
(2008) 01 OHC CK 0010
In the Orissa High Court

Voltas Limited

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 10-01-2008

Acts Referred:

Central Sales Tax Act, 1956 — Section 3, 6, 7

Citation : (2008) 105 CLT 754 : (2008) 1 OLR 455 Supp : (2008) 15 VST 401

Hon'ble Judges : A.K. Ganguly, C.J;B.N. Mahapatra, J

Bench : Division Bench

Judgement

B.N. Mahapatra, J.—In this tax revision petition, the Petitioner has raised several questions of law, but at the time of hearing, the same are confined to the following three modified questions:

- i) Whether in the facts and circumstances of the case the re-opening of the assessment u/s 12(8) of the OST Act is justified as no reason has been indicated in the notice issued under the said Section and that the re-assessment proceeding has not been initiated on change of opinion of the Sales Tax Officer?
- ii) Whether in the facts and circumstances of the case the Sales Tax Tribunal, Orissa is correct in holding that the subsequent sale effected by the Petitioner to Orissa Power Generation Corporation and National Thermal Power Corporation is not in course of inter-state sale but intra-state sale and does not qualify for exemption as contemplated in Section 6(2) of the Central Sales Tax Act, 1956?
- iii) Whether, in the facts and the circumstances of the case, assessing officer is not justified to impose penalty u/s 12 (8) of the OST Act?

2. The background in which this tax revision case has been filed is as follows:

The Petitioner in this case is one M/s Voltas Limited (hereinafter called "the dealer") registered under the Orissa Sales Tax Act, 1947 (hereinafter referred to as "the OST Act") and under the Central Sales Tax Act, 1956 (hereinafter referred to as "the CST Act"). It | is engaged in different activities inside the

State of Orissa. During the year 1993-94 the dealer supplied six circulating water pumps to OPGC on the basis of a contract entered into between the dealer and Orissa Tower Generation Corporation (for short, "OPGC"). The dealer also supplied some air-conditioners on the basis of supply of contract to National Thermal Power Corporation (for short, "NTPC") and has also made a separate contract with NTPC for erection, commissioning etc. of air-conditioning system. During the said year, the dealer disclosed its gross turnover under the OST Act at Rs. 7,50,31,028.24 which has been revised by filing annual return on 22.12.1994 for Rs. 7,49,74,817.24 from which a deduction of Rs. 3,96,32,784.17 was claimed on account of turnover under the CST Act and Rs. 3,53,42,033.47 was disclosed as GTO under the OST Act. The deduction of Rs. 3,96,32,784.17 claimed under the OST Act has been shown in the annual return filed under the CST Act claiming exemption u/s 6(2) read with Section 3(b) of the CST Act as "sale in transit". The Sales Tax Officer (hereinafter called as "the assessing officer") while completing assessment u/s 12 (4) of the OST Act had excluded the sales turnover of Rs. 3,96,32,784/- from the total turnover and determined GTO at Rs. 3,53,42,033.07 and raised a demand of Rs. 13,18,351/- against which the Petitioner preferred first appeal.

3. The first Appellate authority allowed the appeal by reducing the demand vide its Order Dated 27.7.1996. While completing the assessment under the CST Act, the assessing officer disallowed the dealer's claim of exemption u/s 6(2) of the CST Act. Against the said order the dealer preferred first appeal which is still pending. On the very same day of passing of the assessment order under the CST Act, i.e., 11.10.1995, the assessing officer issued notice u/s 12 (8) of the OST Act for reopening of the assessment "under the OST Act. At this stage, the dealer objected to reopening of the assessment on the point of maintainability on the ground that a first appeal against the order passed u/s 12 (4) of the OST Act was pending before the first Appellate authority and this Court in OJC No. 7632 of 1992 directed to consider the objection on the maintainability point. However, the assessing officer completed the assessment u/s 12 (8) of the OST Act on the entire turnover of Rs. 7,49,74,817.24.

