BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

(Arising out of the order of the learned Addl.CST, (North Zone) in Appeal No AA-75/12-13, disposed of on 04.02.2013)

Present: **Shri G.C. Behera, Chairman**
Shri S.K. Rout, 2nd Judicial Member &
Shri B. Bhoi, Accounts Member-II

S.A. No.116(ET) of 2013-14

State of Odisha, represented by the Commissioner of Sales Tax, Odisha, Cuttack. ..... Appellant.

-- Vrs--

M/s. Bonai Industrial Co. Ltd., Barbil, Keonjhar, Odisha, TIN-21412000398. ..... Respondent.

S.A. No.41(ET) of 2013-14

M/s. Bonai Industrial Co. Ltd., Barbil, Keonjhar, Odisha, TIN-21412000398. .... Appellant.

-Versus-

State of Odisha, represented by the Commissioner of Sales Tax, Odisha, Cuttack. .... Respondent.

For the Dealer: : Mr. K. Kurmy, ld. Advocate.
For the State: : Mr. S.K. Pradhan, ld. AS.C.(CT).

Date of Hearing : 20.07.2023 *** Date of Order:19.08.2023

O R D E R

These two appeals are directed against the first appeal orders dated 04.02.2013 passed by the Additional Commissioner of Sales Tax, North Zone (in short, 'ld. FAA') in Appeal Nos. AA/75/12-13. Since both the second appeals have resembling conspectus involving common fact of law of the same dealer

assessee for the same year of assessment, they are taken up for disposal in a composite order for the sake of convenience.

2. The dealer-assessee under the name style of M/s. Bonai Industrial Co. Ltd., Barbil, Keonjhar registered under the Company Act is engaged in raising and processing of iron ore into different sizes and fines for sale in the market. Apart from raising iron ore from its own mines, it also purchases iron ore for processing for sale. The company-assessee was assessed under section 9C of the OET Act by the Joint Commissioner of Sales Tax, Sundargarh Range, Rourkela (in brevity called 'ld. Assessing Authority') for the tax periods from 01.04.2006 to 31.03.2011 on the basis of the Audit Visit Report (AVR) and raised a demand of ₹54,52,603.00 which includes interest of ₹16,32,176.00 and penalty of ₹11,97,106.00. In the first appeal as preferred by the company-assessee, the demand was rather enhanced to ₹62,50,692.00 consisting of tax of ₹40,70,269.00, interest of ₹9,83,317.00 and penalty of ₹11,97,106.00. Both the State and the Company-assessee assail the order of the first appellate authority and approach this forum for reliefs assigning different grounds of appeal.

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3. The State assails the deletion of interest amounting to ₹6,45,859.00 by the ld. FAA. The State holds that the ld. Assessing Authority has rightly levied interest of ₹16,29,176.00

on late payment of admitted tax. It refers to a decision of the Hon'ble Apex Court in the case of **Pepsico India Holdings Ltd Vrs. Commissioner of Trade Tax, Lucknow (U.P.)** delivered in [2011] 40 VST 220 (S.C.) where it has been held that "where the tax admitted became payable under the U.P. Trade Tax Act, 1948, the interest would be payable in terms of sub-Section (1) of Section 8 of the Act from the date when it was due and not under sub-section (1) of Section 8 of the Act from the date when it was due and not under sub-section (IB). The dealer cannot claim that he is liable only from the date of assessment order fixing the correct rate of tax."

4. Mr. S.K. Pradhan, ld. Counsel appearing for the State places reliance on the Judgment passed by the Hon'ble Apex Court in case of ***Royal Boot House Vrs. State of JK*** reported in 56 STC 212 (SC) (1984) wherein the Hon'ble Court observes as under:-

> ".....Where the tax payable on the basis of the quarterly return is not paid before the expiry of the last date for filing such return under the Jammu and Kashmir General Sales Tax Act, 1962, it is not necessary to issue any notice on demand; but on the default being committed, the dealer becomes liable to pay interest under Section 7(5) of the Act on the amount of such tax from the last date for filing the quarterly return prescribed under the Act...."

