BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 48 (C) of 2012-13
&
S.A. No. 17 (ET) of 2013-14

(Arising out of orders of the learned Addl. CST (Central Zone) in Appeal Nos. AA-02 (C) ACST (ASST) SNG/10-11 & AA-03 (ET)/ACST/ SNG/10-11, disposed of on 09.07.2012 and 14.02.2013 respectively)

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

M/s. OCL India Ltd.
At/PO- Rajgangpur,
Dist. Sundargarh ... Appellant

-Versus-

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

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

Date of hearing : 23.02.2023 *** Date of order : 18.03.2023

O R D E R

Both these appeals relate to the same party and for the same period, but under different Acts. Therefore, the same are taken for disposal by this composite order for the sake of convenience.

2. Dealer assails the order dated 09.07.2012 of the Addl. Commissioner of Sales Tax (Central Zone) (hereinafter called as 'First Appellate Authority') in F A No. AA-02 (C) ACST (ASST) SNG/10-11

reducing the assessment order of the Joint Commissioner of Sales Tax, Sundargarh Range, Rourkela (in short, 'Assessing Authority').

3. Dealer is also in appeal against the order dated 14.02.2013 of the First Appellate Authority in F A No. AA-03 (ET)/ACST/ SNG/10-11 enhancing assessment order of the Assessing Authority.

4. Briefly stated, the facts of the cases are that –

M/s. OCL India Ltd. is a Limited Company manufacturing cement, refractory and sponge iron. Dealer effects sale in inside the State, inter-State trade and commerce, in course of export and transfer of stock to the outside State branches. The assessment period relates to 01.04.2006 to 31.03.2007. The Assessing Authority raised tax of ₹73,10,628.00 u/r. 12(3) of the Central Sales Tax (Odisha) Rules, 1957 (in short, 'CST (O) Rules') including penalty and interest on the basis of Audit Visit Report (AVR). Similarly, the Assessing Authority raised tax of ₹16,90,277.00 including penalty and interest u/s. 9C of the Odisha Entry Tax Act, 1999 (in short, 'OET Act').

Dealer preferred first appeals against the orders of the Assessing Authority before the First Appellate Authority. The First Appellate Authority reduced the tax demand to ₹40,78,182.00 under the CST (O) Rules, but enhanced the tax demand to ₹42,93,106.00 under the OET Act. Being aggrieved with the orders of the First Appellate Authority, the Dealer prefers these appeals. Hence, these appeals.

The State files cross-objections for both the appeals.

5. The learned Counsel for the Dealer submits that he is only pressing the issue of interest and penalty under CST (O) Rules. He further submits that levy of penalty is unwarranted and uncalled for in the facts and circumstances of the case. He further submits that levy of interest is illegal and without authority of law. The interest u/r. 8(1) of the CST (O) rules is attracted only in case of default in filing return or less payment of tax as per

return. He further submits that interest can only be imposed only when the Dealer is not able to explain for non-filing of statutory forms without any sufficient cause. So, he submits that the orders of the Assessing Authority and the First Appellate Authority under CST (O) Rules are bad in law and the same require interference in appeal. He relies on the decisions of ***CST v. Hindustan Aluminium Corporation***, reported in **[2002] 127 STC 258 (SC)**; ***J.K. Synthetic Ltd. v. CTO,*** reported in **[1994] 4 SCC 276**; ***OMEC Engineers v. CIT***, reported in **[2007] 294 ITR 599 (Jhr)**; ***Azadi Bachao Andolan v. Union of India***, reported in **[2001] 252 ITR 471 (Delhi)**; ***Gujarat Ambuja Cement Ltd. v. Assessing Authority***, reported in **[2000] 118 STC 315 (HP)**; ***Fosroc Chemicals (India) Ltd. v. State of Karnataka***; ***M/s. General Traders v. State of Odisha*** in **STREV No. 64 of 2017** decided on 08.12.2022; ***Sri Lalbaba Rollers Flour Mills v. State of Odisha*** in S.**A. No. 87 (C) of 2012-13** decided on 03.04.2014; ***M/s. Gajalaxmi Iron Works v. State of Odisha*** in **S.A. No. 53 of 2011-12** decided on 18.12.2013.