4. According to the assessing officer, during the year under consideration, the dealer claimed deduction of Rs. 3,64,22,352/- towards sale of circulating water pumps to OPGC and Rs. 52,10,444/- towards sale of air-conditioners to NTPC as tax free on the ground that those were subsequent sales of the goods within the meaning of Section 6(2) of the CST Act. The assessing officer further found that on receipt of purchase order from and after entering into the contract with OPGC the dealer had placed order of purchase for components/ parts of the circulating water pumps with BHEL of New Delhi and Kirloskar Brothers at Pune. These component suppliers raised sale bills in the name of the dealer and also consigned the goods in the name of the dealer, as a result of which, the goods moved from Delhi and Pune to the State of Orissa. The dealer claimed that while the goods were in transit, title of the goods passed to OPGC by means of transfer of documents, which afterwards were again supplied to the dealer by OPGC for

use in course of execution of works contract and they being the subsequent seller of the goods in course of inter-state trade, the goods were exempted u/s 6(2) of the CST Act. Analyzing the provisions of law as contained in the CST Act, the assessing officer held that a subsequent sale must be made by way of transfer of documents of title over the goods while the goods were still in transit and before delivery of the same to the purchaser and that any sale made after the goods were delivered to the purchaser shall not be subsequent sale in course of interstate sale within the meaning of Section 6(2) of the CST Act. On verification of different documents produced before him by the dealer, the assessing officer found that the goods were sold to OPGC after they were taken delivery by the dealer, i.e., the goods had completed their journey into the State of Orissa before the title in the goods passed to OPGC. He, therefore, rejected the claim of the dealer that they have sold these goods as subsequent dealer within the provisions of Section 6(2) of the CST Act and that the sale is one in course of inter-state trade within the meaning of Section 3(b) of the CST Act. He further held that the contract entered into with OPGC was a supply contract and not a works contract as the goods were sold to the OPGC before they were being used in course of works contract. He treated the sale as an intra-state sale. He levied tax @ 12 % under the OST Act treating the sale as goods qua goods and not related in any way to the works contract.

5. With regard to the agreement with NTPC dated 29.11.1999 the assessing officer found that the agreement was in two parts - one is for supply of air-conditioning package, and another for erection and installation of power project. In pursuance of the said contract, the dealer placed orders with HJ manufacturer at Bombay for supply of air-conditioning package. In this transaction also, the dealer claimed deduction of Rs. 52,10,444.09 towards supply of air-conditioners as subsequent sale in course of interstate trade within the meaning of Section 6(2) of the CST Act. The claim of the dealer is that it has sold those goods to NTPC by way of transfer of documents of title over the goods when the goods were in transit, which afterwards were again supplied to it by NTPC for use in course of execution of works contract. This claim of the dealer was rejected by the assessing officer on the ground that on examination of the documents produced before him in relation to such sale he found that those goods were sold to NTPC only after termination of their journey into the State of Orissa, i.e., only after the goods were delivered to the dealer. The assessing officer further held that even though agreement had been made in two parts, in fact, the contract was one for execution of works contract. The assessing officer treated this transaction as intrastate sale and taxed on value of goods @ 4 % after allowing labour and service charges. All these were giving rise to an extra demand of Rs. 52,20,574/- which includes a penalty of Rs. 10,00,000/-imposed u/s 12(8) of the OST Act.

6. Being aggrieved by the order of assessment passed u/s 12 (8) of the OST Act, the Appellant filed appeal before the first Appellate authority. The first Appellate authority while disposing of the appeal vide his Order Dated 25.5.1996 has

treated" the contract made with the OPGC and NTPC as indivisible works contract and disallowed the dealer's claim for exemption u/s 6(2) of the CST Act. The authority treated the transaction as intra-state sale as held by the assessing officer and levied tax @ 4% after allowing 22% of the gross payment received as deduction towards labour and service charges.

7. Against the first Appellate order, the Petitioner preferred second appeal before the Orissa Sales Tax Tribunal (hereinafter referred to as "the Tribunal"). The Learned Tribunal disposed of the second appeal by its Order Dated 30.4.2001 in S.A. No. 1085 of 1996-97 and S.A. No. 1072 of 1996-97 by confirming the assessment. In the said order, the Learned Tribunal held that there was no infirmity in initiation" of the proceeding u/s 12 (8) of the OST Act by the assessing officer. After examining the materials/evidence on record, the Learned Tribunal in a detailed order came to a conclusion that supply of materials by the dealer to OPGC and "NTPC is not subsequent sale while the goods were in transit as claimed by the dealer, but are intra-state sale and taxable under the OST Act.

