

HIGH COURT OF ORISSA : CUTTACK.

STREV No. 64 of 2017

M/s. General Traders, Berhampur ... Petitioner

VERSUS

State of Odisha represented through ... Opposite party
Commissioner of Commercial Taxes,
Cuttack

Advocates appeared in the case:

For Petitioner : Mr. Jagabandhu Sahoo, Senior
Advocate with Ms. Kajal Sahoo,
Advocate

For Opposite Party : Mr. Susanta Kumar Pradhan,
Additional Standing Counsel
(CT & GST Organisation)

CORAM:
THE CHIEF JUSTICE
JUSTICE MURAHARI SRI RAMAN

JUDGMENT

08.12.2022

Murahari Sri Raman, J.

1. The petitioner, a partnership firm, assailed Order dated 18.05.2017 in Second Appeal No.58(C) of 2015-16 passed by the learned Odisha Sales Tax Tribunal, Cuttack ('Tribunal') directed against Order dated 30.04.2015 of the Additional Commissioner

of Sales Tax, (Appeal), South Zone, Berhampur in connection with Audit Assessment framed under Rule 12(3) of the Central Sales Tax (Odisha) Rules, 1957 (in short referred to as, “CST(O) Rules”) by the Joint Commissioner of Sales Tax, Ganjam Range, Berhampur pertaining to tax periods from 01.06.2006 to 31.03.2010.

Questions of law framed by this Court:

2. While entertaining the revision petition, this Court *vide* Order dated 28th November, 2017 framed the following questions of law:

“A) Whether in view of production of ‘H’ Forms and export documents including Bill of Lading in respect of claim under Section 5(3) and 5(4) of the CST Act, it is lawful and proper for the First Appellate Authority to remand the matter to the Assessing Authority for fresh assessment?”

B) Whether in absence of appeal or cross objection by the State and in view of Circular dated 20.04.2015 of the Commissioner of Commercial Taxes, Odisha the learned Tribunal is justified to render findings for reconsideration on the issue of imposition of penalty under Section 12(3)(g) of the CST(O) Rules, 1957?”

Facts of the case:

3. Tax Audit being undertaken, on the basis of Audit Visit Report submitted under Rule 10 of the Central Sales Tax (Odisha) Rules, 1957 (for brevity referred to as “CST(O) Rules”), Assessment was framed under Rule 12(3) *vide* Order dated 27.02.2013 raising a demand to the tune of Rs.29,91,752/- (tax of

Rs.9,97,250.73 + penalty of Rs.19,94,501.46) by the Joint Commissioner of Sales Tax, Ganjam Range, Berhampur (be called, “Assessing Authority”) rejecting the claim of the petitioner-dealer for exemption from payment of Central sales tax under Section 5(3) of the Central Sales Tax Act, 1956 (herein after referred to as “CST Act”) on account of inter-State sale in the course of export.

3.1. The case of the petitioner-dealer is that Indian exporters having placed order on it to supply goods, such as niger seed, gingelly seed and turmeric, pursuant to contract entered into/purchase order being received from the Foreign Buyer(s), the petitioner at the material period sold those goods in the course of inter-State trade or commerce and in turn received Certificate of Export in Form ‘H’ prescribed under Rule 12(10) of the Central Sales Tax (Registration and Turnover) Rules, 1957 (referred to as “CST (R&T) Rules”). Accordingly, the goods being sold in the course of export, as penultimate seller it claimed exemption under sub-section (3) on compliance of requirement under sub-section (4) of Section 5 of the CST Act.

3.2. On the contrary while disallowing such a claim of the petitioner, the Assessing Authority has observed as follows:

*“*** The dealer claimed that the contract between the Indian Exporters with him and the contract between the Indian Exporter and foreign buyers formed an integrated activity in the course of export. So, all the sales effected by him to the Indian Exporters are exempted from payment of tax as per Section 5(3) of the*

CST Act. Here, the instant dealer-firm is not a direct exporter. **The Indian Exporters have purchased goods from the dealer-assessee in order to fulfill a contract with the foreign buyers.** The dealer-assessee was under no contractual obligation to the foreign buyers either directly or indirectly. The obligations of the dealer were to the Indian Exporters. The immediate and direct cause of the movement of goods and export was the contract between the Indian Exporter and foreign buyers. That was the contract which occasioned export and not the contract between the instant dealer and Indian Exporter. It is the only a contract which occasions the export of goods that will be entitled to exemption under Section 5(1) of the CST Act. Only and the only sale or purchase that is the direct and immediate cause of export of the goods outside the territory of India is the 'sale or purchase in course of export'. In this case, the sale between the Indian Exporters and the foreign buyers, being the direct and immediate cause of export was the 'sale in course of export'. The sale between M/s. General Traders, Berhampur and the Indian Exporters was a sale preceding the sale that caused export or a sale for the purpose of complying an order for export or for facilitating export. That was a sale for export. All such preceding sales in a chain of sales are sales for export.

So, the sales falling under Section 5(1) and 5(3) are now sales in course of export. This is subject to compliance of other conditions like furnishing of declaration in Form H and documents evidencing export as per contract.

Against the above sales, the dealer although submitted H Form but failed to produce the agreement copies or sale contracts or purchase order of the foreign buyer, copies of agreement made between the Indian Exporter and foreign buyer. Since the dealer failed to comply the conditions of Section 5(3) of the CST Act, the export sale to the tune of Rs.30288489.50 is disallowed and treated as inter-State sale and taxed in appropriate rate of tax."

3.3. Appeal being preferred under Section 9(2) of the CST Act read with Section 77 of the Odisha Value Added Tax Act, 2004, the Additional Commissioner of Sales Tax (Appeal), South Zone, Berhampur (be called, “Appellate Authority”) observed as follows:

*“*** At the appeal hearing stage the dealer-appellant appeared and furnished supporting documents like bill of lading, purchase orders towards claim of exemption of export sale amounting to Rs.2,98,93,489.50 but failed to produce the agreement copies or sale contract or purchase order of the foreign buyer with the Indian Exporter for want of which the learned AO disallowed the claim of exemption of sale invoking contravention of provision of Section 5(3) of the CST Act. Further, the dealer-appellant could not be able to furnish Form H for the transaction (niger seeds) of Rs.3,95,000/- exported through Dinesh Kumar Toshniwal, Vizianagaram during the period 2007-08. In absence of declaration Form H the claim of exemption of export sale is not considered and the same is taxed at the appropriate rate. **Further the dealer-appellant has been allowed sufficient opportunity for production of copies of agreement between Indian Exporter and Foreign Buyer but the dealer-appellant could not be able to produce such copies of agreement.** Hence, in absence of supporting documentary evidences the transaction of export sale invoking provision of Section 5(3) of the CST Act could not be considered as true and correct and the above transaction is treated as deemed sale under the CST Act and is taxed at appropriate rate.”*

Observing thus, the Appellate Authority confirmed the disallowance of claim of the petitioner for exemption in respect of transactions of sale in the course of export under Section 5(3) of the CST Act.

