BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 111 (ET) of 2014-15

(Arising out of order of the learned Addl.CST (Appeal), South Zone, Berhampur in First Appeal No. AA (ET)- 37/2013-14, disposed of on 30.05.2014)

Present: **Shri G.C. Behera, Chairman**
Shri S.K. Rout, 2nd Judicial Member &
Shri M. Harichandan, Accounts Member-I

M/s. Utkal Automobiles Ltd.,
S-3/61, IE, Mancheswar, Bhubaneswar ... Appellant

-Versus-

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

For the Appellant : Sri S.K. Mohapatra, Advocate
For the Respondent : Sri D. Behura, S.C. (CT)

Date of hearing : 30.09.2022 *** Date of order : 27.10.2022

O R D E R

The Dealer assails the order dated 30.05.2014 of the Addl. Commissioner of Sales Tax (Appeal), South Zone, Bhubaneswar (hereinafter called as 'First Appellate Authority') in Appeal No. AA (ET) - 37/2013-14 reducing the assessment order of the Assessing Authority (Entry Tax), Bhubaneswar III Circle, Bhubaneswar (in short, 'Assessing Authority).

2. The case of the Dealer, in brief, is that –

M/s. Utkal Automobiles Ltd. is a Limited Company and engaged in trading of two wheelers, four wheelers and its spare parts and accessories.

The assessment period relates to 01.10.2010 to 31.10.2012. The Assessing Authority raised tax and penalty of ₹4,15,437.00 u/s. 9C of the Odisha Entry Tax Act, 1999 (in short, 'OET Act') basing on the Audit Visit Report (AVR).

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority allowed the appeal in part and reduced the assessment to ₹2,63,039.00. Being further aggrieved with the order of the First Appellate Authority, the Dealer prefers the appeal. Hence, this appeal.

3. The State files cross-objection supporting the order of the First Appellate Authority as just and proper.

4. The learned Counsel for the Dealer submits that in the assessment as well as appellate stage the Dealer furnished copy of online payment challan No. CK27989499 dated 19.04.2013 showing payment of ₹1,52,396.00 out of which ₹1,31,504.00 towards ET and ₹20,892.00 for interest, but the Assessing Authority has not considered such payment and raised tax and penalty of ₹4,15,437.00 including interest of ₹40,557.00. He further submits that learned First Appellate Authority has partly considered the payment and reduced the demand to ₹2,63,039.00 instead of reducing the demand to ₹40,557.00 as interest. So, he submits that imposition of penalty is arbitrary and unjustified, which needs to be deleted for the sake of natural justice.

5. Per contra, the learned Standing Counsel (CT) for the State submits that the claim of the Dealer has not been substantiated by any evidence. So, he submits that the First Appellate Authority has rightly considered the online business as evidenced from the order and the same require no interference in appeal.

6. Having heard the rival submissions and the materials available on record, we formulate the following question for determination in appeal :-

> Whether in the facts and circumstances of the case the orders of the Assessing Authority and the First Appellate Authority imposing penalty under the OET Act are justified as per law?

7. The record shows that the Dealer does not dispute the admitted tax. The sole dispute of the Dealer is that the Assessing Authority did not accept the payment made by way of e-challan and imposed penalty on the tax due u/s. 9C(5) of the OET Act. The Assessing Authority recorded a finding that the ET dues comes to a sum of ₹1,90,53,946.67. The Dealer has deposited ET of ₹1,89,28,987.00 earlier with the return filed. Hence, he found the balance ET dues of ₹1,24,960.00 and accordingly, imposed two times penalty, i.e. ₹2,49,920.00 as per Section 9C(5) of the OET Act. He further levied interest of ₹40,557.00 and raised the tax liability of the Dealer for a sum of ₹4,15,437.00 for the period under assessment.

8. Learned First Appellate Authority in appeal accepted payment made through e-challan for ₹1,52,396.00 vide online challan No. CK27989499 dated 19.04.2013, which includes tax of ₹1,31,504.00 and interest of ₹20,892.00. Accordingly, the First Appellate Authority reduced the balance tax and penalty for a sum of ₹2,63,039.00.

9. The orders of the fora below show that both the Assessing Authority and the First Appellate Authority relied on provision of Section 9C(5) of the OET Act and imposed penalty on the balance tax due.

10. The relevant provisions of Sections 7(2) and (5) and 9C(5) of the OET Act are reproduced herein below for better appreciation:-

> "***7. Return and return defaults –***
>
> *(1)* *xx* *xx* *xx*
>
> *(2)* *(a) If any dealer, having furnished a return under sub-section (1), discovers any omission or error in the return so*

furnished, he may file a revised return before the date on which the return for the next tax period becomes due.