8. Against the aforesaid order of Learned Tribunal, the present. Tax Revision has been filed.

9. Learned Counsel on behalf of the dealer-Petitioner urged that re-opening of the assessment u/s 12 (8) of the OST Act is not sustainable as no reason of reopening has been indicated in the notice and the same is based on mere change of opinion of the assessing officer. He further submitted that the finding of the forums below that the transactions of the dealer with OPGC and NTPC were in the nature of intra-state sale is also not correct and that in any event imposition of penalty u/s 12 (8) of the OST Act is uncalled for. The Learned Counsel for State on the other hand supported the impugned order.

10. In the background of these facts, three questions as formulated in paragraph-1 above fall for determination before this Court.

11. With regard to question No. (i), Learned Counsel for the Petitioner submitted that no reason has been assigned in the notice issued u/s 12 (8) of the OST Act and, therefore, re-opening of the assessment is not justifiable. He further submitted that the dealer in his annual revised return disclosed the entire turnover at Rs. 7,49,74,817.24 and claimed a deduction of Rs. 3,96,32,784.17 on account of turnover under the CST Act. Since the assessing officer allowed such deduction while completing assessment u/s 12 (4) of the OST Act, his subsequent action to treat the said turnover as intra-state sale exercising jurisdiction u/s 12 (8) of the OST Act is nothing but a mere change of opinion.

12. Learned Counsel appearing on behalf of the Revenue vehemently opposed the above contention of the Learned Counsel for Petitioner. He submitted that valid reason as required u/s 12 (8), of the OST Act has been recorded by the assessing officer before issuing notice u/s 12 (8) of the OST Act. He referred to the finding of the Tribunal at page 10 of the order where it is held that there were preexisting reasons for initiation of proceeding under Sub-Section 8 of

Section 12 of the OST Act. It is further submitted that in the original assessment order passed u/s 12 (4) of the OST Act no discussion has been made with regard to the dealer's claim on account of subsequent sale in terms of Section 6 (2) of the CST Act and, therefore, question regarding change of opinion did not arise. He relied on the observation made by the assessing officer at page 4 of the said assessment order passed u/s 12 (8) of the OST Act.

13. Now, it is essential to see what are the findings of the Tribunal on these issues. While dealing with the issue relating to recording of reasoning of reopening, the Learned Tribunal at page 10 of the order observes as follows:

I have gone through the assessment records, and found it recorded as follows:

In course of verification of accounts under the C.S.T. Act for the year under question, it is revealed that the dealer company had claimed the deduction of Rs. 3,96,784.00 on the contention that such sale transaction are covered under the provision u/s 6(2) of the C.S.T. Act, 1956. But on perusal of the copy of the orders placed by M/s O.P.G.C. Ltd., Bhubaneswar and N.T.P.C. Ltd., New Delhi in favour of the dealer-company under assessment and the copy of other documents produced at this forum in respect of the nature of such transaction, it is observed that the transactions were intra-state in nature and the deductions claimed by the dealer-company are not permissible under the C.S.T. Act. Since the transaction is not taken into account under the CST Act, I have reasons to believe that these turnover of sales have been escaped assessment for the year under assessment under the O.S.T. Act, 1947.

xx xx xx xx Issue notice u/s 12 (8) of the O.S.T. Act for the year 1993-94 fixing the date to 14.11.1995.

So I find that there .was a preexisting reason for initiation of proceeding under this sub-Section.

At page-11 in paragraph-7, the Tribunal further held as follows:

...I have gone through the assessment record, and found that on 14.11.1995 the Learned S.T.O. in his orders in the order-sheet, mentioned that his earlier orders in the order-sheet dated 11.10.1995 was which provides reasons for initiation of proceeding u/s 12 (8), was read-over and explained to the representative of the dealer-assessee on the day, and there was also a discussion between the Learned S.T.O. and the representative regarding such reopening of the case. The fact on record proves that the reasons for reopening the case was duly communicated to the dealer before the assessment order was passed. Thus I find that all the technicalities required to be fulfilled before initiation and finalization of proceeding u/s 12 (8) was duly fulfilled in this case. So the objection raised in the grounds of appeal in this regard are not sustainable.

Moreover, in the notice issued u/s 12 (8) of the OST Act, the assessing officer has indicated that he has reason to believe that the turnover of the sale and / or purchase of the dealer for the year 1993-94 on which tax is payable under the

OST Act, has escaped assessment/ has been under assessed.

A conjoint reading of the reason of reopening as recorded by the assessing officer and quoted by the Tribunal in its order and contents of 12 (8) notice clearly establishes that the condition precedent to initiate reassessment proceeding has been satisfied in the present case.

