

IN THE HIGH COURT OF ORISSA AT CUTTACK**STREV Nos. 21 of 2008 and 30 of 2008****STREV No.21 of 2008*****M/s. Rameswarlal Shyamsundar* *Petitioner******-versus-******State of Odisha, represented by the
Commissioner of Sales Tax* *Opposite Party*****AND****STREV No.30 of 2008*****M/s. Rameswarlal Shyamsundar* *Petitioner******-versus-******State of Odisha, represented by the
Commissioner of Sales Tax* *Opposite Party*****Advocates, appeared in these cases:*****For Petitioner(s)* : Mr. R.P. Kar, Advocate*****For Opposite Parties* : Mr. S.S. Padhy
Additional Standing Counsel****CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIAK****JUDGMENT****11.04.2022****Dr. S. Muralidhar, CJ.**

1. These two revision petitions involving the same assessee arise out of a common set of facts and give rise to the same questions of law but for two different years i.e. 1985-86 as far as STREV

No.21 of 2008 is concerned and the year 1982-83 as far as STREV No.30 of 2008 is concerned.

2. While admitting STREV No.21 of 2008 on 5th May, 2008 this Court framed the following four questions for consideration:

(i) Whether in the facts and circumstances of the case, the Odisha Sales Tax Tribunal ('Tribunal') was justified in treating the sales of paper to manufacturing registered dealers against declarations in Form IA out of the paper purchased by furnishing declaration in Form 34 inside the State of Odisha as being in contravention of the 2nd proviso to Section 5A(a)(ii) of the Orissa Sales Tax Act, 1947 (OST Act)?

(ii) Whether the Tribunal was justified in not considering Sections 6 and 7 read with Sections 4(1) of the OST Act?

(iii) Whether the Tribunal was justified in sustaining the orders of assessment passed under the Odisha Additional Sales Tax Act (OAST) for which no separate notice under Section 12(8) of the OST Act read with the OAST Act had been issued?

(iv) Whether in the facts and circumstances of the case, the Tribunal was justified in confirming the orders of assessment passed under the OAST Act leaving additional sales tax under Section 5(2)(A)(a)(ii) of the OST Act which did not form part of the gross turnover under the OST Act?

3. At the outset, Mr. R.P. Kar, learned counsel for the Petitioner stated that barring question No.(i) above, he is not pressing the other questions, including those relating to the OAST Act as the tax amount involved is insignificant.

4. Although STREV No.30 of 2008 is yet to be formally admitted by this Court, it is hereby admitted by the present order and question (i) as above is framed in the said STREV No.30 of 2008 as well.

5. Relevant to question No.(i) above in both STREV Nos.21 and 30 of 2008, the facts are that the Petitioner is a proprietary concern carrying on business on papers, stationery articles etc. on wholesale basis. The Petitioner is a registered dealer under the OST Act.

6. For the year 1982-83 assessment under Section 12(4) of the OST Act was completed by the Sales Tax Officer (STO), Cuttack-I Circle, Cuttack. In the said assessment order, sales made to Industrial units which were established pursuant to the Industrial Policy Resolutions (IPRs) declared by the Government of Odisha read with the notification of the Finance Department (FD) issued under Section 6 of the OST Act against declaration in Form 1A were disallowed. This followed the pattern of the year 1982-83 where the assessment was reopened under Section 12(8) of the OST Act. The purchase value of the paper amounting to

Rs.1,84,075.08 was added to the taxable turnover (TTO) by the STO and tax @8% was levied. The gross turn over (GTO) and the TTO were enhanced by Rs.20,000/- respectively on the allegations of suppression. Extra tax of Rs.16,406/- and penalty of Rs.200/- were levied by the STO. The total tax and penalty demanded worked out to Rs.16,606/- under the OST Act. As far as 1985-86 is concerned, the corresponding tax demand was Rs.1,14,251/-.

7. The corresponding appeals filed by the Petitioner before the Assistant Commissioner of Sales Tax (ACST), Cuttack-I Bench, Cuttack (ACST) was registered for the year 1982-33 as AA 1972-1973/CUIW/87-88. As far as the year 1985-86 is concerned, the corresponding appeals were AA 1974 and 1975/CUIW/87-88.