(b) Revised returns may also be furnished by the registered dealer under this Act if revised returns are furnished under VAT Act and the rules made thereunder:

Provided that revised return may not be filed under this Act if the revised return furnished under VAT Act does not relate to the transaction of scheduled goods."

xx xx xx

(5) ***Where a dealer required to file return under this section fails without sufficient cause to pay the amount of tax due as per the return for any tax period*** *or fails to furnish return, such dealer shall be liable to pay interest in respect of –*

(i) ***the tax, which he fails to pay according to the return****; or*

(ii) the tax payable for the period for which he has failed to furnish return,

at the rate of one percentum per month from the date the return for the period was due to the date of its payment or the date of order of assessment, whichever is earlier."

(Amended w.e.f. 01.07.2012 at the rate of one percentum per month and prior to amendment, it was two percentum per month)

"9C. Audit assessment –

(1) xx xx xx

(3) Where the dealer to whom a notice is issued under sub-section (1) produces the books of account and other documents, the assessing authority may, after examining all the materials as available with him in the record and those produced by the dealer and after causing such other enquiry as he deems necessary, assess the tax due from that dealer accordingly.

(4) If the dealer fails to appear or cause appearance, or fails to produce or cause production of the books of account and documents as required under sub-section (1), the assessing authority may proceed to complete the assessment to the best of his judgment basing on the materials available in the Audit Visit Report and such other materials as may be available, and after causing such enquiry as he deems necessary.

(5) Without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under sub-section (3) or (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-sections."

11. Now, we are to decide whether the Assessing Authority and the First Appellate Authority are justified in imposing penalty u/s. 9C(5) of the OET Act. It is not in dispute that the Dealer has balance entry tax dues of ₹1,24,960.00. It is also not in dispute that that the notice for audit assessment was issued on 14.01.2013 and the Dealer received the same on 13.02.2013. It is also not in dispute that the Dealer deposited ₹1,52,396.00 under online Challan No. CK27989499 dated 19.04.2013 i.e. after receipt of the notice and before completion of assessment.

12. The proviso to Section 33(5) of the OVAT Act reads as under :-

> ***"33. Periodical returns and payment of tax –***
>
> *(1) xx xx xx*
>
> *(5) If any dealer, after furnishing a return under sub-section (1) or sub-section (2), discovers that a higher amount of tax was due than the amount of tax admitted by him in the original return for any reason, he may voluntarily disclose the same by filing a revised return for the purpose and pay the higher amount of tax as due at any time, in the manner provided under Section 50 :*
>
> *Provided that no such voluntary disclosure shall be accepted where the disclosure is made or intended to be made after receipt of the notice for tax audit under this Act, or as a result of such audit."*

Also, Rule 34 of the OET Rules is quoted herein below :-

> ***"34. Implementation –***
>
> *For any other matters not specified under these rules but required for the carrying out the purposes of the Act and these Rules, the provision under VAT Act and the rules made thereunder shall, mutatis mutandis, apply."*

13. Now, the question remains whether the above proviso of Section 33(5) of the OVAT Act is applicable to the proceeding u/s. 9C of the OET Act. Rule 34 of the OET Rules provides for any other matter not specified under these rules, but required for carrying out the purposes of the Act and

these Rules, the provisions under the VAT Act and the Rules made thereunder shall apply *mutatis mutandis*.

It means in absence of any specific provision in the OET Act to carry out the purpose of the Act, the provisions of OVAT Act shall apply *mutatis mutandis*. But, OET Act provides specific provision of Section 7, which corresponds to Section 33(5) of the OVAT Act. But, Section 7(2) of the OET Act does not prescribe any bar for voluntary disclosure like Section 33(5) of the OVAT Act. Therefore, any payment made by the Dealer during the assessment proceeding can be accepted.

So, the First Appellate Authority has considered the payment of the Dealer and adjusted the same from the total tax raised on the ground that the same has been made before completion of assessment. As there is no bar like proviso to Section 33(5) of the OVAT Act in Section 7(2) of the OET Act, the decision of imposing penalty by the Assessing Authority u/s.9C(5) of the OET Act and confirming the decision of the Assessing Authority in imposing penalty by the First Appellate Authority is not proper.

14. The record shows that the outstanding tax dues was for ₹1,24,960.00 and the outstanding balance interest was for a sum of ₹40,557.00, but the Dealer has paid ₹1,52,396.00. The order of the First Appellate Authority shows that the tax dues is for a sum of ₹1,31,504.00 and interest of ₹20,892.00 on the basis of the challan produced by the Dealer before him, which differs from the assessment order. So, we feel it proper to remit the matter to the Assessing Authority to recompute the tax liability including interest only as per the provisions of law. Accordingly, the question is decided in favour of the Dealer and against the State. Hence, it is ordered.

15. Resultantly, the appeal is allowed and the orders of the First Appellate Authority and the Assessing Authority are hereby set aside. The

matter is remitted to the Assessing Authority for recomputation of the tax liability of the Dealer as per the observations made above within a period of three months from the date of receipt of this order. The Dealer shall appear before the Assessing Authority on the date to be fixed by the Assessing Authority for recomputation of tax liability in accordance with law. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

Sd/-
(G.C. Behera)
Chairman

I agree,

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

I agree,

Sd/-
(M. Harichandan)
Accounts Member-I