In view of the above, it cannot be said that no reason of reopening has been recorded by the assessing officer before issuing notice u/s 12 (8) of the OST Act and the same has not been communicated to the dealer before the assessment order was passed.

14. To deal with the issue relating to change of opinion it is Hi necessary to refer to page 4 of the assessment order passed by the assessing officer u/s 12 (8) of the OST Act which reads as follows:

The annual return, filed in form IV of the O.S.T. Rules, 1947 reveals that the dealer-company has disclosed the Gross turn over of Rs. 7,49,74,817.24 and has claimed the deduction of the sales turnover of Rs. 3,96,32784.00 under subsequent sales as provided under Sub-section (2) of Section 6 of the C.S.T. Act. Since, such disclosed sales transaction does not come under the purview of inter-state transaction the Gross turnover is determined at Rs. 3,53,42,033.07 by the Learned Assessing Officer under the O.S.T. Act, 1947 on the grounds that the representative of the company preferred to produce the supporting documentary evidences for the verification of the Assessing Officer during the assessment stage under the C.S.T. Act for the period under question....

It goes without saying that a completed assessment cannot be reopened on change of opinion of the assessing officer on similar facts. The question of change of opinion in a particular issue will arise only when an opinion was earlier formed on that issue.

A perusal of the assessment order earlier passed u/s 12 (4) of the OST Act on 20.1.1995, which has been furnished to the Court by the Learned Counsel for the dealer in course of hearing of this revision petition, does not reveal any formation of any opinion by the assessing officer with regard to the dealer's claim for exemption as contemplated in Sub-section (2) of Section 6 of the CST Act. On the other hand, as stated above, during the earlier assessment proceeding u/s 12 (4) of the OST Act, representation was made by the dealer to produce the supporting documentary evidence relating to its claim for exemption under Sub-section (2) of Section 6 of the CST Act for verification of the assessing officer during the assessment stage under the CST Act for the period in question. Thus the subsequent assessment proceeding has not been initiated u/s 12 (8) of the OST Act on change a of opinion of the assessing officer. In view of the above, we answer the question (i) in the affirmative and in favour of Revenue.

15. With regard to question no (ii), the Learned Counsel for the Petitioner strenuously argued that the forums below have erred in law in holding that the

sales effected by the dealer to OPGC and NTPC are not in course of inter-state sale and do not qualify for exemption u/s 6(2) of the CST Act, but are intrastate sales. In support of his contention he referred to some of the clauses of the agreement entered into with the OPGC. Referring to clause 7 of the purchase Order Dated 4.1.1992 at page 122 of the paper book; he submitted that the materials are to be delivered to Manager (Materials), IB-Thermal Power Station, at Banharpalli, in the district of Sambalpur, as consignee. He also referred to Clause 11 of the said purchase order that deals with unloading and storing of the materials, which reads as follows:

The consignee after receiving the despatch documents retired from the Bank shall hand over R/R or L/R as the case may be to contractor or his authorized representative at site office for taking the delivery from transporter or nearest Railway stations or site railway siding or his representative who shall verify the material in relation to detail given in despatch documents vis-a-vis the provision of purchase order. The material shall then be handed over to the contractors' site personnel for erection. Till such time, the materials will be in O.P.G.C.'s Storage Godowns & custody.

According to the Learned Counsel, in pursuance to the above, materials were despatched and invoices were raised in favour of the dealer. Consignment notes were duly endorsed by the dealer in favour of the OPGC who thereafter took delivery of goods from the transporter. He further submitted that in support of such transaction, necessary declaration forms "c" and "EI" were furnished before the Sales Tax Officer in support of the claim for exemption in terms of Section 6(2) of the CST Act and the assessing officer has not found any defect in said declaration forms. In the absence of any defect pointed out in the declaration forms, the claim for exemption in terms of Section 6(2) of the CST Act cannot be disallowed. Similarly, referring to the agreement entered with NTPC, Learned Counsel submitted that the dealer placed orders with HJ International, the manufacturer at Bombay for supply of air-conditioning package and the latter despatched the goods to Talcher and raised bill in favour of the dealer. The dealer on receipt of the lorry receipt endorsed the same in favour of NTPC. He further submitted that as per the clauses of the purchase order, transfer of the title to goods to the consignee would take place while goods were in transit and the same shall be delivered to the Manager (Materials) of the OPGC and NTPC.

