mishra, ASC

CORAM:
THE CHIEF JUSTICE
JUSTICE R. K. PATTANAİK

Order No.

ORDER
20.07.2022

Dr. S. Muralidhar, CJ.

04. 1. This revision petition by the Assessee arises from an order dated 24th December, 2008 passed by the Orissa Sales Tax Tribunal, Cuttack (Tribunal) allowing the State's appeal i.e. S.A. No.1878 of 1999-2000 for the year 1994-95. By the said order dated, the order dated 16th December, 1999 of the Assistant Commissioner of Sales Tax, Sambalpur (ACST) reducing the demand raised by the Sales Tax Officer (STO) from the sum of Rs.1,30,964/- to Rs. Nil under Section 12(4) of the Orissa Sale Act, 1947 (OST Act), was reversed by the Tribunal.

2. While admitting this revision petition by the order dated 22nd January 2010, this Court framed the following questions of law for consideration:

"1. Whether in the facts and circumstances of the case and on the face of the tax exempted entry 30 under Orissa Sales Tax Act, 1947 in respect of sales to "Sale of goods

to the military personnel by the Defence Service Installations”, the Tribunal committed error in concluding that by furnishing statutory declaration form XXXIV, the petitioner has contravened Section 5(2)(A)(a)(ii) of the Orissa Sales Tax, 1947?

2. Whether in the facts and circumstances of the case, the Tribunal was justified in concluding that the petitioner is liable to pay tax in respect of purchase of IMFL by furnishing statutory declaration form XXIV on account of alleged contravention.

3. Whether in view of the assertion made that the declaration form XXXIV was erroneously furnished, the Tribunal was justified in holding that the petitioner was liable to pay tax in respect of exempted sales to defence personnel under Entry 30 of the tax exempted list?”

3. The background facts are that the Petitioner-Assessee runs a departmental canteen and is engaged in selling various goods to defence personnel. All such commodities except IMFL were being purchased from C.S.D. Canteen Store, Vishakapatnam, which by itself was a tax-exempted Unit. IMFL was purchased from M/s. Carow Phipson Limited, Cuttack against declaration in Form-XXXIV.

4. In the course of the assessment proceeding for the year in question, a fraud case report was submitted and was confronted to the Assessee by the S.T.O. It was pointed out in the said report that the purchase by the Petitioner of IMFL against Form-XXXIV was subject to tax at the last point in the series of sales and as such the Petitioner was obliged to collect sales tax at the point of sale. The STO held that since the Petitioner was not a Defence Service Installation (DSI), it ought to have collected tax on the sales made by it to either military personnel or to DSI and accordingly

enhanced the taxable turnover and raised the demand as indicated hereinbefore.

5. The Assessee then went in appeal before the ACST, who set aside the assessment order on the ground that the STO had failed to consider that there was an object behind Government exempting payment of tax on sale to defence personnel. It was held that the order of the STO would cause hardship for the canteen selling goods to defence personnel but also defeat the object behind the exemption.

6. The State then went in appeal before the Tribunal with S.A. No.1878 of 1999-2000. The Tribunal examined Entry 30 of OST Rate-9, which is a part of the rate chart appended to the OST Act and concluded that it exempts only “sales of goods to military personnel by the Defence Service Installations” and not sales made to DSIs. In other words, it did not say that purchase of goods from DSIs is tax free. It was concluded that the Assessee having purchased the IMFL utilizing the From-XXXIV was in terms of Section 5(2) (A) (a) (ii) obliged to pay tax on the purchase price of the goods and since he had purchased the goods free of tax for resale, such resale had to be subjected to tax under the OST Act. If the Assessee was aware that the resale of the goods would be tax free, the Assessee should not have purchased IMFL by utilizing From-XXXIV.

7. Learned counsel for the Petitioner placed reliance on the judgments of this Court in *State of Orissa v. Phipson and Co. Ltd [2002] 125 STC 284 (Ori.)* and *Rameswarlal Shyamsundar v.*

State of Orissa, MANU/OR/121/2022 and contented that the sale of the IMFL by the Petitioner-Assessee to DSIs and defence personnel ought not to be subjected to sales tax by virtue of Entry 30 of Rate-9 of the rate chart appended to the OST Act. In particular, he pointed out that in *Phipson and Co. Ltd. (supra)* in more or less similar facts where sale had been made by the Assessee of IMFL to defence personnel, it was held that such sale should be treated as exempt from tax by virtue of Entry 30. Reference in that order was also made to Entry 29-B, which was inserted in the Schedule above Entry 30, which specifically talks of sale of goods to DSIs located inside the State of Orissa for resale to military installations or personnel.

8. Mr. Sunil Mishra, learned Additional Standing Counsel (ASC) appearing for the Department points out that the decision in *Rameswarlal Shyamsundar (supra)* is distinguishable on facts since question of sale to DSIs or military personnel did not arise in that case. As far as the decision in *Phipson and Co. Ltd. (supra)* is concerned, he points out that the said decision did not consider the question whether Entry 29-B in the Schedule of OST Rate-9 could be said to have retrospective effect since it was inserted only with effect from 9th February, 1999 whereas the present case is concerned with the year 1994-1995.

9. Having considered the above submissions, the Court is of the view that the Tribunal did not commit any legal error in concluding that the transaction in question in the present case was amenable to tax at the stage of sale by the Petitioner to the DSI. It must be

noticed that there is a clear distinction in the wording of Entry 29-B and Entry 30 of OST Rate-9, both of which read as under:

“29-B. Sale of Goods to Defence Service Installations located inside the State of Orissa for resale to military installations or personnel.

30. Sale of goods to military personnel by the Defence Service Installations.”

10. Thus, it will be seen that under Entry 30 what is exempted is sale of goods to military personnel by DSI. Since the Petitioner in the present case is not a DSI itself, the sale by it of the IMFL to a DSI or military personnel would not be covered by Entry 30. On the other hand, what applies to the Petitioner's transactions would be Entry 29-B, which talks of sale of goods to DSIs for resale to military installations or personnel. However, as correctly pointed out by learned ASC, Entry 29-B was inserted with effect from 9th February, 1999 and had only a prospective effect. Therefore, for the year in question i.e. 1994-95 it would have no application.

11. The Court finds that in *Phipson and Co. Ltd. (supra)*, this Court indeed had not considered the prospective applicability of Entry 29-B and proceeded on the basis that even for the assessment year 1986-87 it would apply. Clearly, that is not a sustainable legal position as far as taxation statutes are concerned. This is a substantive change in the taxing statute which in this case is the OST Act. Unless expressly stated to have retrospective effect, there cannot be a presumption of a retrospective effect of the above entry 29-B.

12. Consequently, the Court is satisfied that the Tribunal has not committed any error in allowing the State's appeal against the order of ACST. The Questions framed by this Court are accordingly answered in the negative i.e. in favour of the Department and against the Assessee. The Revision Petition is accordingly dismissed.

(Dr. S. Muralidhar)
Chief Justice

(R. K. Pattanaik)
Judge

M. Panda