3.4. The petitioner-M/s. General Traders carried the matter further before the Tribunal in Second Appeal invoking provisions of Section 9(2) of the CST Act, 1956 read with Section 78 of the Odisha Value Added Tax Act, 2004. The learned Tribunal affirmed the Appellate Order by observing thus:

*“6. *** in the instant case the additional demand has been raised due to non-filing of C declaration forms and due to disallowance of claim of exempted sale to the tune of Rs.3,02,88,489.50 and Rs.3,95,000.00 towards export of niger seeds since in the first case, the copies of purchase order of the foreign buyer/sale contract/agreement copies could be produced and in the second case no H form could be produced. *** Moreover, against the export sale of Rs.3,02,88,489.50 the dealer could not produce purchase order of the foreign buyer/sale contract/agreement copies for which the said amount was not allowed as exempted sale as contemplated under Section 5(3) of the CST Act, though H forms have been submitted. In such type of transaction, we would like to say that the learned STO is to see as to whether the goods involved in the transactions referred to above have really moved out of the territory of India after thorough verification of the connected documents to be produced at the time of assessment afresh. In case the dealer is able to convince the learned STO that there was actually export of materials and the goods have crossed the border of Indian territory then, the exemption as contemplated under Section 5(3) of the CST Act to be allowed as deduction while arriving at the NTO of the dealer appellant for the calculation of its final tax liability.”*

3.5. Since much stress was laid by all the fact-finding authorities on the production of copy of contract between the Foreign Buyer and the Indian Exporter, contending that, that is not the

requirement under the statute, the petitioner has approached this Court by way of the present Sales Tax Revision under Section 9(2) of the CST Act read with Section 80 of the Odisha Value Added Tax Act.

The contentions of the counsel for the petitioner:

4. Sri Jagabandhu Sahoo, Senior Advocate appearing with Ms. Kajal Sahoo, Advocate for the petitioner submitted that there being no dispute that the petitioner had produced before the authorities necessary Certificate of Export in Form H supported by copies of bill of lading and purchase orders, said documents were sufficient evidence to say that the goods supplied to the Indian Exporters were sent outside the territory of India. Mere non-production of copy of agreement between Indian Exporter and Foreign Buyer could not have been the ground to disbelieve the penultimate sale in course of export falling within ambit of sub-sections (3) and (4) of Section 5 of the CST Act. When the Certificate of Export 'H', prescribed under Rule 12(10), issued by the exporter as per requirement of provisions contained in sub-sections (3) and (4) of Section 5 was produced supported by documents, like purchase order and bill of lading, before the authorities, in absence of defects being pointed out in such certificate(s), there was no occasion for the Revenue Authorities to discard statutory form and doubt the veracity of the transactions particularly when the exporter filled up said form by disclosing *inter alia* agreement number/purchase order number and furnished

information regarding bill of lading indicating transport of goods to outside the territory of India.

4.1. It is next urged by Sri Jagabandhu Sahoo, learned Senior Advocate for the petitioner that the First Appellate Authority being satisfied that the Assessment in question was framed on the basis of observations made in the Audit Visit Report after thorough examination of books of account and other documents. The demand is raised on account of non-production of copy of agreement between the Indian Exporter and the Foreign Buyer, though Certificate of Export in Form 'H' was submitted supported by necessary documents to justify claim of exemption under Section 5(3) of the CST Act and non-furnishing of certain declaration in Form C in respect of certain transactions of inter-State sale in order to avail benefit of concessional rate of tax in terms of Section 8 of the said Act. Having applied his mind and finding that there was no contumacious conduct on the part of the petitioner in non-production of aforesaid documents, the Appellate Authority had correctly deleted the penalty as imposed by the Assessing Authority under Rule 12(3)(g) of the CST (O) Rules. The learned Senior Counsel submitted that non-furnishing of declaration forms does not attract imposition of penalty. He would further submit that the Commissioner of Commercial Taxes, Odisha, issued a Circular bearing No.42-III(I)38/09/CT, dated 20th April, 2015, by referring to *Gujarat Ambuja Cement Ltd. and Anr. Vrs. Assessing Authority-cum-Assistant Excise and Taxation Commissioner and Ors.*, (2000) 118 STC 315 (HP); *Fosroc*

Chemicals (India) Pvt. Ltd. Vrs. The State of Karnataka, (2015) 79 VST 25 (Karn); M/s. Lalbaba Roller Flour Mills, Nayabazar, Cuttack Vrs. State of Odisha, S.A. No.87(C) of 2012-13, disposed of vide Order dated 3rd April, 2014 of the Odisha Sales Tax Tribunal and Gajalaxmi Iron Works, Industrial Estate, Kalunga, Rourkela Vrs. State of Odisha, S.A. No.53 of 2011-12, disposed of vide Order dated 18th December, 2013 of the Odisha Sales Tax Tribunal instructed the field formation not to impose penalty in cases of *bona fide* non-submission of declaration forms. As the Sales Tax Department is not keen in enforcing penalty imposed under Rule 12(3)(g) of the CST (O) Rules on account of non-submission of declaration form, the learned Odisha Sales Tax Tribunal should not have interfered with the First Appellate Order.

Contention of the opponent-Revenue:

5. *Per contra*, Sri Susanta Kumar Pradhan, learned Additional Standing Counsel submitted that mere filing of Form 'H' would not suffice to allow exemption from payment of Central sales tax under Section 5(3). The claimant is obligated to produce documents to the satisfaction of the authorities for the said purpose to rule out possibility of erroneous claims being made by the penultimate seller. All the authorities including the learned Odisha Sales Tax Tribunal were satisfied that there is requirement of production of copy of agreement between the Indian Exporter and the Foreign Buyer as the same would not only indicate that the sale by the petitioner-penultimate seller to the exporter is in order to comply with the terms of "agreement or order for such

export”, but also would show that the goods so supplied by the petitioner to the exporter have, in fact, been move out of the territory of India. This facilitates ascertainment of the quantum of goods sold in the course of inter-State trade or commerce by way of export so as to enable the Assessing Authority to consider exemption under Section 5(3) of the CST Act.

