IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV No. 127 of 2013

M/S. Shri Purusottam Agencies .... ***Petitioner***
Mr. Ajit Ku.Roy, Advocate

-versus-

State of Odisha, represented by the Commissioner of Sales Tax, Orissa,Cuttack .... ***Opp. Parties***
Mr. Sunil Mishra, ASC(C.T & GST)

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K.PATTANAIK

Order No.

ORDER
13.07.2022

08. 1. The Assessee has filed this revision petition against an order dated 16^{th} January, 2013 passed by the Odisha Sales Tax Tribunal, Cuttack (Tribunal) disposing the Assessee's Appeal SA 251(VAT) of 2010-11 for the period 1^{st} April, 2005 to 31^{st} December, 2008.

2. The Assessee is a partnership firm carrying on business in Honey, Glucose, Colgate, Ghee and Amul brand on wholesale basis. On receipt of an audit visit report (AVR) the Assistant Commissioner of Sales Tax, Bhubaneswar IV Circle (Assessing Authority) (AA) initiated proceeding under Section 42 of the Odisha Value Added Tax Act, 2004 (OVAT Act).

3. When the audit team visited the Petitioner's business premises it noted that the dealer has received some goods from the selling company free of cost under a sales incentive scheme

and has supplied the same free of cost to its customers on retail basis. The free goods were reflected in the tax invoice which included the total value of goods on which the dealer had claimed input tax credit (ITC). It was deduced that since the dealer had claimed ITC on purchases, he was liable to be pay VAT on such sales. The sum of such incentive goods was calculated as Rs.3,76,458.00. The AA accordingly computed the tax liability and, inclusive of penalty under Section 42(5) of the OVAT Act, raised a demand of Rs. 85.785.00.

4. The appeal of the Assesses was rejected by the Deputy Commissioner of Sales Tax (DCST) by an order dated 17th June, 2010 after which the Assessee went in appeal before the Tribunal.

5. Although, the Tribunal noticed that the Assessee had relied on certain invoices which showed that the goods were received as free gifts on which tax not been paid, the Tribunal concluded 'no such document was also filed by the dealer appellant before this forum to justify the contention that it has received any goods as free gifts and supplied the same to the customers as free gifts. Accordingly, there was no proof that the dealer has dealt with any goods as free gifts'.

6. While admitting this revision petition on 9th July, 2015 questions were framed by this Court which were later modified by the order dated 28th August, 2015. The first question is:

> 'Whether on the facts and in the circumstances of the case the learned Judicial Member of the Tribunal is right in law in holding that the

> Petitioner is liable to pay tax under Section 12 of the OVAT Act in respect of goods received at free of costs under sales promotion scheme from another registered dealer under the Act?'

7. The other question relates to the validity of the order levying penalty on the Petitioner under Section 42 (5) of the OVAT Act.

8. Before the AA and DCST, the Assessee had produced the tax invoices received from the dealer from whom it had purchased the goods and as part of the sales. In a separate column in the said invoice the goods received free were shown. The column is titled 'free quantity'. Likewise, in the retail invoices issued by the Petitioner the pieces supplied free have been separately shown. Despite the above documents the Tribunal erroneously observed that no documents were produced by the Petitioner to show that it had been supplied by the dealer under a tax invoice as part of sales incentive scheme goods that were free while effecting retail sales such free goods were also reflected. The observation of the Tribunal therefore appears to be not supported by the record. The very basis of the Tribunal upholding the orders of the AA and DCST is a surmise that 'the value of such goods must have been included in the purchase price on which the dealer has paid VAT at the time of purchase'. From the invoices produced which form part of the assessment record it is plain that on the free goods VAT has not been paid at the time of purchase and the free goods received have been supplied to the customers on retail basis as such.

9. The Assessee appears to have paid a certain amount of tax at the time of the audit visit. This Court is not dealing with that part of the order of the Tribunal which has remanded the matter to the AA for that limited purpose since that is not within the scope of the present petition.

10. For the aforementioned reasons, the first question is answered in favour of the Assessee and against the Department. Correspondingly, the penalty amount under Section 42 (5) of the Act, OVAT Act is also hereby set aside. The second question is also accordingly answered in favour of the Assessee and against the Department. The impugned orders of the Tribunal, the DCST and the AA are to that extent set aside.

11. The revision petition is disposed of in the above terms.

(Dr. S. Muralidhar)
Chief Justice

(R.K.Pattanaik)
Judge

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