Further, Mr. Pradhan, ld. Counsel for the State relies on an another Judgment passed by the Hon'ble Supreme Court relating to levy of interest in case of ***Indodan Industries Ltd. Vrs. State of U.P.*** reported in 27 VST 1 (2010). The said judgment reads as follows:-

"The levy of interest for delayed payment of tax is given the status of 'tax due'. The interest is compensatory in nature in the sense that when the assessee pays tax after it becomes due, the presumption is that the department has lost the revenue during the interregnum period (the date when the tax become due and the date on which the tax is paid). It is in this sense that the interest is compensatory in nature and in order to recover the lost revenue, the levy of interest is contemplated under the statute."

Furthermore, Mr. S.K. Pradhan, ld. Counsel for the State places another judgment of the Hon'ble High Court of Odisha passed in WP(C) No.13736 of 2017 in case of ***Shree Bharat Motors Ltd.*** and ***Another Vrs. The Sales Tax Officer, Bhubaneswar-I Circle, Bhubaneswar and Others*** which observe as under:-

> "To strike a balance between deprivation of the State of Odisha to utilize 2/3rd of the amount of tax since September, 2009 till March, 2017 at the relevant point of time and non-payment of full amount of tax liability

disclosed in the return(s) during this period by the petitioner, the aforesaid unpaid entry tax, for the period during which interim Order dated 30.10.2009 as modified vide Order dated 03.02.2010 passed by the Supreme Court of India in I.A. Nos. 327-651 filed by the State of Odisha in its appeals being SLP(C) Nos.14454-14778/2008 was operational, is directed to be deposited along with simple interest @ 9% per annum based on the principles enunciated in Tata Refractories Ltd. Vrs. Sales Tax Officer, (2003) 129 STC 506 (SC) = (2003) 1 SCC 65; Commissioner, Commercial and Sales Taxes and Others Vrs. Orient Paper Mills and Another, (2004) 9 SCC 181 = (2004) 135 STC 19 (SC); Odisha Forest Development Corporation Ltd. Vrs. Anupam Traders and Others, 2019 SCC On Line SC 1524; Union of India Vrs. Willowood India Pvt. Ltd., (2022) 9 SCC 341; IDL Industries Ltd. Vrs. State of Odisha, (2004) 134 STC 62 (Ori)."

With the above submission, the State urges that the order of the ld. Assessing Authority is sought to be restored and that of the ld. FAA be modified.

5. The dealer-company submitted cross objection stating that interest cannot be charged when tax quantified in the assessment has not fallen due until demand notice is served. In case of ***Birla Cement Works Vs. State of Rajasthan*** (1994) 94

STC 422 (SC), the Hon'ble Apex Court has held that interest is chargeable when the dealer has defaulted in payment of tax as per return. Any tax found due in assessment, interest cannot be charged until the dealer is found default in payment of tax in accordance with demand notice served. Besides, the provision under Section 9C of Orissa Entry Tax Act, in which the appellant is assessed, there is no mandate to levy interest on the tax amount found due in the assessment. It is also submitted that Section 7(5) of the OET Act provides interest payable only in case a dealer fails to payment the amount of tax due as per return. The case laws relied upon by the State in relation to levy of interest in the present case are of no assistance.

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6. The dealer-Company assails the order of the ld. FAA stating that levy of entry tax of ₹24,95,770.00 on import of Mobile Crusher valuing ₹12,47,88,500.00 from outside the territory of India is illegal and without authority of law.

(ii) Demand of 2/3rd entry tax of ₹12,11,797.00 on goods brought from outside the state of Odisha but not manufactured in the State of Odisha is illegal in terms of the decision of the Hon'ble High Court of Odisha in case of ***Reliance Industries Ltd. Vrs. State*** of Odisha reported in (2000) 18 VST 85 (Ori).

(iii) It is submitted that levy of entry tax @2% on ₹1,26,78,845.00 towards purchase value of Energy meter, Pump, Drive drum, Screen Crusher, Plant and its Spares, Lightening System, Dust Suppression System treating the same as Components/Spare Parts of machinery and equipments classified under Sl. No.9 of the Part-II of the Schedule is illegal.

It is submitted that purchase of Energy meter, pump Drive Drum, Screen Crusher, Plant of its spares, lighter system, Dust Suppression system valuing ₹1,26,78,845.00 though not scheduled goods have been taxed @2% classifying as component spare parts of machinery or equipments under Sl. No.9 of part 11 to the Schedule without specifying the machinery or equipments in which the alleged goods are fitted. It is admitted that ET of 1% on the purchase value of the above has been deposited inadvertently.