5.1. With regard to imposition of penalty under Rule 12(3)(g) of the CST (O) Rules, Sri Susanta Kumar Pradhan, learned Additional Standing Counsel for the CT&GST Organisation would submit that Circulars being issued for guidance, the *quasi* judicial authority like Odisha Sales Tax Tribunal is not bound by such circular issued by the Commissioner of Commercial Taxes. He submitted that Rule 12(3)(g) of the CST (O) Rules mandates imposition of penalty at the rate of twice the amount of tax assessed. The learned Tribunal did not commit any error in law while setting aside the Appellate Order and remanding the matter to the Assessing Authority for fresh consideration in view of interpretation put forth by this Court while considering *pari materia* provision contained in Section 42(5) of the Odisha Value Added Tax Act, 2004, in the cases of *National Aluminium Company Ltd. Vrs. Deputy Commissioner of Commercial Taxes, Bhubaneswar-III Circle, Bhubaneswar, 2021 (I) OLR 828* and *Jindal Stainless Ltd. Vrs. State of Odisha, (2012) 54 VST 1 (Ori)*. Said decision has also been subsequently followed and discussed in the case of *State of Odisha Vrs. Chandrakanta Jayantilal, Cuttack, STREV No.69 of 2012, vide Order dated 05.07.2022*.

Discussion regarding question No. A:

6. From the pleadings and arguments advanced by respective parties, it transpires that the claim of exemption of penultimate sale in course of export is denied by the Assessing Authority which is affirmed by the First Appellate Authority as also the Odisha Sales Tax Tribunal on the ground of non-production of copy of agreement between the Indian Exporter and the Foreign Buyer.

6.1. The First Appellate Authority clearly outlined the dispute as follows:

*“*** At the Appeal hearing stage the dealer appellant appeared and furnished supporting documents like bill of lading, purchase orders towards claim of exemption of export sale amounting to Rs.2,98,93,489.50 but failed to produce the agreement copies or sale contract or purchase order of the foreign buyer with the Indian Exporter for want of which the learned AO disallowed the claim of exemption of sale invoking contravention of provision of Section 5(3) of the CST Act. ***”*

6.2. On consideration of rival contentions, it is, thus, necessary to examine as to whether in spite of the fact that the petitioner-penultimate seller furnishes Certificate of Export in Form ‘H’ as prescribed under Rule 12(10) of the CST (R&T) Rules along with supporting documents, like purchase orders and bill of lading, before the appropriate authorities, there is requirement to submit copy of agreement between the Indian Exporter and the Foreign

Buyer in order to claim exemption under sub-section (3) read with sub-section (4) of Section 5.

6.3. Chapter-II of the CST Act deals with formulation of principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import or export. Section 5 thereof deals with “when is a sale or purchase of goods said to take place in the course of import or export”. While sub-section (1) of Section 5 speaks about direct export and claim of exemption by the exporter; sub-section (3) as inserted with effect from 01.04.1976 by virtue of Central Sales Tax (Amendment) Act, 1976, entitles the penultimate seller to claim exemption in respect of sale of goods to the exporter. To avoid difficulties for claiming exemption under sub-section (3), sub-section (4) has been inserted *vide* Finance Act, 2005.

6.4. The provisions contained in sub-sections (3) and (4) of Section 5 of CST Act read as follows:

“(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.

(4) The provisions of sub-section (3) shall not apply to any sale or purchase of goods unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner a declaration duly filled and

signed by the exporter to whom the goods are sold in a prescribed form obtained from the prescribed authority.”

6.5. The term “prescribed” has been defined under Section 2(e) of the CST Act to mean “prescribed by rules made under this Act”.

6.6. Section 13(1) thereof empowers the Central Government to frame rules *inter alia* providing for:

“(d) the form in which and the particulars to be contained in any declaration or certificate to be given under this Act, the State of origin of such form or certificate or declaration shall be produced or furnished.”

6.7. Rule 12(10) of the CST (R&T) Rules prescribes as follows:

“(10) (a) The declaration referred to in sub-section (4) of Section 5 shall be in Form H and shall be furnished to the prescribed authority upto the time of assessment by the first assessing authority.

(b) The provisions of the rules framed by the respective State Government under sub-sections (3), (4) and (5) of Section 13 relating to the authority from whom and the conditions subject to which any form of certificate in Form ‘H’ may be obtained, the manner in which such form shall be kept in custody and records relating thereto maintained and the manner in which any such forms may be used and any such certificate may be furnished in so far as they apply to declaration in Form ‘C’ prescribed under these rules shall mutatis mutandis apply to certificate in Form ‘H’.”

6.8. The statutory Form ‘H’ as appended to CST (R&T) Rules is reproduced hereunder:

*“Original
The Central Sales Tax
(Registration and Turnover) Rules, 1957.
Form H
Certificate of export
[See Rule 12(10)]*

Serial No. _____
Name of the issuing State _____
Office of issue _____

*Seal of the
issuing authority*

Date of Issue

Name and complete address of the exporter _____

*Registration No. of the Exporter under the Central Sales Tax Act,
1956 if any.*

To

(Name and complete address of the seller)

Sales Tax registration number of the seller

(a) under the relevant State sales tax law

(b) under the Central Sales Tax Act, 1956

*Certificate I: Certified that the goods (the particulars whereof have
been specified in items (1) and (2) of the Schedule below) supplied in
pursuance of our purchase order No. _____ dated
_____ purchased from you as per Bill/Cash Memo/Challan
No. _____ dt. _____ for Rs. _____ have*

*been sold by me/us, in the course of export out of the territory of
India, as per details given in Item (3) to (6) of the said Schedule, and
that the said goods were purchased from you by me/us after, and for
the purpose of complying with, the agreement or order
No. _____ dated _____ for or in relation to such export.*

*Certificate II: It is further certified that non-liability to tax under the
Central Sales Act, 1956, in respect of goods referred to in Certificate
I has not been claimed from any other person and that no other
certificate for such non-liability has been issued to any other person
in India in respect of those goods.*

*Certificate III: It is further certified that in case the goods covered by
this certificate are reimported into India by me/us after their export,
I/we undertake to inform the sales tax authority of the person to whom
this certificate has been supplied, about the fact of such reimport
within a period of one month from the date of reimport of the said
goods into India.*

THE SCHEDULE

A. Particulars of goods

(1) Description of goods _____

(2) Quantity of goods _____

B. Details regarding export

- (3) Name of airport, seaport or land customs station through which the goods have been exported. _____
- (4) Name of the airlines/ship/railway/goods vehicle or other means of transport through which the export has taken place. _____
- (5) _____ Number and date of air consignment note/bill of lading/railway receipt or goods vehicle record or postal receipt or any other document in proof of export of goods across the customs frontier of India (Certified copy of such air consignment note/bill of lading/railway receipt/goods vehicle record/postal receipt/other document to be enclosed)
- (6) Description, quantity/weight and value of the goods exported under the document referred to in item (5) above _____

VERIFICATION

The above statements are true to the best of my knowledge and belief and nothing has been concealed therefrom.

Signature with date.

(Name of the person signing the certificate)

(Status of the person signing the certificate in relation to the exporter).

Note: To be furnished to the prescribed authority in accordance with the rules made by the State Government under Section 13."

