

IN THE HIGH COURT OF ORISSA : CUTTACK

W.P.(C) No. 313 of 2014

State Bank of India,
Stressed Assets Management
Branch(SAMB),
Bhubaneswar & Anr.

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Petitioner

-Versus-

State of Odisha represented
Through Principal Secretary,
Finance Department, Govt.
Of Odisha, Bhubaneswar
& 3 others

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Opp. parties

For the petitioner ... Mr. R.K.Rath, Sr.Advocate

For the opp.parties ... Mr.R.P.Kar, S.C.(CT),
(for opp. parties)

B E F O R E

**THE HONOURABLE CHIEF JUSTICE MR. A.K.GOEL
THE HON'BLE DR. JUSTICE A.K.RATH**

Date of hearing : 17.02.2014
Date of Judgment : 03.03.2014

JUDGMENT AND ORDER

(A.K.Goel, CJ.)

1. The question raised for consideration is whether the petitioner-bank is covered by definition of “dealer” under Section 2(12) of the Orissa Value Added Tax Act, 2004 (OVAT Act) and liable to value added tax on sale of pledged assets effected by it for recovery of loan.

2. The case set out in this petition is that the petitioner has been constituted under the State Bank of India Act, 1955. Its Stressed Assets Management Branch initiated action under Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) for enforcing the security interest to realize the outstanding loan dues from the borrowers whose account had been classified as Non-Performing Assets (NPA). The movable assets of such borrowers were put to auction under Rule 6 of the Security Interest (Enforcement) Rules, 2002 and sale proceeds were appropriated to the loan account of the borrowers. The Sales Tax Officer, opposite party no.4 issued notice to the Bank to produce the accounts. In reply, stand of the bank was that it was not covered by the definition 'dealer' and was not liable to be assessed under the OVAT Act. In the auction conducted by the petitioner, no element of 'sale' was involved. However, rejecting the stand of the petitioner vide impugned order dated 12.12.2013, demand of tax and penalty was raised which according to the petitioner-Bank is illegal and without jurisdiction. The Assessing Authority has relied upon the judgment of this Court dated 12.3.2012 in WP (C) No. 3127 of 2012 (*M/s. Indusind Bank Ltd. Vs. Principal Secretary to Government, Finance Department, Government of Odisha*) and order of West Bengal Taxation Tribunal in *ICICI Bank Ltd. vs. Joint Commissioner, Sales Tax, Central Section, Kolkata*), (2010)31 VST 178. According to the petitioner, in absence of clear provision specifying the subject of tax, person liable to pay tax and the rate at which tax is to be paid, no tax could be levied.

3. We have heard Sri R.K.Rath, learned Senior Counsel for the petitioner and Mr. R.P.Kar, learned Standing Counsel (Commercial Department) for the opposite parties.

4. Supporting the stand taken in the writ petition, Mr. Rath, learned Senior Counsel for the petitioner submits that unless the sale is in the course of business of a person, the seller is not covered by the definition of 'dealer'. In support of this submission, reliance has been placed on the judgment of Hon'ble the Supreme Court in State of Tamil Nadu & Anr. Vs. Board of Trustees of the Port of Madras, (1999) 4 SCC 630, wherein, definition of 'dealer' under Section 2(g) of the Tamil Nadu General Sales Tax Act, 1959 was interpreted in the context of sale of unclaimed and unserviceable goods by the Madras Port Trust constituted under the Major Port Trust Act, 1905. Referring to the scheme of Port Trust Act, the Hon'ble Supreme Court observed that Port Trust was not constituted to carry on business of sale of goods. The sale of goods was incidental to the 'non business' activity of the Port Trust. Since the main activity of the Port Trust was not business, its incidental activity also did not amount to business, unless the Revenue could establish an independent intention by showing the volume of such business to be large enough in comparison to the main activity. Learned counsel submits that situation of sale transaction by the Bank was at par with the Port Trust and in respect of such sale, the Bank was not a dealer. He further submits that view taken by this court in **Indus Bank** was contrary to above decision of Hon'ble Supreme Court and required reconsideration.

5. On the other hand, learned counsel for the Revenue supports the order of assessment. He submits that in view of judgment of this Court in *M/s. Indusind Bank Ltd.*, learned Commissioner of Sales Tax rightly held the transaction of auction sale effected by the bank to be taxable for levy of Value Added Tax. Judgment in **Port Trust** case is distinguishable.

6. Reliance has also been placed on the following decisions.

- (i) 107 STC 204(SC) State of Orissa vs. Orissa Road Transport Co. Ltd.
- (ii) (2007)4 SCC 188 (Federal Bank Ltd. & ors. vs. State of Kerala & ors.
- (iii) W.P.T.T. No. 6 of 2011 (Tata Motors Finance Ltd. vs. Asst. Commissioner of Sales Tax, Central Section, Investigation Wing, Kolkata) decided on 8.10.2013 (Cal. H.C.)