The ld. Counsel representing the dealer-company places reliance on the decision of the Hon'ble High Court of Orissa in case of ***IFGL Refractory Ltd. Vs. State of Orissa in W.P. (C) No.7 of 2008*** where the Hon'ble Court has held that items such as Ladle Shrouds, Nozzle, Monoblock Stepper, Tundlish Nozzle, Sligate Plates etc and raw materials such as Fuse Silica, Lime Stabilizer, Fuse Zirconia, Fused Magnesia, Sintered Magnesia, Silicon Metal, Natural PUC, Refractory

Glaze, Furfulor Alcohol and Micro Silicon are not scheduled goods.

Likewise, the levy of entry tax on purchase value of Conveyor for ₹1,60,44,421.85, and that of Wire Mesh Screen for ₹70,33,197.51 treating them as machinery and equipments is objected to by the ld. Counsel which is said to be in contrary to the ratio of the Judgment of the Hon'ble High Court of Orissa cited supra.

(iv). It is further contended that disallowance of set off of ₹3,97,791.71 is illegal and contrary to the provision of section 26 of the OET Act.

(v). It is defended that the ld. FAA has caused enhancement of ₹7,71,945.85 on purchases effected outside the State of Odisha adding freight charges @3% on such purchases. It is argued that the ld. FAA has contravened the provision of Rule 17(1) of the OVAT Rules which provides that the purchase value shall be determined on the basis of invoices unless the same are rejected for reasons to be recorded in writing after giving reasonable opportunity of being heard to the dealer. The Circular No.111(1) 296/98-240/CCT dated 4.1.2001 issued by the Commissioner of Sales Tax which provides that where certain charges such as transportation charges, insurance charges, royalty, handling charges are not reflected in the invoice and the assessing authority feels that the invoice does

not reflect the correct value, before taking further action must reject the invoices under Rule 17(1) of the OVAT Rules. Since the value as appearing in the invoices have not been rejected in the instant case and the statutory pre-conditions have not been fulfilled, the enhancement of purchase value is contrary to Rule17(1).

(vi). It is submitted that provision of section 7 of the OET Act is attracted only in circumstances of default in filing of return or no payment of tax as per the return. In the instant case, there was no tax withheld by the dealer-company. Hence levy of interest is unwarranted.

(vii). The ld. Counsel of the dealer-company protests imposition of penalty u/S. 9C(5) of the OET Act holding that there is no existence of *mens rea* like suppression of purchase or sales, erroneous claim of deduction and evasion of tax in the present case. In order to support its stand, several case laws such as Uniflex Cable Ltd. Vs. CCE reported in 2011 NTN (Vol.47) -278, (SC), Dye chemicals vs. CCE reported in 1995 (75) ELT-721(SC), Pushpam Pharmaceuticals Company vs. CCE reported in 1995(75) ELT -401 (SC), Hindustan Steel Ltd. Vs. State of Orissa reported in (1970) 25 STC 211 (SC), CST vs. Sanjay Fabrics reported in 2010(35) VST-1 (SC) of Cement Marketing Co. of India vs. The ACST reported in (1980) 45 STC 197 have been relied upon.

7. Gone through the rival submissions. The grounds of appeals and cross objections filed in both the second appeals are perused. The orders of the learned assessing authority and that of the ld.FAA are carefully gone through vis-a-vis the materials available on record. We feel it ideal to dispose both the appeals hereunder considering the provisions of law enshrined under the OET Act and Rules made thereunder and relying on the case laws placed by both the parties where applicable.

(i) The learned Counsel representing the dealer-company assails levy of entry tax on goods imported from outside the territory of India. The ld.FAA inferred in this regard holding that the Hon'ble High Court of Odisha in case of **Tata Steel Ltd. V. State of Orissa** in W.P.(C) No.15519/2010 decided on 09.10.2012 have held that entry of goods would not exclude entry tax on imported goods. The Hon'ble Apex Court in case of **State of Kerala and others Vs. Fr. William Fernandez and others** in (2021)11 Supreme Court cases 705 held that the charging event arises on entry of scheduled goods into a local area. Any goods which are entering into a local area of a State whether coming from another local area of State, any other State or outside the country, the charging event is same for all goods entering into local area. It is, therefore, held that charging section is clear, unambiguous and the provisions cannot be read to mean that the imported goods coming from outside the country

are excluded from charge of entry tax. No such indication is discernible from any provision of the Act. Charging event is complete as and when goods enter into local area for use, sale or consumption irrespective of its origin. In view of the said settled principle of law, levy of entry tax on import of Mobile Crusher valuing ₹12,47,88,500.00 is justified as observed by the forums below. We are not inclined to interfere in this regard.