6.9. Conjoint reading of aforesaid provisions makes it clear that exemption from payment of Central sales tax on the transactions falling under sub-section (3) is available to the selling dealer on compliance of terms of sub-section (4) of Section 5 of the CST Act read with Rule 12(10). In other words, in order to avail benefit of exemption from payment of Central sales tax on transaction of sale to the exporter under sub-section (3) of Section 5, sub-section (4) *ibid.* read with Rule 12(10) of CST (R&T) Rules explicitly requires furnishing of a declaration in Form 'H' duly filled and signed by the exporter to whom goods are sold. Minute scrutiny of Form 'H' makes it clear that the exporter who declares the goods sold by the penultimate seller has been exported out of the territory of India and fills in the information, like purchase order number with date, challan number with date. The exporter is

obliged to fill in the agreement number and date entered into between the exporter and the foreign buyer. As per Certificate-I appended to Form H, the exporter certifies that the very goods purchased from the penultimate seller is for the purpose of complying with the agreement for or in relation to such export. Descriptions as regards goods and details of transport are required to be furnished by the exporter as required under the Schedule appended to said Form H. The exporter is also required to supply copy of consignment note/bill of lading/railway receipt/goods vehicle record/postal receipt, *etc.* Nothing in the said Form 'H' is required to be done by the penultimate selling dealer. The penultimate selling dealer is only required to furnish the Certificate of Export in Form 'H' as received from the exporter to the prescribed authority with the copies of documents as specified in said Form 'H'. Neither the statute nor the rules or the contents of Certificate of Export in Form 'H' requires the penultimate selling dealer to furnish "*the agreement copies or sale contract or purchase order of the foreign buyer with the Indian Exporter*".

6.10. Apt here to refer to the decision rendered by the Madras High Court rendered in the case of *V. Win Garments Vrs. Additional Deputy Commercial Tax Officer, Central-I Assessment Circle, Tirupur, (2011) 42 VST 330 (Mad)*. In the said case it has been observed as follows:

"4. According to the learned counsel for the petitioner, though the petitioner has not produced the agreement with foreign buyers, the petitioner has filed Form-H and other documents in support of his claim

and the order of the assessing authority without insisting those documents and by considering the production of agreement with foreign buyers, is unfair and arbitrary and is bad in law. This Court finds considerable force in such argument advanced on the side of the petitioner. **What is required on the part of the petitioner is to prove the factum of the transaction and once he is able to do so with sufficient and satisfactory documents, the value of the same is exempted from tax liability and no rule lays it mandatory to produce the agreement with the foreign buyers.** That being so, the failure on the part of the assessing authority to consider the documents already produced by the petitioner and to pass appropriate orders in the light of the same amounts to non-application of mind and the impugned order, which is the outcome of the same cannot be legally allowed to stand. The learned counsel for the petitioner has also in the course of hearing, produced the copy of the order passed by our High Court dated 30.08.2004 in W.P. No. 24354 of 2004 made in M/S. Rolls Appliances (P) Limited Vrs. The Commercial Tax Officer and order dated 05.04.2004 in W.A. No.4 of 2003 in M/s. South India Hosiery Manufacturers Association Vrs. The State of Tamil Nadu and others. The perusal of the orders reveal that identical issue was raised in both the matters before the Hon'ble Division Bench and the learned Single Judge and our High Court has in both the cases considering the submission made by the petitioners therein, set aside the identical impugned orders and remanded the matter to the assessing authority with liberty given to the petitioner therein, to produce sufficient materials to convince the assessing authority about the genuineness of the claim made by the petitioner. In my considered view, the petitioner herein, is also entitled to get such opportunity as such the impugned order passed by the appellate authority is hence to enable the petitioners to avail such opportunity, set aside."

6.11. It is apposite to refer to the Judgment of this Court in the case of *Tilakraj Mediratta Vrs. State of Odisha and Others*, (1992) 86 STC 453 (Ori) rendered in the context of declaration forms *vis-à-vis* claim of deduction from gross turnover while computing taxable turnover under the Odisha Sales Tax Act, 1947. In the said case selling dealer in order to be entitled to the deduction was required to produce at the time of assessment the declaration in Form IA, which he was required to obtain from the purchasing dealer. This Court held,

“6. Under Section 5(2)(A)(a)(i) the sale of any goods notified from time to time as tax-free under section 6 is deducted from the gross turnover of a selling dealer for the purpose of computation of taxable turnover. In other words, a selling dealer who produces evidence to show that it sold goods covered by notification issued under Section 6 and the conditions and exceptions are complied with, is entitled to a deduction while its taxable turnover is computed. The selling dealer in order to be entitled to the deduction has to produce at the time of assessment the declaration form I-A which it has obtained from the purchasing dealer. In the instant case, there is no dispute that the purchasing dealer had issued form I-A to the petitioner. It is also not disputed that the certification of the unit is in terms of the requirement of entry 26-A of the list of exempted goods. According to the department, if the goods have not been utilised for the purpose indicated in the declarations, deduction to the selling dealer is not to be allowed. In our view, the stand is fallacious. It is not for the selling dealer to go after the purchasing dealer to find out as to in what manner the latter utilises the goods which it has purchased on the strength of the declaration forms in order to be entitled to the deduction. Such a requirement would fasten an impossible burden on the selling dealer. The question,

however, has rightly been posed by the learned counsel for the department that if there is misuse, on whom the department shall lay its hands. It is the purchasing dealer who is getting exemption on fulfilment of certain conditions. Therefore, if goods purchased on the basis of the declaration are put to a different use, the benefit of exemption is to be denied to it. The selling dealer cannot be faulted if there is any diversion or change of user. In this connection, the fifth proviso to sub-section (1) of section 5 of the Act is relevant, and has application.

7. Therefore, in our view the authorities were not correct in taxing the petitioner for any alleged change in user of the goods purchased by issue of Form IA by the purchasing dealer. It is open to the department to appropriately levy tax on opposite party No.7 if it is established that the goods purchased by it on the strength of Form IA was put to a different use or that there has been any contravention of the declaration.”

6.12. The aforesaid decision was referred to larger Bench of this Court in the case of *Manisha Enterprises Vrs. State of Odisha*, OJC No.13383 of 1999 to find out whether the view expressed in *Tilakraj Mediratta (supra)* is in conflict with another division Bench Judgment of this Court rendered in the case of *State of Odisha Vrs. Sahoo Traders*, SJC No.27 of 1990, disposed of on 22.12.1994. *Vide Manisha Enterprises & Ors. Vrs. State of Odisha & Ors.*, 2015 (1) ILR-CUT 637 this Court in Full Bench (3-Judges) held,

“13. Taking into consideration the provisions of the Act, as contained in Section 5(2)(A)(a)(i) and Section 5(2)(A)(a)(ii) and decisions in the case of State of Odisha Vrs. M/s. Sahoo Traders (supra) and Tilakraj Mediratta Vrs. State of Odisha, (supra), we

are of the considered view that there is no conflict of opinion in the decisions rendered by this Court in both the aforesaid cases, i.e., State of Odisha Vrs. M/s. Sahoo Traders (SJC No.27 of 1990, disposed of on 22.12.1994) and Tilakraj Mediratta Vrs. State of Odisha, (1992) 86 STC 453 (Ori)."