As regards **S.A. No. 17 (ET) of 2013-14**, the Dealer only pressed the issue of imposition of ET @ 2% instead of 0.5%, levy of entry tax by adding freight/transportation charges of ₹4,94,95,762.00 over and above gross value as per purchase invoice and imposition of penalty of ₹9,17,836.00 u/s. 9C(5) of the OET Act.

He further submits that the First Appellate Authority in charging ET @ 2% instead of 0.5% as per the provision of Rule 3(4) of the OET Rules. The Assessing Authority has to reject the invoice before adopting best judgment principle to determine the purchase value of scheduled goods adding freight charges, which he has not done. As regards penalty u/s. 9C(5) of the OET Act, the orders of the Assessing Authority is unjust and uncalled for and the same require interference in appeal. He relies on the decisions in ***Smt. Tarulata Shyam v. CIT***, reported in **[1977] 3 SCC 305**; ***S.A. No. 100 (ET) of 2013-14*** decided on 20.12.2018.

6. On the other hand, the learned Standing Counsel (CT) for the State opposes the contention of the learned Counsel of the Dealer under the CST Act vehemently and submits that the only option remains with the Assessing Authority to levy interest for non-submission of statutory form and the State should not suffer loss for the inter se dispute between the purchaser and seller. The Dealer who has chosen to trust to other dealer must suffer for his mercantile recklessness. The Dealer fails to adduce material evidence to explain the sufficient cause for non-submission of statutory form inspite of best efforts. He further submits that the Assessing Authority had rightly levied penalty, but the First Appellate Authority reduced the same without any reasonable cause.

As regards levy of ET @ 2% by the First Appellate Authority, the First Appellate Authority followed the procedures, gave opportunity to the Dealer and levied ET as per law and the same requires no interference in appeal. As per provision of Section 9C(5) of the OET Act, the word 'shall' shows it is mandatory and imposition of penalty is automatic. He further submits that the Assessing Authority rightly discarded the invoice though the order is not specific and adopted best judgment principles to determine the fright charges on the purchase value of the goods and the same requires no interference in appeal. He relies on the decision in ***Tel Utpadak Kendra v. Deputy Commissioner of Sales Tax***, reported in **[1981] 48 STC 248 (SC)** and ***Dharamendra Textile v. Union of India***, reported in **[2008] 18 VST 180 (SC)**.

7. Having heard the rival submissions and on going through the materials on record, it transpires from the assessment order u/r. 12(3) of the CST (O) Rules that the Assessing Authority determined the tax liability of ₹73,10,628.00 including penalty and interest. The First Appellate Authority deleted penalty of ₹32,32,446.00 levied towards non-submission of 'C' forms. The First Appellate Authority rejected the claim of exemption on

account of 6(2) sale as well as export sale and assessed the tax of ₹4,30,743.00 and imposed twice penalty of ₹8,61,486.00. Accordingly, the First Appellate Authority assessed the tax of ₹25,17,475.00, interest of ₹6,99,221.00 and the balance penalty of ₹8,61,486.00 against claim of exemption u/s. 6(2) and sale in course of export.

8. The Dealer assails the impugned order on the ground of penalty u/r. 12(3)(g) and interest u/r. 8(1) of the CST (O) Rules. The learned Counsel for the Dealer submits that interest cannot be imposed, if the Dealer explains the sufficient cause from the very inception for non-submission of statutory forms on the ground that the same is beyond its control.