16. The further case of the Petitioner is that both the assessing officer and the Tribunal, even though quoted the Sections of the CST Act and decision of the Apex Court, have misinterpreted the same. He emphasized that the state from which the movement of goods takes place is a proper state to levy tax and collect tax. In support of his above contentions the Learned Counsel for the Petitioner relied on Sections 3 and 6(2) of the CST Act and some judicial pronouncements.

17. Learned Counsel appearing on behalf of the Revenue"" submitted that there were two sales involved in the transaction between the dealer and the

contractees. According to him, the first inter-state sale is a sale as contemplated u/s 3(a) of the CST Act and who completed as and when the Petitioner received the goods which moved from the outside state and the second sale is in Orissa by transfer of the documents by the Petitioner to the contractees after receipt of the goods in Orissa and do not fall u/s 6(2) of the CST Act. In support of his contention Learned Counsel for the Revenue referred to the finding of the Tribunal in paragraph 12 of its order and relied on the decisions of the Hon''ble Supreme Court in the case of Sundaram Industries v. State of Tamil Nadu reported in (1992) 86 STC 554.

18. Assailing to the above contention of the Revenue, Learned Counsel for the Petitioner submitted that there is not even a single document to show that the Petitioner has received the goods in the State of Orissa before he transferred the title of the goods to the contractees and that the same is contrary to the provisions contained in clauses 7 and 11 of the purchase order as quoted above.

19. The question which now falls for consideration before this Court is whether the subsequent sales effected by the Petitioner to the contractees are in course of inter-state sale and qualify for exemption as contemplated in Section 6(2) of the CST Act or these sales are intra-state sales under the OST Act.

20. Since Learned Counsel for the parties rely on Section 3 and Sub-section (2) of Section 6 of the Central Sales Tax Act and on some judicial pronouncements, it is necessary to know what do these Sections contemplate and judicial pronouncements lay down.

Section 3 of the Central Sales Tax Act reads as follows:

3. When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce.:

A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase:

- (a) occasions the movement of goods from one State to another; or
- (b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation 1.- Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of Clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2.- Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State.

Thus, Section-3 of the C.S.T. Act has two clauses and two explanations which

indicate when a transaction of sale is of the character of inter-State sale or purchase. It says a sale which:

- (a) occasions the movement of goods from one State to another, or
- (b) is effected by a transfer of documents of title to the goods during their movement from one State to another is of the character of inter-state sale or purchase.

Sub-Section (2) of Section 6 of the Central Sales Tax Act reads as follows:

6. Liability to tax on the Inter-State sales.:

(1) xx xx xx

(IA) xx xx xx

(2) Notwithstanding anything contained in Sub-section (1) or Sub-section (IA), where a sale of any goods in the course of inter-State trade or commerce has either occasioned the movement of such goods from one State to another or has been effected by a transfer of documents of title to such goods during their movement from one State to another, any subsequent sale during such movement effected by a transfer of documents of title to such goods,:

- (a) to the Government, or
- (b) to a registered dealer other than the Government, if the goods are of the description referred to in Sub-section (3) of Section 8, shall be exempt from tax under this Act:

Provided that no such subsequent sale shall be exempt from tax under this sub-Section unless the dealer effecting the sale furnishes to the prescribed authority in the prescribed manner and within the prescribed time or within such further time as that authority may, for sufficient cause, permit,:

(a) a certificate duly filled and signed by the registered dealer from whom the goods were purchased containing the prescribed particulars in a prescribed form obtained from the prescribed authority; and

(b) If the subsequent sale is made:

(i) to a registered dealer, a declaration referred to in clause

(a) of Sub-section (4) of Section 8 or

(ii) to the Government, not being a registered dealer, a certificate referred to in Clause (b) of Sub-section (4) of Section 8:

21. Thus, sales which are covered by Sub-section (2) of Section 6 are exempted from tax. A dealer who claims exemption must satisfy the following required conditions incorporated in Sub-section (2) of Section 6:

(a) A movement of goods in pursuance to a prior sale is the first prerequisite to a

subsequent sale for exemption which means the first sale must have been a sale in the course of inter-State trade or commerce.

(b) Subsequent sale must have taken place during the movement under the first sale which means the second sale must have been effected before the journey of goods ends or before the goods reach their destination.

(c) The subsequent sale is effected by a transfer of documents or title to the goods.