6.13. While answering the question "Whether in the facts and circumstances of the case, the Tribunal was correct in rejecting the declarations in Form-IV, which were furnished by the purchasing dealers to the Petitioner, for purchase of logs, as manufacturers", this Court in the case of *Odisha Forest Development Corporation Ltd. Vrs. State of Odisha*, STREV 74 of 2004, vide Judgment dated 22.03.2022, held as follows:

"9. *** As far as issue (i) is concerned, the Court notes that in the present case nothing has been brought on record to enable either the Tribunal or this Court to come to a conclusion that the saw mill manufacturers who purchased the logs of wood from the Petitioner did not subject the logs to manufacturing or processing. That was an enquiry that could have been undertaken by the Assessing Officer (AO)/Sales Tax Officer (STO). It was not incumbent on the selling dealer to enquire whether the saw mill manufacturer furnishing a declaration in Form IV was or was not entitled to avail of the concessional rate of sales tax.

10. *** As explained by this Court in *Tilakraj Mediratta (supra)* "It is not for the selling dealer to go after the purchasing dealer to find out as to in what manner the latter utilizes the goods which it has purchased on the strength of the declaration form in order to be entitled to deduction. Such requirement would place on an impossible burden on the selling dealer". To the same effect is the decision in *M/s. Bharat Petroleum Corporation Ltd. (supra)* [*State of*

Odisha Vrs. M/s. Bharat Petroleum Corporation Ltd., 93 (2002) CLT 364].”

6.14. In yet another decision being *Kalinga Timber, Jagatpur, Cuttack Vrs. State of Odisha represented by the Commissioner of Sales Tax, STREV No.63 of 2011, vide Judgment dated 05.07.2022*, it has been stated as follows:

“9. Applying the ratio of the above decision [Tilakraj Mediratta Vrs. State of Odisha, (1992) 86 STC 453 (Ori)] to the case on hand, it is seen that the declaration in Form IV does not disclose the intention of the purchasing dealer to use the size goods purchased as ‘packing materials’. Consequently, the selling dealer cannot be saddled with any liability of tax. If indeed, the Department finds that the purchasing dealer has used the purchased goods for the purpose other than that disclosed in the declaration form, it would be open to the Department to proceed against the purchasing dealer. It is, therefore, not justified on the part of the Department to pass on that liability to the selling dealer.”

6.15. With regard to the terms “agreement” and “order” contained in Section 5(3) of the CST Act, the Hon’ble Supreme Court of India in *Consolidated Coffee Ltd. Vrs. Coffee Board, Bangalore, (1980) 46 STC 164 = AIR 1980 SC 1468 = (1980) 3 SCC 358* made certain pertinent observations:

“The aforesaid provision [Section 5(1) of the CST Act] was examined by this Court in two leading cases, namely, Coffee Board Bangalore Vrs. Joint Commercial Tax Officer, Madras & Anr., (1970) 25 STC 528 (SC) and Mohd. Serajuddin etc. Vrs. State of Orissa, (1975) 36 STC 136 (SC) and a certain interpretation had been accorded by this Court to the expression ‘in the course

of export’ and according to these decisions the last sale, immediately preceding the sale occasioning the export of goods out of India (hereinafter called the ‘penultimate sale’), however closely related to the final export, was held not to be the course of export but only for export and hence liable to tax and according to the petitioners it was with a view to remove the difficulties caused by these and other similar decisions that the Parliament enacted the new sub-section (3) of Section 5 and added a proviso to Section 6(1) by the Amending Act (103 of 1976).

It is thus clear to us that Section 5(3) formulates a principle of general applicability in regard to all penultimate sales provided they satisfy the specified conditions mentioned therein and there is no question of the said provision creating a legal fiction as has been contended for by counsel. The contention, therefore, that Section 5(3) is beyond the power or authority of Article 286(2) and, therefore, ultra vires, must be rejected.

The material words which prescribe the two conditions on satisfying which the penultimate sale is to be regarded as a sale in the course of export are: ‘If such last sale or purchase (meaning the penultimate sale or purchase) took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.’ It is true that Parliament has not said ‘the agreement or order for or in relation to such sale occasioning the export’, but has used the phrase ‘the agreement or order for or in relation to such export.’ But in our view two aspects emerge very clearly on a close scrutiny of this phrase which by implication show that the ‘agreement’ spoken of there refers to the agreement with a foreign buyer and not an

agreement with a local party containing a covenant to export.

*Applying this rule of construction [noscitur a sociis] it becomes clear that 'the agreement' occurring in the phrase must mean the agreement with a foreign buyer and not the agreement with a local party containing a covenant to export. Secondly and more importantly, the user of the definite article 'the' before the word 'agreement' is, in our view, very significant. Parliament has not said 'an agreement' or 'any agreement' for or in relation to such export and in the context the expression 'the agreement' would refer to that agreement which is implicit in the sale occasioning the export. Between the two sales (the penultimate and the final) spoken of in the earlier part of the sub-section ordinarily it is the final sale that would be connected with the export, and, **therefore, the expression 'the agreement' for export must refer to that agreement which is implicit in the sale that occasions the export.** The user of the definite article 'the', therefore, clearly suggests that the agreement spoken of must be the agreement with a foreign buyer. As a matter of pure construction it appears to us clear, therefore, that by necessary implication the expression 'the agreement' occurring in the relevant phrase means or refers to the agreement with a foreign buyer and not an agreement or any agreement with a local party containing the covenant to export.*

Two things become clear from this Statement; first, Mohd. Serajuddin's decision (supra) [Mohd. Serajuddin Vrs. State of Orissa, (1975) 2 SCC 47] is specifically referred to as necessitating the amendment and secondly, penultimate sales made by small and medium scale manufacturers to an export canalising agency or private export house to enable the latter to

export those goods in compliance with existing contracts or orders are regarded as inextricably connected with the export of the goods and hence earmarked for conferral of the benefit of the exemption. But here again, 'existing contract' with whom is not clarified. In other words, on this crucial point the Statement is silent and does not throw light on whether the existing contract should be with a foreign buyer or will include any agreement with a local party containing a covenant to export. Therefore, the question will again depend upon proper construction and, as we have said above, in the matter of construction the two aspects discussed earlier show that by necessary implication 'the agreement' spoken of by Section 5(3) refers to the agreement with a foreign buyer.