8. By two separate orders dated 14th February, 1991 the ACST allowed both sets of appeals. Following the decision of the Tribunal in *Sahoo Traders v. State of Odisha*, the ACST concluded that there was no contravention of Section 5A(a)(ii) of the OST Act. It was observed that the Assessee had sold the goods inside the State of Odisha subject to levy of tax but the same could not be taxed because of Section 6 of the OST Act. There was no restriction on the dealer to resale such goods to the manufacturing dealers on the Strength of Form IA. Consequently, the Appellant dealer was held not to have contravened the declaration in Form 34. It was not in dispute that the purchasing dealer had purchased the goods in Form IA and sales to that effect

were exempted under Sl.No.26A of the Tax-Free list. It was observed that the enjoinder of Form IA was consistent to a particular set of traders and such concession could not be described as 'tax free'. As far as 1982-83 is concerned, the demand was reduced to Rs.1680/- with the penalty amount of Rs.200/-. As far as 1985-86 is concerned, the ACST reduced it to Rs.1, 22,478.36 and the penalty was reworked as Rs.9623.62

9. The State thereafter preferred appeals before the Tribunal. Two separate sets of orders dated 23rd September, 1996 in both sets of appeal by the State. The Tribunal allowed the appeals following a judgment of this Court in ***State of Orissa v. M/s. Sahoo Traders*** (decision dated 22nd December, 1994 in SJC No.27 of 1990). The appeals were accordingly allowed by the Tribunal.

10. Mr. R.P. Kar, learned counsel appearing for the Petitioner in both the cases argued that the judgment in the ***State of Odisha v. Sahoo Traders*** (*supra*) was contrary to the judgment of a coordinate Bench in ***Gurudev Singh Ray v. Authorized Officer (1993) 76 CLT 671 (Ori)***. However, he submitted that there was no need to refer to the question of correctness of the decision in ***M/s. Sahoo Traders*** to a Larger Bench on account of three subsequent judgments of the Supreme Court of India categorically answering the question in favour of the Assessee and against the Department. In particular he referred to the decisions in ***Peekay Rerolling Mills Pvt. Ltd. v. The Assistant Commissioner (2007) 4 SCC 30***; ***State of Punjab v. Perfect Synthetics AIR 2008 SC***

1597 and *Lloyd Electric and Engineering Ltd. v. State of Himachal Pradesh* (2016) 1 SCC 560.

11. Mr. Kar submitted on the strength of the decision of this Court in ***Tilakraj Mediratta* (1992) 86 STC 453** that the authorities were not correct in taxing the Petitioner for alleged change in use of the goods purchased by using Form IA by the purchasing dealer. He submitted that if it was established that the goods purchased on the strength of Form 1A were put to a different use in contravention of the declaration in Form 34, then it would be open to the Department to appropriately levy tax on the purchasing registered dealer.

12. Mr. Kar submitted that Section 5 (2)(A)(a)(ii) of the OST Act was not a charging section and the declaration Form 34 is also not an independent charging clause. The only sections of the OST Act which create a liability on the dealer to pay tax are Sections 3-B, 5, 6 7 and 8. If the interpretation placed on Section 5 (2)(A)(a)(ii) of the OST Act by this Court in ***State of Odisha v. M/s. Sahoo Traders* (supra)** is accepted as correct then it would create another liability which was impermissible under the OST Act.

13. On the other hand, Mr. S.S. Padhy, learned Additional Standing Counsel for the Opposite Party (Revenue) referred to the exact wording of Form 34 and submitted that any sales made in contravention of the declaration contained therein would attract contravention of the 2nd proviso to Section 5 (2)(A)(a)(ii) of the

OST Act and therefore, there was no warrant for interference of the impugned order of the Tribunal. In other words, the case of the Department is that by selling goods by accepting Form IA from dealers who are industries availing of concession under the IPR, the Petitioner has violated the undertaking given in the above declaration Form 34 that the goods purchased from the Petitioner are meant for the purpose of resale “in Odisha in the manner that such resale shall be subject to the levy of tax under this Act.”

14. The above submissions have been considered. The charging provision as far as the OST Act is concerned, is Section 4 which reads as under:

“4 (1) Incidence of Taxation:

Subject to the provisions of section 3-B, 5, 6, 7 and 8 one with effect from such date as the State Government, may, by notification in the gazette, appoint, being not earlier than 30 days after the date of the said notification every dealer whose gross turn over during the year immediately preceding the date of commencement of the (Orissa Sales Tax (Amendment) Act, 1981) exceeded (Rs.50,000) shall be liable to pay tax under this Act on sales and purchases affected after the date so notified.”