(ii) The observation of the ld. FAA in respect of demand of 2/3rd entry tax of ₹12,11,797.00 on goods brought from outside the State of Orissa but not manufactured in the State of Orissa is affirmed in view of the order of Hon'ble Apex Court passed on 03.02.2010 in SLP(C) No.14454-14778/2008. We, therefore, find no justification to interfere in this case.

(iii) The ld. Counsel for the dealer-company vehemently defends levy of entry tax on goods such as Energy Meter Pump, Drive Drum, Screen Crusher, Plant and its Spares, Lightening System, Dust Suppression System. Similarly, the ld. Counsel for the dealer-company objects levy of entry tax on the purchase value of Conveyor Belts and Wire Mesh Screen. Reliance has been placed on the Judgment of the Hon'ble High Court of Odisha in W.P. (C) No.7 of 2008 passed in case IFGL Refractory Ltd. Vs. State of Orissa. This contention was also taken in the first appellate stage. The ld. FAA took reliance of the judgment of the Hon'ble High Court of Odisha passed in case of Orissa Agro

Industries Vs. State of Orissa reported in (1993) 90 STC 571(O) wherein it is held that "Machinery in generic sense could include all appliances and instruments whereby energy or force is transmitted and transferred from one point to another. Machinery implies the application of mechanical means to attainment of some particular end by help of natural forces and includes everything which by its action produces or assists in production." The ld.FAA places reliance on the decision of the Hon'ble High Court of Odisha in case of State of Odisha Vrs. IPITATA Refractory Ltd. (1993) 91 STC P-561(O) as to the meaning of equipment wherein the Hon'ble Court observes that "Equipments means an act of equipping or the action or process of equipping or fitting out, the state or condition of being equipped". The Hon'ble High Court also gives the example of hospital in laying down the meaning of equipment holding that anything and everything which is required to convert an empty building, part of an empty building into a hospital are the equipments. Under this analogy, the ld. FAA holds that any material, in the nature of machinery and equipments with their spare parts and components parts used for any purpose is exigible to entry tax. Therefore, there is nothing wrong to levy entry tax in respect of purchase value of Energy Meter Pump, Drive Drum, Screen Crusher, Plant and its Spares, Lightening

System, Dust Suppression System treating them as scheduled goods under the entry of 'Machinery and Equipment'.

The ld. FAA has observed as to the usability of 'Conveyor Belt' stating that this belt connects the motor to run the machine. So, it is a component part of machinery or equipment without which the machine cannot run. Similarly, 'Wire Mesh Screen' is as good as equipment used in separating the iron ore from fines. Accordingly, as minutely observed by the ld. FAA, the aforesaid goods in dispute having been coming under the ambit of 'Machinery and Equipment' provided under Sl. No.9 of the Part II to the Schedule are scheduled goods exigible to entry tax @2%. We, therefore, find no room to interfere in the matter.

(iv) The learned Counsel of the dealer-company assails disallowance of set off to the tune of ₹3,97,791.71 by the assessing authority. In this connection, it is desirable to refer to the Rule 19(5) of the OET Rules which provides that 'the entry tax paid by the manufacturer of the scheduled goods on the purchase of raw materials which directly go into the composition of finished products by the manufacturer of the scheduled goods shall be set off against the entry tax payable under sub-rule (2) above by the selling dealer.'

Explanation:-'Where no entry tax is payable under sub-Rule(2) of this rule on a part of the sales effected, the set off admissible under this sub-rule shall be reduced proportionately.'

The dealer-company is learnt to have claimed set off of ₹5,13,941.71. The learned assessing authority basing on an illustration as reproduced below has determined set off.

ET paid:-₹513,941.71 X VAT sales:-₹104,11,89,122.84

Total sales:- ₹460,70,75,152.13

= ₹1,16,150.00 (set off allowable)

In view of the above, the set off of ₹1,16,150.00 as determined at assessment seems to be as per law and thus, necessities no interference.