As regards imposition of penalty u/r. 12(3)(g) of the CST (O) Rules for non-submission of statutory forms for sales u/s. 6(2) and for non-submission of Form 'H', considering the Circular dated 20.04.2015 of the Commissioner of Commercial Taxes, in the case of ***M/s. General Traders, Berhampur v. State of Odisha*** (**STREV No. 64 of 2017** decided on 08.12.2022) Hon'ble Court have been pleased to observe not to impose penalty u/r. 12(3)(g) in the circumstances for non-filing of declaration forms in respect of bona fide transactions and in absence of substantive provision for such imposition u/s. 9(2) of the CST Act. So, in view of the decision cited supra in ***M/s. General Traders'*** case, no penalty can be imposed for non-submission of declaration forms. Therefore, we are of the unanimous view that the imposition of penalty by the First Appellate Authority is otherwise bad in law and is liable to be deleted.

9. As regards levy of interest, the Dealer has taken consistent plea from the very inception of proceeding, i.e. at the stage of assessment, that the purchaser did not provide the declaration forms inspite of its best effort and claims that the interest cannot be levied u/r. 8(1) of the CST(O) Rules if the Dealer explains ground of non-submission of declaration forms with sufficient cause even before the Assessing Authority. So, the provisions of

Section 9(2B) of the CST Act r/w Rule 8(1) and 8(2) of the CST (O) Rules are quoted hereunder for better appreciation :-

> ***"9(2B)*** If the tax payable by any dealer under this Act is not paid in time, the dealer shall be liable to pay interest for delayed payment of such tax and all the provisions for delayed payment of such tax and all the provisions relating to due date for payment of tax, rate of interest for delayed payment of tax and assessment and collection of interest for delayed payment of tax, of the general sales tax law of each State, shall apply in relation to due date for payment of tax, rate of interest for delayed payment of tax, and assessment and collection of interest for delayed payment of tax under this Act in such States as if the tax and the interest payable under this Act were a tax and an interest under such sales tax law."
>
> *"**8. Payment of interest for non-submission of return/non-payment of tax –***
>
> ***(1)*** If a registered dealer fails, without sufficient cause, to pay the amount of tax due as per the return furnished under Rule 7 or fails to furnish a return under these rules, such dealer shall be liable to pay interest in respect of the tax, which he fails to pay according to the return or the tax payable for the period for which he failed to furnish return, at the rate of one per centum per month from the date the return for the period was due to the date of its payment or to the date of order of assessment, whichever is earlier.
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> ***(2)*** Every dealer required to pay interest under sub-rule (1) shall pay such interest at the time of making payment of the tax, or on the date specified in the demand notice as per the order of assessment, whichever is earlier."

A bare reading of Rule 8(1) of the CST (O) Rules, it shows that the Dealer is liable to pay interest if he fails to explain without sufficient cause for non-payment of tax as per return under Rule 7 or fails to furnish a return under these rules. It is not a case of non-filing of return.

Likewise, bare reading of Rule 8(2) shows that the Dealer is required to pay interest under sub-rule (1), he shall pay such interest at the time of making payment of tax or on the date specified in the demand notice as per the order of assessment, whichever is earlier. Section 9(2B) of the CST Act provides that all the provisions relating to due date of payment of tax, rate of interest for delayed payment of tax and assessment and collection of interest for delayed payment of tax of the general sales tax of law of each State shall apply in relation to due date for payment of tax, rate

of interest for delayed payment and assessment and collection of interest for delayed payment of tax under this Act in such State as if the tax and interest payable under this Act were a tax and interest under such sales tax law. It clearly reveals that Section 9(2B) provides the due date of levy of interest runs from the very date of payment even in case of delayed payment.

10. The learned Counsel for the Dealer argues that even bare reading of Section 9(2B) of the CST Act shows that Section 9(2B) empowers the States to make rules for levy of interest. He further argues that in compliance to the substantive provision provided under the CST Act, the State of Odisha frames Rule 8 of CST (O) Rules to impose interest, if the Dealer fails to explain 'sufficient cause' for non-submission of declaration forms. He has also argued that the Dealer has no control over the outside State purchaser, nor the Dealer has any malafide intention to evade the tax on the inception of the business. He further argues that rules or section under Sales Tax statute do not provide any remedy to the Dealer to reimburse the interest from the purchaser in case of the default of the end purchaser in furnishing the statutory forms. He also argues that the Dealer has no alternative than to pay interest for the fault of the end purchaser. On the contrary, learned Standing Counsel (CT) for the State vehemently opposed the submissions and submits that as per the statute payment of interest is automatic for the default payment of tax by the Dealer. He also submits that there is no discretion provided under the statute not to impose interest in such default payment for any bonafide reason.