15. Section 5 of the OST Act relates to rate of tax. The relevant portion of the same reads as under:

“5. Rate of Tax.

(1) The tax payable by a dealer under this Act shall be levied on his taxable turnover at such rate, not exceeding sixteen percent), and subject to such rate, not (exceeding sixteen percent), and subject to such

conditions as the State Government, may from time to time by notification, specify;

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Provided further that where a registered dealer purchases goods of the class or classes specified in his certificate of registration as being intended for so (within the State of Odisha), by him in the manufacture or processing of goods for sale or in the mining or in generation of distribution of electricity or any other form of power at concession rate of tax or free of tax after furnishing a declaration in the prescribed form, but utilizes the same for any other purpose (or outside the State of Orissa), he shall pay the difference in tax or the tax, as the case may be payable had he not furnished the declaration.”

16. Section 5(2)(A) of the OST Act reads as under:

“In this Act, the expression “taxable turn over means that part of dealer’s gross turn over during any period which remained after deducting therefrom:-

(a) his turn over during that period on

(i) the sale of any goods notified from time to time as tax free under section 6 of the packing materials if any, in respect of such goods.

(ii) Sales to a registered dealer of goods specified in the purchasing dealers’ certificate or registration for resale by him in Orissa in a manner that such resale shall be subject to levy of tax under this Act, and on sale to registered dealer of, containers or other materials for the packing of such goods.

Provided that for the purpose of ascertaining the deductions under this item the dealer selling the

deductions under this item the dealer selling the goods shall furnish to the prescribed authority in the prescribed manner, a declaration in the prescribed form obtained from the prescribed authority within the prescribed time or within such further time as that authority may after sufficient cause permit:

Provided further that where any goods specified in the certificate of registration are purchased by a registered dealer free of tax after furnishing a declaration (under the preceding proviso) but are utilized by him for any other purpose, the price of such goods shall be included in the taxable turnover of the selling dealer but shall be included in the taxable turnover of the purchasing dealer."

17. Sections 6 and 7 of the OST Act are relevant in the present context, and they read as under:

"6. Tax Free Goods.

The State Government may, by notification, subject to such conditions and exceptions, if any exempt from tax the sale (or purchase) of or withdraw any such exemption".

"7. Power of the State Government to exempt dealers from tax and to dealer payment of tax :-

Notwithstanding anything to the contrary, in this Act, the State Government may subject to such restrictions and conditions including conditions as to registration and registration fees, by notification exempt in whole or in part, any class of dealers from the payment of tax or allow any class of dealers to defer payment of tax."

18. This has to be also read with Entry 26A of the tax free goods list in terms of the notification dated 23rd April, 1976 under Section 6 of the OST Act. Entry 26A reads as under:

"26-A. Purchase or sale of-

(a) raw materials that is to say, goods which directly go into the composition of the finished products;

(b) machinery and spare parts thereof actually required for starting and maintaining the unit;

(c) packing materials required for packing the finished products in the same form as manufactured by the unit.

When sold to or purchased by a registered dealer who is certified by the Director of Industries, Orissa or General Manager (or Project Manager) of the concerned District Industries Center] as a Village/ Cottage/Small Scale Industry starting production inside the State on or after 1st August, 1980:

Provided that the finished products of such industrial unit are sold inside Orissa or in course of inter-State or export from Orissa.

The exemption shall be allowed for a period of five years from the date of certification of the unit by the Director of Industries, Orissa or General Manager (or Project Manager) of the concerned District Industries Center], irrespective of the change in the ownership, if any provided that the dealer or his authorized agent furnishes a declaration in form I-A appended below.

The form shall be in triplicate and the same shall be obtained from the Sales Tax Officer within whose jurisdiction the dealer is registered on application affixed with a fee of five rupees for every twenty-five blank declaration forms. The declaration forms shall be duly filled in and signed by the dealer or his authorized agent. The portion marked "Original" shall be made over to the selling dealer and the portion marked "Duplicate" shall be made over to the Sales Tax Officer who issued the forms to the dealer. No second or subsequent supply of declaration forms shall be made unless a true account of the forms last supplied is furnished. All unused, obsolete and invalid declaration forms shall be surrendered to the concerned Sales Tax Officer. In case of loss, theft or destruction of any form and other matters incidental thereto the same shall be notified in the Official Gazette."