It is submitted that extending the loan facility for financing the purchase of vehicles, plant and machinery etc. and recovering outstanding loan dues is part of business of the bank and, thus, auction sale conducted was also part of the said business. The bank thus covered by definition of 'dealer' under Section 2(12) of the OVAT Act, which also covered 'casual dealer' as defined under Section 2(9). The expression 'business' under Section 2(7) included the transactions incidental to the trade, commerce or manufacture irrespective of the profit motive. Under Section 9, tax is leviable on the sale or purchase of goods by a dealer liable to pay tax. Under Section 11(1), levy of tax is on a dealer who sells the goods, on his taxable turn over of sale. Rate of tax is provided under Section 14. It is thus

submitted that rate of tax, person liable to pay tax and the taxing event have been clearly mentioned.

7. Before we proceed to consider the question, it would be appropriate to set out the relevant provisions.

Section 2(12) "**Dealer**" means any person who carries on the business of buying, selling, supplying or distributing goods, executing works contract, delivering any goods on hire-purchase or any system of payment by instalments, transferring the right to use any goods or supplying by way of or as part of any service, any goods directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration and includes: -(a) a casual dealer; (b) a commission agent, a broker or a del credere agent or an auctioneer or any other mercantile agent, by whatever name called; (c) a non -resident dealer or an agent of a non -resident dealer, or a local branch of a firm or company or association or body of persons whether incorporated or not, situated outside the State; (d) a person who, whether in the course of business or not, -(i) sells goods produced by him by manufacture, agriculture, horticulture or otherwise; or (ii) transfers any goods, including controlled goods whether in pursuance of a contract or not, for cash or for deferred payment or for other valuable consideration; (iii) supplies, by way of or as part of any service or in any other manner whatsoever, goods, being food or any other articles for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration;

Section 2(9) "**casual dealer**" means any person, whether as principal, agent or in any other capacity, who has occasional transactions of buying, selling or supplying or distributing goods in the State without having a fixed place of business for cash or deferred payment or for commission, remuneration or other valuable consideration and includes, whether he has a fixed place of business in this State or not,-(a) a transporter who, while carrying any goods in his goods vehicle, fails to disclose the name and address of the consignor or

consignee in the State or fails to furnish copy of invoice, challan, transport receipt or consignment note or document of like nature in respect of such goods, or

(b) an owner or a lessee of a warehouse who fails to disclose the name and address of the owner of any goods stored at his warehouse or fails to satisfy the Commissioner that such goods are for his personal use or consumption;

Section 2(7) "**business**" includes -(a) any trade, commerce or manufacture;

(b) any adventure or concern in the nature of trade, commerce or manufacture;

(c) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern;

(d) any transaction in connection with, or incidental or ancillary to, the commencement or closure of such trade, commerce, manufacture, adventure or concern;

(e) any occasional transaction, whether or not there is volume, frequency, continuity or regularity of such transaction, in the nature of such trade, commerce, manufacture, adventure or concern, whether or not such trade, commerce, manufacture, adventure, concern or transaction is effected with a motive to gain or profit or whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure, concern or transaction.

9. Charge to tax and incidence.--There shall be levied in accordance with the provisions of this Act,

(a) a Value Added Tax hereinafter called VAT on the sale or purchase of goods by a dealer; and

(b) a turnover tax in lieu of VAT on the taxable turnover of sales of every retailer registered under this Act, whose annual gross turnover does not exceed rupees ten lakh and dealers of any specific class or category as may be notified under section 16.

10. Liability.--(1) Subject to other provisions of this Act, every dealer

(i) whose gross turnover of sales or purchases, as the case may be, during a period of twelve consecutive months immediately preceding the appointed day exceeded the taxable limit; or

(ii) who is registered or liable to be registered under the Orissa Sales Tax Act, 1947 (Orissa Act 14 of

1947) or the Central Sales Tax Act, 1956(74 of 1956); or

(iii) to whom clauses (i) and (ii) do not apply, but -

(a) whose gross turnover exceeds the taxable limit during any period of twelve consecutive months, or

(b) who has become liable to pay tax under the Central Sales Tax A 1956(74 of 1956), or

(c) who is registered as a dealer under the Central Sales Tax Act, 1956(74 of 1956) or under this Act at any time on and from the appointed day, shall be liable to pay tax in accordance with the provisions of this Act,

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11. **Levy of tax on sale.**--(1) The tax shall be levied under this Act on every dealer who is liable to pay tax under Section 10 on his taxable turnover of sales.

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14. **Rates of VAT.**--(1) The Value Added Tax payable by a dealer under this Act shall be levied on his taxable turnover in respect of different goods specified in Schedule B and Schedule C at the rate mentioned under the said Schedules in respect of those goods.