(d) The subsequent sale must be one that comes within Clause

(b) of Section 3.

(e) Subsequent sale must be either to (a) Government or (b) to a registered dealer u/s 7 of the Central Sales Tax Act,

(f) The dealer effecting subsequent sale has to produce before assessing authority Form E-1 or E-11 as the case may be, obtained from the dealer when he purchased the goods and also produce Form "c" or "D" as the case may be obtained from the dealer or a person to whom the subsequent sale is effected.

22. Relying on the Judgment of the Hon"ble Kerala High Court in the case of P.A. George and Company v. Assistant Commissioner of Sales Tax (Assessment) I, Special Circle, Alappuzha and Ors. reported in (1998) 110 STC 253, Learned Counsel for the Petitioner submitted that in order to get exemption u/s 6(2) of the OST Act, the only requirement is to produce E-1 and "c" declaration forms and once the said declaration forms are produced, a dealer is entitled to get exemption in terms of Section 6(2) of the said Act. According to him, since he has produced E-1 and C declaration forms and no defect was pointed out by the assessing officer in those declaration forms, the Petitioner is entitled to exemption from payment of CST as provided u/s 6(2) of the CST Act.

In the above case, the question before the Hon"ble High Court was whether for the purpose of claiming exemption in respect of sale in transit, the assesseees were obliged under the provisions of the CST Act and the rules made thereunder to produce any other documents in addition to E-1 and C declaration forms. The Hon"ble High Court categorically held that in the subsequent sale in course of inter-State movement of the goods pursuant to an inter-State purchase has to be granted exemption as provided u/s 6(2) of the C.S.T. Act on production of E-1 and C declaration forms and the Learned Assessing Officer is not justified in requiring the dealer to produce any secondary evidence to substantiate its claims for exemption.

Since in that case the subsequent sale in course of interstate movement of goods pursuant to one inter-state purchase was not in dispute, the Hon"ble Court has rightly held that if the subsequent sale is effected in course of inter-state movement of goods pursuant to one inter state purchase, the exemption as provided u/s 6(2) of the C.S.T. Act has to be granted on production of E-1 and C

declaration forms. There is no need to produce any secondary evidence to substantiate the claim. In the Petitioner's case, the claim of subsequent sale in transit is itself in dispute. Moreover, production of declaration form issued under the C.S.T. Act or Local Sales Tax Act cannot determine the character/nature of the transactions involved in purchase and sale of the goods. The character/nature of a sale shall be decided only on the basis of relevant statutory provisions contained in the respective Acts. A dealer is entitled to get statutory declaration Forms under the CST Act and Local Sales Tax Act by virtue of being registered under the said Acts. The Officer at the time of issuing declaration Form does not know how the declaration Form would be used by a dealer. Therefore, power is vested with the Assessing Officer to examine whether the declaration Forms are used in accordance with law or not at assessment stage. The Statute also provides penal action against misuse of declaration Form. In view of the above, the dealer's claim for exemption of tax u/s 6(2) of the C.S.T. Act cannot be accepted solely on the basis of mere production of declaration Form in E-1 and C if the sale in question does not satisfy the required conditions incorporated in Section 6(2) of CST Act.

23. In the case of Siemens India Limited v. State of Kerala reported in (2003) 132 STC 418, the Hon'ble High Court has delivered the Judgment on the footing that when the goods were in transit, the Petitioner transferred the title to the property to the contractee and since the Tribunal had not considered this aspect in detail, the Hon'ble High Court directed the Assessing Officer to consider the matter again after hearing the parties. In the present case, the dispute is whether or not the title to the goods has been transferred by the Petitioner to the contractee while the goods were in transit and the Tribunal in a detailed order held that the title to the goods has not been transferred while the goods were in transit.

In support of his proposition that the inter-state sale that commences from outside State of Orissa cannot be taxed in the State of Orissa, the Learned Counsel has relied on the Judgment of Hon'ble Supreme Court in the case of Gannon Dunkerly & Co. and Ors. v. State of Rajasthan and Ors. reported in (1993) 88 STC 204.

In the present case, according to the Revenue, tax is not levied on any inter-state sale under O.S.T. Act in the State of Orissa. The first sales are from outside the State of Orissa into the State of Orissa and no tax has been levied on these sales in the state of Orissa. What is taxed in the State of Orissa is the subsequent sale as effected by the dealer to the contractees after completion of the first sale in the State of Orissa.