(v) It is observed that scheduled goods worth ₹1,64,89,795.40 (under 1% group) and ₹92,41,755.78(under2% group) were purchased on payment of freight charges by the dealer-company. The dealer-company having not produced the freight account at assessment, an amount of ₹7,71,945.85 being 3% of the total purchases was added to the GTO and TTO resulting in extra demand of ₹10,492.00 on this account. In this contest it is felt worthy to enunciate the definition of 'purchase value' as enshrined in Section 2(j) of the OET Act which is as follows:-

> **"Purchase value** means the value of scheduled goods as ascertained fro original invoice or bill and includes insurance charges, excise duties, countervailing charges, sales tax, [value added tax or, as the case may be, turnover tax] transport charges, freight charges and all other charges incidental to the purchase of such goods:"

In the present case, the original invoice or bill have been furnished without disclosure of freight charges therein. The ld. Assessing Authority and the ld. FAA has justifiably added freight charges @3% over and above the purchase value. The provision of Rule 17(1) of the OET Rules is not attracted in the present fact of the case. Accordingly, the contention of the ld. Counsel of the dealer-Company is not acceptable.

(vi) The State assails deletion of interest amounting to ₹6,45,859.00 by the ld. FAA. In this context, it is of the opinion that the liability to interest on unpaid tax amount accrued on the dealer in consequence of delayed payment of tax admitted in the return. In the present case, the dealer-company is visited with interest of ₹9,83,317.00 as per section 7(5) of the Act on account of delay in payment of admitted tax. The ld.FAA has rightly observed that interest cannot be charged when tax quantified in the assessment has not fallen due until demand notice is served. In other words, where tax is found due on final assessment and the dealer fails to pay the differential tax within the time prescribed, he is required to pay interest at the rates prescribed under the stature. In case of Birla cement Works Vs. State of Rajasthan reported in (1994) 94 STC 422 (SC), the Hon'ble Apex Court has held that interest is chargeable when the dealer has defaulted in payment of tax as per return. Any tax found due in assessment, interest cannot be charged until the dealer is found

default in payment of tax in accordance with demand notice served. Under the analogy, deletion of interest amounting to ₹6,45,859.00 by the ld.FAA which emanated on final assessment is justified. The contention of the State on this score utterly fails.

(vi) On perusal of the first appeal order, it transpires that penalty twice the tax assessed has been levied as per section 9C (5) of the OET Act on an tax amount of ₹5,98,553.04 instead of on tax amount of ₹26,26,321.00 pursuant to the stay order of the Hon'ble Apex Court clamped on Para 30 of the judgment of the Hon'ble High Court of Orissa in case of **M/s. reliance Industry** in WP (C) No.6515 of 2006 dated 18.02.2009. The penalty under Section 9C(5) of the OET Act has as such been worked out to ₹11,97,106.00. The learned Counsel of the dealer-company opposes levy of penalty assigning different grounds apart from case laws of the Hon'ble Courts as cited above which are of little assistance in the present fact and circumstances of the case. The Hon'ble high Court of Odisha **in case of Nirman Udyog, Berhampur Vs. State of Odisha in STREV No.118 of 2019 dated 21.12.2022** observes as under:-

> "In respect of Section 42(5) of the Odisha value Added Tax Act, 2004 (OVAT Act) which is in pari materia with Section 9(C) (5) of the OET Act it has been held that by this Court in the judgment dated 5th July, 2022 in STREV No.69 of 2012 (State of Odisha Vs. M/s Chandrakanta Jayantilal, Cuttack) that the penalty

thereunder is mandatory with there being no discretion available with the assessing authority. Accordingly, the Court is not inclined to admit the present revision petition and frame the question as urged by the Petitioner-assessee"

In view of the above decision of the Hon'ble Court, imposition of penalty under Section 9C (5) of the OET Act in the event of assessment completed under Section 9C of the Act determining an amount assessed to tax is automatic. Accordingly, the contention of the learned Counsel of the dealer-company on this score is without merit.

8. Under the above background of the case and in keeping with the observations made in the foregoing paragraphs, we are of the considered view that the appeals filed by the dealer-Company and the State are dismissed. The order of the ld.FAA is confirmed. Cross objections are hereby disposed of accordingly.

Dictated and corrected by me.

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member