*However, in support of his construction counsel for the petitioners pressed into service two aspects arising from the Statement of Objects and Reasons, namely, (a) that the exemption was intended to be extended even to small and medium scale manufacturers who manufacture goods for foreign market but have to depend upon a canalising agency or private export house for the export of their goods and (b) that the object of granting the exemption was to promote our exports in fiercely competitive international markets and, according to counsel, both these objectives would be frustrated if the narrow construction was placed on the expression 'the agreement as meaning the agreement with a foreign buyer and that the construction suggested by him would carry out the objectives. **It is true that the benefit of the exemption was intended to be extended to small and medium scale manufacturers desirous of exporting their goods but the requirement of the new provision is not that they must procure or have with them a foreign buyer's contract but the requirement is that before they complete the sale of their goods to the canalising***

agency of the private export house there must be in existence a foreign buyer's contract to implement which they should have sold their goods to such agency or export house. In the nature of things such manufacturers who have no expertise of export trade are not expected to have a foreign buyer's contract with them and it would be sufficient compliance of the provision if the canalising agency or the export house has with it the foreign buyer's contract. It would, therefore, be incorrect to say that the benefit of the exemption depends upon the fortuitous circumstance of a foreign buyer's contract being available with such manufacturer when he sells his product to the agency or the export house. No hardship as is sought to be suggested is involved and we do not agree that by the construction which we are inclined to place on the expression 'the agreement' occurring in Section 5(3) the small or medium scale manufacturers would be deprived of the benefit of the exemption. In fact, the construction which we are inclined to accept would be in consonance with the trade practice obtaining in export trade, namely, that normally the export activity commences with securing or obtaining an export contract or a firm order from a foreign buyer as the first step towards the ultimate export [vide: observations of this Court in State of Mysore Vrs. The Mysore Spg. and Mfg. Co. Ltd., (1958) 9 STC 190 (SC) where obtaining a firm order from overseas buyer is described the first out of nine steps enumerated in the entire procedure for export]. As regards the other aspect it is clear to us that two public interests are involved; promotion of the exports of the country is one public interest while augmentation of the States' revenues through sales tax is the other and it is obvious that if the liberal construction, as suggested by the counsel for the petitioner, is accepted the former public interest will undoubtedly be served while the latter will greatly suffer and if the narrow construction is accepted the latter public interest will be served and the former will suffer. It is difficult to say that the Parliament intended to

prefer one and sacrifice the other. In fact the granting of exemption to penultimate sales was obviously with a view to promote the exports but limiting the exemption to certain types of penultimate sales that satisfy the two specified conditions displays an anxiety not to diminish the States' revenues beyond a certain limit. The section in any case gives no indication that one public interest is to be preferred to the other and therefore, in our view, the matter must again depend upon the proper construction of the language employed. On construction we are of the view that by implication the expression 'the agreement' occurring in Section 5(3) refers to the agreement with a foreign buyer."

6.16. The 5-Judge Constitution Bench of the Hon'ble Supreme Court of India in the case of *State of Karnataka Vrs. Azad Coach Builders Pvt. Ltd. and Anr.*, (2010) 9 SCC 524 laid down the principles in respect of entitlement to claim exemption under Section 5(3) of the CST Act, which are as follows:

"26. When we analyse all these decisions in the light of the Statement of Objects and Reasons of the amending Act 103 of 1976 and on the interpretation placed on Section 5(3) of the CST Act, the following principles emerge:

i. To constitute a sale in the course of export there must be an intention on the part of both the buyer and the seller to export.

ii. There must be obligation to export, and there must be an actual export.

iii. The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export.

iv. To occasion export there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it, without which a transaction sale cannot be called a sale in the course of export of goods out of the territory of India.

27. The phrase “sale in the course of export” comprises in itself three essentials:

- (i) that there must be a sale;
- (ii) that goods must actually be exported;
and
- (iii) that the sale must be a part and parcel of the export.

The word “occasion” is used as a verb and means “to cause” or “to be the immediate cause of”. Therefore, the words “occasioning the export” mean the factors, which were the immediate cause of export. The words “to comply with the agreement or order” mean all transactions which are inextricably linked with the agreement or order occasioning that export. The expression “in relation to” are words of comprehensiveness, which might both have a direct significance as well as an indirect significance, depending on the context in which it is used and they are not words of restrictive content and ought not be so construed. Therefore, the test to be applied is, whether there is an inseverable link between the local sale or purchase and export and if it is clear that the local sale or purchase between the parties is inextricably linked with the export of the goods, then a claim under Section 5(3) for exemption from State sales tax is justified, in which case, the same goods theory has no application.

29. *We may also indicate that the burden is entirely on the assessee to establish the link in transactions relating to sale or purchase of goods and to establish that the penultimate sale is inextricably connected with the export of goods by the exporter to the foreign buyer, which in this case the assessee has succeeded in establishing.”*

6.17. As is revealed from the orders of the authorities in the instant case it is not in dispute that Certificate of Export in Form ‘H’ as issued to the petitioner-penultimate seller is in order and free from defect. This indicates that the exporter has supplied information with regard to date of agreement with the foreign buyer or the date of purchase order placed by the foreign buyer. Said form also contains details of transport and bill of lading. It is recorded as a matter of fact by the authorities that the petitioner produced purchase order and bill of lading for verification of the authorities. In view of provisions of the statute and the decisions referred to above, this Court is of the considered opinion that the petitioner has discharged its burden in the instant case and the authorities could very well have ascertained from the details mentioned in the Certificate of Export in Form ‘H’ supported by bill of lading and purchase order whether the agreement/purchase order preceded the procurement of goods by the Indian Exporter from the petitioner-penultimate seller. There being no adverse finding of any sort in this regard, this Court is, therefore, comes to conclusion that mere non-production of agreement entered into between the Indian Exporter and the Foreign Buyer would not invalidate the claim of the petitioner-penultimate seller for exemption under Section 5(3) of the CST Act. Furthermore, the

authorities have not complained that the petitioner has not complied with the terms of sub-section (4) of Section 5. The disallowance of claim of the petitioner under Section 5(3) of the CST Act has been made by the Assessing Authority and confirmed by the Appellate Authority and the Odisha Sales Tax Tribunal was on account of non-production of copy of agreement between the Indian Exporter and the Foreign Buyer. In view of discussions made *supra*, there is no scope for this Court left but to overrule the view expressed by the authorities. Therefore, this Court is inclined to set aside the Order dated 18.05.2017 passed by the learned Odisha Sales Tax Tribunal in S.A. No.58(C) of 2015-16.

Discussion regarding question No. B:

7. As regards question No.(b), it may be relevant to notice Rule 12(3)(g) of the CST (O) Rules.

7.1. Rule 12(3)(g) as it stood during the relevant point of time is reproduced hereunder:

“Without prejudice to any interest or penalty that may have been levied or imposed under any of the provisions of the Act, an amount equal to twice the amount of tax assessed under clause (e) or (f) shall be imposed by way of penalty in respect of any assessment completed under the said clauses.”