Relying on the Judgment of Supreme Court in the case of Bharat Heavy Electricals Ltd. v. Union of India reported in (1996) 102 STC 373, it is submitted that only the state from which movement of goods took place is the proper state to levy and collect tax under the C.S.T. Act. As stated above, according to the Revenue, no tax has been levied on inter-state sale in the State of Orissa but it is

levied on intra state sale.

24. Learned Counsel appearing for the Revenue relied on a decision of the Madras High Court in the case of Sundaram Industries (*supra*). In this case the Hon"ble High Court held that there was no sale which could be said to have taken place during the movement of goods and that the transaction was taxable under the Tamil Nadu General Tax Act 1959 and did qualify for exemption u/s 6(2) of the C.S.T. Act.

25. There is no quarrel with the proposition of law as canvassed by the Learned Counsel for the parties, but the factual position will determine the result. The dispute between the parties is the time when the Petitioner has effected sale of goods to the contratees i.e. whether such sale took place before the first sale came to an end or the same took place while the goods were in transit. The Tribunal which is the final fact finding authority at page-18 of its Judgment has dealt with this aspect in the following manner:

13. I also find that in order to claim an exemption, SALE- B must be a sale in course of inter-state trade and commerce either u/s 3(b) or u/s 6(2) of the C.S.T. Act. The dealer assessee claims that document of title to goods was transferred while the goods were still in transit-before delivery to them, which, of course, was objected to the Learned S.T.O. It is observed on record that the Manager (Materials) of ml s Voltas Ltd. was declared as the consignee of the goods in SALE-A. Similarly, some other Manager of M/s Volta's Ltd. was declared as the consignee in case 0,? such sales. Sri Pattnaik states that the Manager took delivery of goods before termination of their journey into the state of Orissa as an agent of M/s N.T.P.C. Ltd. and M/s O.P.G.C. Ltd., as the case may be, and not as an employee of the dealer-assessee. But I find that the Manager (Materials) nor the other Manager, as the case may be was Manager (materials) of the dealer-assessee before he worked as an agent (if he is assumed to be an agent of M/s O.P.G.C. Ltd. or M/s N.T.P.C. Ltd.). He also remained the Manager (materials) of the dealer-assessee when the work of taking delivery was over. So he can identified as the Manger (materials) of the dealer-assessee even when he acted as the agent, unless something is done which results in negating his Manger ship. But I find nothing on record that "something" was done to drop him as well from his Manger ship of the dealer-assessee when he acted as an agent. So this man, the Manger was a Manager of the dealer-assessee as well as an agent of M/s O.P.G.C. Ltd. or M/s N.T.P.C. Ltd. as the case may be, at the same time when he took delivery of goods. He could have taken delivery of the goods either as the Manger from the side of the dealer-assessee or on the agent from the side of M/s O.P.G.C. Ltd. or M/s .N.T.P.C. Ltd. So his taking delivery of goods is not determinative whether or not the documents of title to goods was transferred while the goods were still in transit. So that the transaction cannot be treated as one in course of inter-state trade, for he might take delivery of goods as the Manger of the dealer-assessee. So what is determinative of whether it is a sale in course of inter-state trade is the priority of events between the transfer of

documents of title to the goods and taking delivery of goods. If the transfer of documents of title to goods is an event prior to the event of taking delivery of goods the sale is one in course of interstate trade. The dealer-assessee is making a claim of exemption on the ground that the sale is one in course of inter-state trade. So the onus is upon him to prove that transfer of documents of title to the goods is earlier than taking delivery of goods. The dealer-assessee could have discharged the onus by showing the date of transfer of documents of title to the goods and the date of taking delivery "of the goods. But unfortunately no date is found to have been put under the signature in both the cases relating to M/s O.P.G.C. Ltd. and M/s N.T.P.C. Ltd., when an endorsement for transfer of title to the goods was made. The dealer-assessee thus fails to prove that the documents of title to goods are transferred to M/s O.P.G.C. Ltd. when the goods were still in transit within the meaning of provisions in the Explanation-I below Section 3(b) of the C.S.T.Act. The dealer-assessee fails to discharge the onus to substantiate his claim of exemption by proving that SALE-B is a sale in course of inter-state trade and commerce within the provision of Section 3(b) and that therefore, SALE-D as its subsequent sale, is also a sale in course of inter-state trade. The succeeding sales in a series of sales of the same goods can not be a sale in course of inter-state trade u/s 6(2), if the preceding sale is not one in course of inter-state trade.

