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IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV No.96 of 2017

M/s. Maa Khadi Cashew Industries .... ***Petitioner***

M/s. J.M. Pattnaik, Advocate and associates

-versus-

The Commissioner of Commercial Taxes, Odisha and others .... ***Opposite Parties***

Mr. Sunil Mishra, A.S.C.

CORAM:
THE CHIEF JUSTICE
JUSTICE M.S. RAMAN

ORDER
15.12.2022

Order No.

Dr. S. Muralidhar, CJ.

06. 1. The present revision petition by the Assessee arises out of an order dated 4th September 2017 passed by the Odisha Sales Tax Tribunal, Cuttack (Tribunal) allowing the State's S.A. No.188 (ET) of 2015-2016.

2. By the impugned order, the Tribunal set aside the order of the Joint Commissioner of Sales Tax, Koraput Range, Jeypore (JCST) reducing the demand raised by the Sales Tax Officer, Nabarangpur Circle (STO) under Section 9-C(5) of the Odisha Entry Tax Act, 1999 (OET Act) for the tax period 1st April 2012 to 31st March 2014 from Rs.6,51,600/- to nil. In other words, the demand raised by the STO was restored by the Tribunal.

3. While admitting the present revision petition on 10th May 2018, the following question was framed for consideration:

> "Whether on the facts and in the circumstances of the case, the learned Sales Tax Tribunal is justified in setting aside the order of the Joint Commissioner of Commercial Tax in Annexure-2 thereby restoring the order of the Assessing Officer in Annexure-1 and imposing the tax on a good/item which has not been provided in Serial No.20 of Part-II of the Scheduled Goods of ET Act and law laid down by this Court holding that cashew nut does not come within the definition of fruit."

4. The background facts are that the Petitioner is a partnership registered under the Odisha Value Added Tax Act, 2004, Central Sales Tax Act and the OET Act. It is engaged in trading in seasonal products including maize, tamarind, cashew nuts, gunny bags etc. The Petitioner purchases raw cashew nut and converts the same into cashew kernel and effects sale both inside and outside the State. There is no specific entry in the OET Act under which 'cashew kernel' can be taxed. The case of the Petitioner-Assessee is that 'cashew nut' and 'cashew kernel' are two different commodities and kernel cannot be treated as 'dry fruit'.

5. For the period in question, the STO taxed the sale of cashew kernel at 2% by an order dated 14th September, 2015. The said item was held by the STO to be exigible to entry tax in terms of the entry at serial No.20 of Part-II to the Schedule to the OET Act which reads as "dry fruits, jam, potato chips, packaged cashew nuts and pickles". Aggrieved by the above assessment order, the Petitioner filed an appeal before the JCST. By an order dated 29th December 2015, the JCST accepted the plea of the Petitioner and held that neither 'cashew nut' nor 'cashew kernel' is dry fruit and that since cashew kernel has not been mentioned in any of the entries in the

scheduled to the OET Act, it was not exigible to entry tax. The Department's appeal against the said order of the JCST was allowed by the Tribunal holding that "in common parlance as well as commercial production use cashew kernel constitutes an integral part of dry fruits packets when distributed as gifts during Diwali/New Year etc. Whatever is mentioned at Entry-20 of Part-II is ready to eat and cashew kernel also comes under that category."

6. This Court has heard the submissions of Mr. J.M. Pattnaik, learned counsel appearing for the Petitioner and Mr. Sunil Mishra, learned Additional Standing Counsel for the Department.

7. At the outset, it is pointed out by learned counsel for the Assessee that the Tribunal itself has in a subsequent order dated 12th December 2017 in S.A. No.183 (ET) of 2016-17 (***State of Odisha v. Kalyani Cashew Industries***) noted that cashew nut or cashew kernel is not a dry fruit as held by this Court in ***S. Sadasiva Rao v. State of Orissa*** (decision dated 17th July 1980 in OJC Nos.508 and 509 of 1977). Further, since the entry only talks of 'packaged cashew nut', it cannot be said to include 'cashew kernel'.

8. Indeed, in the impugned order, the Tribunal has not noticed the aforementioned decision of this Court in ***S. Sadasiva Rao*** *(supra)* where the question that arose was whether cashew nut comes within the definition of 'fruit' in item No.30 of Appendix-D to the Odisha Sales Tax Act, 1947. The said question was answered in the negative and it was held that cashew nut does not come under the category of fruit in common parlance.

9. Apart from the fact that cashew kernel is not the same as cashew nut, it is plain that the entry itself only talks of 'packaged cashew nut' and not cashew nut per se. These are distinct and different products as understood in the trade. Consequently, this Court is unable to concur with the view expressed by the Tribunal that cashew kernel or plain cashew nut would come within the purview of Entry-20 of Part II of the Scheduled to the OET Act.

10. For the aforementioned reasons, the question framed is answered in the negative i.e., in favour of the Petitioner-Assessee and against the Department. The impugned order of the Tribunal and the corresponding order of the STO are hereby set aside. The order of the JCST is restored to file.

11.The revision petition is allowed in the above terms with no order as to costs. LCR be returned forthwith.

12. Issue urgent certified copy of this order as per rules.

(Dr. S. Muralidhar)
Chief Justice

(M.S. Raman)
Judge

S.K. Guin