7.2. It is seen that said provision is *pari materia* with the provision contained in Section 42(5) of the Odisha Value Added Tax Act. This Court is not in a position to accept the argument of

Sri Susanta Kumar Pradhan, learned Additional Standing Counsel that the decisions rendered earlier in the cases of *National Aluminium Company Ltd. Vrs. Deputy Commissioner of Commercial Taxes, Bhubaneswar-III Circle, Bhubaneswar, 2021 (I) OLR 828*; *Jindal Stainless Ltd. Vrs. State of Odisha, (2012) 54 VST 1 (Ori)* and *State of Odisha Vrs. Chandrakanta Jayantilal, Cuttack, STREV No.69 of 2012, vide Order dated 05.07.2022* are applicable to the instant case, for the Commissioner of Commercial Taxes has issued Circular dated 20.04.2015. Said Circular has been issued by taking conscious decision by respecting Judgments of the Karnataka High Court, the Himachal Pradesh High Court as also the orders of the Odisha Sales Tax Tribunal. The circular being a benevolent one, this Court feels it expedient to impress upon all concerned to follow it in the circumstances enumerated therein.

7.3. It may be beneficial to reproduce the Circular dated 20.04.2015 issued by the Commissioner of Commercial Taxes, Odisha, which was circulated amongst Special Commissioner of Commercial Taxes (Enforcement), All Additional Commissioners (Head Office), Joint Commissioners of Commercial Taxes of all Territorial Ranges, All Deputy Commissioners of Commercial Taxes, Assistant Commissioners of Commercial Taxes, Commercial Tax Officers in charge of Circles, Assessment Units, Commercial Tax Officers in charge of Investigation Units and Commercial Tax Website for information and necessary action:

*“Office of the Commissioner of Commercial Taxes:
Odisha : Cuttack
No. 42/III(I)38/09/CT dated, 20/04/2015*

CIRCULAR

*Sub: Non-levy of mandatory penalty on audit assessment under
Central Sales Tax Act*

Madam/Sir,

It has come to my notice that in many case the assessing authorities are imposing penalty equal to twice the amount of tax assessed in the assessments due to non-submission of declaration forms as per Rule 12(3)(g) of the CST (O) Rules, 1957. As per Rule 12(3)(a), (e) and (f) of the CST(O) Rules, 1957, the tax audit, if results in detection of suppression of purchases or sales or both, erroneous claims of deduction, evasion of tax or contravention of any provision of the Act affecting the tax liability of the dealer, the Assessing Authority (AA) is required to do assessment of the dealer and impose penalty equal to twice the amount of tax assessed in such assessment as per Rule 12(3)(g) of the CST(O) Rules, 1957.

In cases of non-production of ‘C’ Forms, it has been noticed that there is no uniformity and consistency in the approach by the departmental officers as to whether penalty is leviable for non-production of ‘C’ Forms or not. It is seen that assessing officers and appellate officers are interpreting the provisions of the relevant statutes in a varying manner. This is leading to unnecessary litigation which is affecting the dealers adversely and also not bringing any revenues to the department when orders are set aside in the OSTT and in the higher judicial forums. In order to obviate such dissimilar approach by the different assessing authorities, in cases of non-production of ‘C’ Forms, there is a need to issue this circular based on the decisions of the Odisha Sales Tax Tribunal and the judiciary.

As the provision of the Central Sales Tax Act, 1957 stands, in cases relate to non-production of ‘C’ Forms, appropriate tax is to be levied by applying the higher rate of tax as prescribed under

Section 8(2) of the CST Act. In this context, it is to be mentioned here that the imposition of penalty at the time of audit assessment for non-submission of 'C' Forms may or may not be proper in all cases. The conditions precedents for imposition of penalty under Clause (g) of Rule 12(3) as provided in Clause (a) of the said Rule are:

- 1. Suppression of purchase or sale or both;*
- 2. Erroneous claim of exemption or deduction;*
- 3. Evasion of tax;*
- 4. Contravention of any provision of the Act affecting the tax liability of the dealer.*

It is required to determine whether failure to furnish declaration in Form 'C' against the bona fide claim of concessional rate of tax falls under the ambit of any of the offences stated above.

The Odisha Sales Tax Tribunal in the case of M/s Sri Lalbaba Roller Flour Mills, Nayabazar, Cuttack Vrs. State of Odisha in S.A. No. 87 (C) of 2012-13 dated 03.04.2014 have observed that

[to quote]

“The dealer respondent has been assessed under Rule 12(3) of the CST (O) Rules, 1957 and the disputed amount of penalty has been imposed on the amount of the tax assessed or the turnover not supported with declarations due to failure on the part of the dealer to furnish the required declaration in Form “C” and “H”. Since there was no allegation of Audit visit report and the dealer respondent has produced the required books of accounts excepting the declarations as already cited above, which are beyond his control and also the facts remains that the dealer has not concealed / suppressed any part of its turnover and has also been assessed appropriately on the turnover not supported with the declarations, for which the levy of penalty u/r 12(3)(g) of the CST (O) Rules by the learned STO is not justified and hence is liable to be deleted.”

Similarly in another judgment in the case of M/s Gajalaxmi Iron Works, Industrial Estate, Kalunga, Rourkela Vrs. State of Odisha in S.A. No. 53 of 2011-12 dated 18.12.2013, the Hon'ble Odisha Sales Tax Tribunal have given a clear finding along similar lines which reads as follows:

[to quote]

“On a careful reading of Rules 12(3)(g), I find that the imposition of penalty can be made in this provision only where there has been assessment under clause (e) or (f) of the said rules. On a reading of the aforesaid two rules I find that non-submission of “C” forms is not covered for assessment under the same rules. Therefore, considering submissions from both sides I come to a positive finding that the filing of “C” form is an optional condition to avail of concessional rate of tax and non-compliance of the same will only debar the dealer to get the exemption of tax benefit.