19. Since purchase of the goods by the present Petitioner was by using Form 34 that is also relevant for the purpose of the present case. The declaration furnished in the said form is what is really important and it reads as under:

"Certified that the goods ordered in my/our purchase Order No.....dated.....purchased from you as per Cash Memo/Bill No.....datedfor an amount of Rs..... are meant for the purpose of resale in Orissa in a manner that such resale shall be subject to levy of tax under this Act] and are covered by my/our Registration Certificate No.....issued under the Orissa Sales Tax Act, 1947.

(To be filled in by the dealer issuing the Form for purchase of goods.)"

20. The scope of Section 5(2)(A)(a)(i) of the OST came up for consideration in the decision of the Division Bench of this Court ***Tilakraj Mediratta*** (*supra*), the relevant portion of which reads as under:

"8. 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 has sold goods covered by notification issued under section 6 and the conditions and exceptions are complied with, is entitled to a deductions 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 1-A which it has obtained from the purchasing dealer. In the instant case, there is no dispute that the purchasing

dealer had issued Form 1-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 utilized 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 he utilized 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 fulfillment 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."

21. The expression 'levy of tax' occurring in the declaration in Form 34 has to be correctly understood. It is not the same as 'collection of tax'. In ***Peekay Rerolling Mills Pvt. Ltd. v. Asst. Commissioner*** (*supra*), the Supreme Court drew the proper distinction between the two expressions by referring to the decisions in ***Asst. Collector of Central Excise, Calcutta Division v. National Tobacco Company of India Ltd.*** AIR 1972 SC 2563, wherein it is observed as under:

"19. The term "levy" appears to us to be wider in its import than the term "assessment". It may include

both "imposition" of a tax as well as assessment. The term "imposition" is generally used for the levy of a tax or duty by legislative provision indicating the subject matter of the tax and the rates at which it has to be taxed. The term "assessment", on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be the object of the tax in a particular case and determining its amount. The Division Bench appeared to equate "levy" with an "assessment" as well as with the collection of a tax when it held that "when the payment of tax is enforced, there is a levy". We think that, although the connotation of the term "levy" seems wider than that of "assessment", which it includes, yet, it does not seem to us to extend to "collection". Article 265 of the Constitution makes a distinction between "levy" and "collection".

22. The Supreme Court in *Peekay Rerolling Mills* (supra), also referred to the observations in *M/s. Somaiya Organics (India) Ltd. v. State of Uttar Pradesh AIR 2001 SC 1723*; *National Tobacco Company of India Ltd. (supra)* and *Collector, Central Excise, Hyderabad v. M/s. Vazir Sultan Tobacco Company Ltd. AIR 1996 SC 3025*, it was observed as under:

"45. In the light of the above two cases, it is evident that collection and levy are distinct and that collection is not an essential facet of levy. It is true that collection of a tax may sometimes be indicative of a lawful levy of tax, but in our opinion it does not logically follow that absence of collection means an absence of liability. We are also of the opinion that the reliance on the Town Municipal Committee (supra) by the Division Bench which involved an interpretation of "continued to be levied" and "to be applied to the same purposes" in

Article 277 of the Constitution was misplaced. While that case did hold that in the circumstances before them 'levy' was intended to include 'collection', in our opinion the logic or ratio of that case cannot be extended so far as to say that every 'levy' must include collection and without such collection no levy can be said to have been made."

23. Referring to both the above decisions i.e. **National Tobacco Company Ltd.** (*supra*) and **Somaiya Organics (India) Ltd.** (*supra*), the Supreme Court in **Peekay Re-Rolling Mills (P) Ltd.** (*supra*) concluded as under:

"46. Thus, after an examination of the relevant case law, we find that the liability to tax or taxability u/s 5 of the State Act remains unaffected by an exemption u/s 10 of the State Act. Consequently, the respondent cannot validly shift the burden of tax to the purchaser u/s 5A of the State Act for the same would violate the condition of single-stage tax u/s 15 of the Central Act."

24. The same approach has been adopted in **State of Punjab v. Perfect Synthetics** (*supra*). In the said case, the question that arose was as under:

"4. Whether the assessee is entitled to deduction, from gross turnover, the purchase value of the raw-material which the assessee bought from exempted units?