For the reasons elaborated above, I find that SALE-B, and therefore, SALE-D, are not sales in course of inter-state trade and commerce, and therefore, I disallow the claim of exemption of the dealer-assessee on the plea of subsequent sale u/s 6(2). When the sales made by the dealer-assessee are thus found to be not in course of inter-state trade, they remain subject to tax under the State Act, for they are not sales outside the state, nor in course of export or import. The State, while taxing these sales, have not transgressed the restrictions imposed by the constitution, discussed in this order at para-6. These sales are now held to be intra-state sales, subject to tax under the O.S.T. Act.

26. The above conclusion of the Tribunal is essentially factual and has been arrived at after analyzing the materials on record. Those findings are not perverse. Hence, no question of law arises. This question is answered in affirmative, i.e. in favour of the Revenue.

27. With regard to question No. (iii), the Learned Counsel appearing on behalf of the Petitioner vehemently argued that since the dealer has not suppressed its turnover, the levy of penalty of Rs. 10,00,000 as imposed by the Assessing Officer and sustained by the Learned Tribunal is unjustified, more particularly when the Assistant Commissioner has deleted the same. Learned Counsel appearing for the Revenue argued that by the impugned order the Assessing Officer has assessed the dealer's escaped turnover and, in view of the same, imposition of penalty of Rs. 10,00,000/- u/s 12(8) of the O.S.T. Act has been rightly imposed by the Assessing Officer.

The Assessing Officer has imposed penalty of Rs. 10,00,000/-with the following

observation at page-23 of his order:

Further, the dealer-company is visited with penalty of Rs. 10,00,000.00 u/s 12(8) of the O.S.T. Act.

While dealing with levy of penalty u/s 12(8) of the O.S.T. Act, the first Appellate authority deleted the imposition of penalty with the following finding at page 19 of his order:

The penalty imposed u/s 12(8) of the O.S.T. Act is deleted, because there is no suppression of turnover.

28. In the Second Appeal, the Learned Tribunal even though restored the order of the Learned S.T.O. has not specifically dealt with regarding levy of penalty u/s 12(8) of the O.S.T. Act by the Learned S.T.O. As it appears, the Assessing Officer has imposed penalty of Rs. 10,00,000/- u/s 12(8) of the O.S.T. Act without assigning any reason, for imposing such penalty. The Tribunal has also not dealt with this matter while confirming the assessment order. It is the first Appellate authority who has deleted the penalty on the ground that there was no suppression of turnover. Law is well settled that imposition of penalty is quasi criminal in nature for which discretion has been vested with the Assessing Officer to impose or not to impose penalty and such discretion shall be exercised judicially by the Assessing Officer. The Hon"ble Supreme Court in the case of Hindustan Steel Ltd. v. The State of Orissa reported in (1970) 25 STC 211 held:

An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal preceding) and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform as statutory obligation is as matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the Statute.

29. In the present case, it is not disputed that the dealer in its return filed in Form No. IV of O.S.T. Act has disclosed its gross turnover at Rs. 7,49,74,817.24 and the same has also been accepted in the re-assessment order passed u/s 12(8) of the O.S.T. Act. The only dispute involved in the case is regarding dealer"s claim for exemption u/s 6(2) of the C.S.T. Act. In the return filed under the O.S.T. Act, the dealer claimed deduction of turnover of Rs. 3,96,32784/ - on account of subsequent sale as contemplated under Sub-section (2) of Section 6 of the C.S.T. Act. This claim of the dealer having not been accepted in the assessment order passed under the C.S.T. Act, the same has been treated as intra-state sale in the re-assessment order passed u/s 12(8) of the O.S.T. Act by

the assessing officer and the same has been accepted by the first and second, Appellate after detailed factual analysis.

30. In the circumstances, imposition of penalty of Rs. 10,00,000/- u/s 12(8) of the O.S.T. Act is not justified.

31. In view of the above, we answer the question No. (iii) in affirmative, in favour of the dealer.

32. In conclusion, we answer question No. (i) in affirmative in favour of Revenue, question No. (ii) in affirmative in favour of the Revenue and question No. (iii) in affirmative in favour of dealer. The Tax Revision is allowed to the aforesaid extent. No costs.

A.K. Ganguly, C.J.

33. I agree.