In the Judgment of Gujarat Ambuja Cement Ltd. and Another Vrs. Assessing Authority-cum-Assistant Excise and Taxation Commissioner and Others reported in (2000) 118 STC 315 (HP), it has been observed by the Hon'ble High Court of Himachal Pradesh that for the provisions of the CST Act and Rules made thereunder, the question of filing of Form ‘C’ is envisaged only in order to avail of concessional or reduced rate of taxation. Such Forms are permitted to be filed not only before the finalization of the assessment and even at the appellate and revisional stages in cases where the availing of concession is dependent upon filing of C Forms the non-filing of ‘C’ Forms or the filing of defective ‘C’ Forms may only render the assessee liable to pay at the full rate of taxation without the benefit of concessional rate in their favour, and the filing of ‘C’ Forms being optional and a mere condition to avail of the concessional rate contemplated in the statutory provision as such, the lapse, if any, cannot be considered to operate as a penal or forfeiture clause. It will be appropriate to quote the relevant portion:

'Case law are innumerable where the courts, including the apex Court, have held that even at the appellate stage the assessee may be allowed to file 'C' forms or file rectified and proper forms if those filed were found to be defective in any manner or for any reason. Further Sri Shanti Bhusan learned Senior Counsel is also right in contending that in a case where the availing of concession is dependent upon filing 'C' form, the non-filing of 'C' form or filing of defective C forms may only render the assessee liable to pay at the full rate of taxation without the benefit of concessional rate in their favour, and the filing of 'C' forms being optional and a mere condition to avail of the concessional rate contemplated in the statutory provision as such, the lapse, if any, cannot be considered to operate as a penal or forfeiture of clause. Being an optional benefit available, non-availing of the same or non-compliance of such provision, in any event, cannot be held to be non-compliance with the provisions of the Act, Rules and notifications, envisaged in the notification dated January, 1996. Placing such interpretation would amount to being not merely perfidious, but vitiated by perversity of approach also.'

Similarly the Hon'ble High court of Karnataka in case of Fosroc Chemicals (India) Pvt. Ltd. Vrs, the State of Karnataka in STRP Nos. 130, 136-168 & 169-170 of 2014 is of opinion that on a representation made by the purchaser the dealer company has sold the goods claiming concessional rate of tax. When the purchaser is unable to produce the 'C' Forms for any reason whatsoever, then the liability is cast on the assessee to pay tax under the State VAT Act. The said tax ought to have been paid on the date of sale, if there is a delay in payment of the said tax then there is automatic and mandatory interest in terms of State VAT Law.

On a plain reading it emerges that mere non-submission of declaration in Form 'C' against a bona fide transaction does not constitute an offence under rule 12(3)(a) of the CST(O) Rules so as to attract liability to imposition of penalty under Clause (g) of the said Rule. The filing of 'C' Form being optional and a mere condition to avail concessional rate, the lapse, if any, cannot be considered to operate as a penal clause. Being an optional benefit available to the dealer, the non-availing of the same or non-compliance with such provision, in any event, cannot be held to be non-compliance with the provisions of the Act, Rules and notifications. It is not only that tax liability is affected but when tax liability is affected by contravention of any conditions mentioned in Rule 12(3)(a) of the CST(O) Rules, then only penalty can be imposed. On the other hand the submission of declaration forms is not strictly in the control of the assessee dealer, since it is to be obtained from the purchasing dealer and submit before the assessing authority to avail concessional rate of tax. Non-submission of Forms is not an incentive for the assessee as he has to pay higher rate of tax as prescribed under Section 8(2) of the CST Act. Hence, no intention can be attributed to the assessee for his failure to submit declaration in Form 'C'.

In view of the above facts it is required to impress upon all assessing/appeal authorities that non-filing of Form 'C' and 'F' Form for a bona fide transaction in terms of the provision of Clause (a) of the Rule 12(3) of the CST (O) Rules, will not attract penalty under Clause (g) of the said Rule in the absence of substantive provision for such imposition under the Section 9(2) of the CST Act or CST (R&T) Rules.

*Commissioner of Commercial Taxes
Odisha, Cuttack
Dated: 20/04/2015"*

7.4. In view of the aforesaid Circular issued by the Commissioner of Commercial Taxes, instructing not to enforce

penalty under Rule 12(3)(g) in the circumstance where there was non-filing of declaration forms in respect of *bona fide* transactions, particularly in absence of substantive provision for such imposition under Section 9(2) of the CST Act, this Court is of the considered opinion that the First Appellate Authority was justified in deleting penalty as imposed by the Assessing Authority while finalizing Audit Assessment.

7.5. In the First Appellate stage, the petitioner had been granted relief with respect to penalty for non-submission of statutory forms. There was neither cross-appeal nor cross-objection by the Revenue. It deserves to be noted, therefore, that in the appeal of the petitioner-dealer, the Odisha Sales Tax Tribunal was not legally correct to grant relief to the opponent-State of Odisha by remanding the matter to the Assessing Authority to take action as deemed proper “as per requirement of statute” *qua* matter of imposition of penalty.

7.6. This Court in the case of *Srinivas Traders Vrs. State of Odisha*, (2015) 81 VST 80 = 2014 SCC OnLine Ori 442 has opined as follows:

“In view of the above, we are of the considered opinion that in absence of any appeal or cross-appeal by the Revenue, the Tribunal ought not to travel beyond the dispute raised by the petitioner in its appeal. Therefore, the Tribunal should not have disallowed the relief granted to the petitioner by the First Appellate Authority by restoring the assessment order when the Revenue has no grievance against grant of such relief to the petitioner by the First Appellate Authority.”

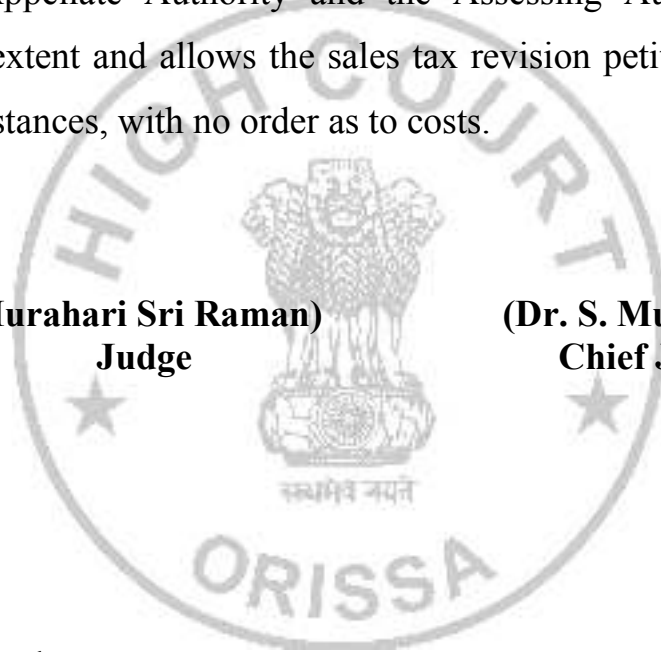
Conclusion and decision:

8. For the discussions made in foregoing paragraphs and the reasons stated above, both the question Nos.A and B are answered in the negative in favour of the petitioner-dealer and against the State of Odisha-Revenue.

9. In the result, this Court sets aside the Order dated 18.06.2017 of the Tribunal and the corresponding orders of the First Appellate Authority and the Assessing Authority to the above extent and allows the sales tax revision petition but, in the circumstances, with no order as to costs.

(Murahari Sri Raman)
Judge

(Dr. S. Muralidhar)
Chief Justice



Aks

High Court of Orissa, Cuttack
December 08, 2022