25. The case of the Department was that the Assessee is not entitled to such deduction as the said purchase value is not subjected to tax at the first stage of sale as the raw materials were purchased from the exempted units. According to the Department, only the purchase value which stood subjected to tax at the first

stage of sale under Section 5(1)(A) of the Punjab General Sales Tax Act, 1948 would be entitled to deduction under Rule 29(12) of the Punjab General Sales Tax (Deferment and Exemption) Rules, 1991. Negating the said plea, the Supreme Court held as under:

“13. We find no merit in the said argument of the Department. In this connection, we have to construe the scheme of the 1948 Act. As stated above, Section 4 is the charging section whereas Section 5(1A) indicates the point at which the levy takes place. The said “1948 Act” refers to single point levy of tax on the first sale. The Notification dated 25.7.1990 specifically incorporates the provisions of Rule 9 of the 1991 Rules which requires the unit holding exemption certificate to file the return under the Act and for the assessment of an eligible unit in respect of which exemption certificate has been granted. The said notification read in entirety thus indicates the exemption given to the eligible unit under the Act is only qua the payability. The said exemption to the eligible unit is not in the matter of assessment. The reason is obvious. The exemption is granted to the unit for 10 years or till the exemption entitlement gets exhausted, whichever is earlier. Therefore, under the notification, exemption is only qua payability and not in respect of assessment. That is the reason for incorporating Rule 9 into Notification dated 25.7.1990 which requires the eligible unit to file its returns in the manner specified under the Act, to attach requisite documents and for assessment in accordance with the provisions of the Act. Even with regard to payability, It may be noted that, under the scheme of the 1948 Act, the calculated tax gets appropriated towards the scheme entitlement. Taking this linkage into account, we are of the view that the words “subjected to tax”

cannot be equated to the words “having suffered tax.”

26. In *Lloyd Electric and Engineering Ltd.(supra)*, the question was whether the Appellant Assessee is liable to pay central sales tax @ 2% on the inter-State sales for the period 1st April, 2009 to 17th June, 2009 or @ 1 % in view of the Industrial Policy of the State? The question was answered in favour of the Assessee and it was held that the Assessee would be entitled to concessional rate of CST @ 1%. In coming to that conclusion, it was held that the State Government was bound by the policy decision taken by the Council of Ministers and duly notified by the Department concerned, namely, the Department of Industries. It was held that "the State Government cannot speak into two voices". It was further observed that:

“Once the Cabinet takes a policy decision to extend its 2004 Industrial Policy in the matter of CST concession to the eligible units beyond 31.03.2009, upto 31.03.2013, and the Notification dated 29.05.2009, accordingly, having been issued by the Department concerned, viz., Department of Industries, thereafter, the Excise and Taxation Department cannot take a different stand. What is given by the right hand cannot be taken by the left hand. The Government shall speak only in one voice. It has only one policy. The departments are to implement the Government policy and not their own policy. Once the Council of Ministers has taken a decision to extend the 2004 Industrial Policy and extend tax concession beyond 31.03.2009, merely because the Excise and Taxation Department took some time to issue the notification, it cannot be held that the eligible units are not entitled to the concession till the Department issued the notification. It has to be

noted that the Finance Department of the State Government had concurred with the proposal of the Department of Industries to extend the tax concession beyond 31.03.2009 till 31.03.2013 and the Council of Ministers had accordingly taken a decision also. No doubt, the statutory notification issued by the Excise and Taxation Department under Section 8(5)(b) of the Act on 18.06.2009 has stated that the eligible units will be entitled to the concession with immediate effect. Merely because such an expression has been used, it cannot be held that the State Government can levy the tax against its own policy. The State Government is bound by the policy decision taken by the Council of Ministers and duly notified by the Department concerned, viz., Department of Industries.”

27. This Court is of the view that the decision in ***State of Odisha v. M/s. Sahoo Traders*** (*supra*) is not consistent with the above exposition of law by the Supreme Court of India. It is the law laid down by the Supreme Court which is binding on this Court, and which should govern the present case as well. In the present case, as long as the Petitioner has sold the goods on submission of Form IA by the purchasing dealer although within the State of Odisha, such sales are subject to levy of tax and there is no contravention of Section 5(2)(A)(a)(ii) of the OST Act. Question (i) framed by this Court is therefore, answered in the negative by holding that the Tribunal was not justified in treating the sales of paper to be manufacturing registered dealers against declaration in Form IA out of the paper purchased by furnishing declaration in Form 34 inside the State of Odisha as being in contravention of Section 5(A)(a)(ii) of the OST Act.

28. The impugned orders of the Tribunal for both years are accordingly set aside and the corresponding orders of the ACST are restored to file.

29. The revision petitions are disposed of, but in the circumstances, with no order as to costs.

(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

S.K. Jena/PA