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8. In **Federal Bank**, the question considered by the Court was whether the bank was a 'dealer' in relation to auction sales as per Section 2(viii) of the Kerala General Sales Tax Act, 1963. While considering the said issue, the nature of activity of the bank was considered with reference to the provisions of the Banking Regulation Act, 1949 and it was observed as follows:

“The first question which, therefore, arises is: whether sale of pledged ornaments for consideration falls in the course of trade or business of the bank. It is no doubt true that banks have to act on instructions of the borrower. In the present case, we are not concerned with the provisions of Section 176 of the Contract Act, 1872. We are concerned with the definition of the word “sale” under the 1963 Act. When a bank sells the pledged ornaments it is not acting as an agent of the

borrower even under the 1949 Act. When the bank sells the goods pledged with them they do not act as the agents of the borrower. As pledges, the banks, acting under Section 176 of the Contract Act, 1872 have a right to sell the goods. That sale is not as agents but that sale is in exercise of the statutory power under the 1949 Act. No doubt the sale is on behalf of the pledgor, however, the sale is in exercise of the statutory power (see: *Dy. CCT v. A.R.S. Thirumeninatha Nadar Firm*, (1968)21 STC 184 (Mad). To the same effect is the judgment of the Punjab and Haryana High Court in *High Channel Video v. Enclave Electronics*, (1999)116 STC 131 (P&H). Further, on reading the provisions of the 1949 Act, one finds that every bank is required to maintain its balance sheet in Form 'A' of the Third Schedule, quoted above. The prescribed form indicates that non-banking assets acquired by the banks even in satisfaction of claims are required to declare their holdings. The prescribed form of balance sheet indicates that banks are required to show on the asset side non-banking assets acquired by them in satisfaction of claims. Similarly, in Form 'B' of the Third Schedule under profit and loss account, banks are required to show income from non-banking assets and profit from sale of such assets. In our view, therefore, sale of pledged assets takes place in the course of banking business. Therefore, as stated above, the banks, in selling the goods pledged to them, did not act as agents of the borrowers/pledgors and that their sale was in exercise of statutory power under the 1949 Act.”

(Underlining supplied)

9. From the above, it is clear that when the bank sells the pledged goods in exercise of its statutory power, such sales are required to be indicated in its Balance Sheet and profit and loss account as per Third Schedule to the said Act. The said activity was thus, covered under Section 8 of the 1949 Act.

10. Learned counsel for the petitioner sought to distinguish the judgment in **Federal Bank** by submitting that the definition of 'dealer' in Kerala Act specifically covered a bank or a

Financial Institution selling pledged articles for realization of the loan amount and the same could not read into the definition of 'dealer' in the Orissa Act. We are, however, of the view that the ratio of the judgment in Federal Bank is not confined to specific inclusion of the bank in the definition 'dealer' but on consideration of the nature of banking business. No doubt, prior to amendment of the Kerala General Sales Tax Act, Kerala High Court had taken the view that in absence of express inclusion of the bank, the bank was not covered by the definition of 'dealer' and after amendment, the Kerala High Court took a different view, but the basis of the judgment of Hon'ble Supreme Court is not only the change in the definition of 'dealer' but the nature of banking business which had not been considered by the Kerala High Court on earlier occasion. In OVAT Act, 'dealer' means any person who carries the business of buying and selling. 'Any person' does not exclude the bank when the bank is selling the goods as part of its business. The Apex Court clearly held that sale of goods to recover the loan is part of banking business. We do not find any reason to exclude the bank from the definition 'dealer' under the Orissa Value Added Tax Act even in the absence of express inclusion of bank in the said definition. Ratio in Madras Port Trust also does not help the petitioner. Unlike activities of Port Trust, sale of pledged goods is in the course of Banking business.

We may also briefly refer to other judgments relied upon on behalf of the petitioner. *CBI vs. V.C.Shukla*, AIR 1998 SC 1406 has been relied upon on the issue of scope of word 'business'. *Vimal Chandra Grover Vs. Bank of India*, (2000) 5 SCC 122 has been relied upon to explain "Banking business". *Mathuram Agrawal vs. State of M.P.*,

AIR 2000 SC 109, has been relied upon to submit that a tax cannot be levied by inference. *Commissioner of Sales Tax vs. Sai Publication Fund*, AIR 2002 SC 1582 has been relied upon to show that Madras Port Trust case has been followed therein. *State of H.P. vs. Gujarat Ambuja Cement & Anr.*, (2005) 6 SCC 499 has been relied upon to submit that jurisdictional issue could be gone into in writ jurisdiction. There is no conflict with the view taken in the said judgments but in view of law laid down in **Federal Bank**, the Banking 'business' includes sale of pledged goods to recover the loan and in respect of such sales in the course of banking business, the Bank is 'dealer'.

11. In view of the above, we are unable to hold that the bank is not a dealer liable to pay Value Added Tax on the transaction of sale of goods in auction conducted by it to recover the loan dues. Since we are only deciding the jurisdictional issue, we do not express any opinion on merits of the assessment which may be decided at an appropriate forum.

The petition is disposed of.

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JUDGE

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CHIEF JUSTICE