11. On careful scrutiny of the record in the light of arguments advanced by both the parties, it transpires that the Dealer fails to furnish declaration forms for 6(2) sales as well as export sales before the Assessing Authority and took a plea before the Assessing Authority from the very inception that inspite of his best and sincere efforts, he could not collect the statutory forms from the end purchaser. He has also taken the consistent plea

before the First Appellate Authority and before this Tribunal. But, the Dealer could not produce any material evidence to that effect before this forum. Unless the Dealer explains the reason for non-submission of statutory forms with sufficient cause by producing material evidence, the Dealer cannot be discharged from its liability to pay the interest as per statute. The State should not suffer financial loss for the latches of the Dealer as well as the end purchaser for non-furnishing of statutory forms as required under law. It is an inter se dispute between the Dealer and the end purchaser.

12. In the case of ***Hindustan Aluminium Corporation*** cited supra, Hon'ble Apex Court have been pleased to observe that there have been no finding by the Tribunal that the assessee acted malafide in not depositing the tax @ 7%, the demand of interest was not justified. In the case at hand, it is the duty of the Dealer to file statutory forms to avail the concessional rate of tax and in default he is liable to pay the differential amount along with interest from the due date. So, the cited decision is of no assistance to this case.

In the case of ***J.K. Synthetic Ltd***. cited supra, the Hon'ble Apex Court have been pleased to observe that the dealer is required to pay the interest on the basis of return. If a dealer subsequently found to have made a wrong claim would be placed in the same position and they would all be liable to pay interest on the amount of tax which they are liable to pay, but have not paid as required by Section 7 of the Act. So, the decision relied on the Dealer is not applicable to the present facts and circumstances of the case.

13. In the case of ***Commissioner of Sales Tax, Delhi and others v. Shri Krishna Engineering & Co. and others***, reported in **[2005] 139 STC 457 (SC)**, wherein Hon'ble Apex Court have been pleased to observe as follows :-

> "Exemption from including in the total turnover of the selling dealer is possible only when the requisite form ST-1 is produced. The embargo on charging tax under the Act is only in those instances where the purchasing dealer contemporaneously offers from ST-1 to the selling dealer. The sales tax department is neither privy to nor concerned with any assurances that might have been exchanged inter se parties.
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> Even if the purchasing dealer has applied for ST-1 forms but has not received them for any reason, the selling dealer is not automatically exonerated from liability. It is his statutory duty to collect the tax, since the ST-1 form is not forthcoming. Likewise, there is no reason for the State to lose its revenue merely because the purchasing dealer is unable to obtain such forms because of his falling in arrears. It is the dealer, because of his own omission, who has broken the chain whereby it is arranged devised by the department to be collected at a single point only."

In view of the decision cited supra, Hon'ble Apex Court have been pleased to observe that the scheme of the Act is that either statutory form should be available or tax should be collected. If a dealer shows such indulgence as to delivery of statutory forms for a particular period, he takes the risk. The dealer who has chosen to trust the other dealer must suffer for his mercantile recklessness. The State is entitled to tax, where the requisite statutory form is unavailable for any reason. So, we do not find any merit in the contention advanced by the learned Counsel for the Dealer on this score.

S.A. No. 17 (ET) of 2013-14 :

14. Now coming to the dispute under the OET Act, it transpires from the assessment order that the Assessing Authority rejected the books of account of the Dealer and assessed the tax liability by following the best judgment principles. The Assessing Authority accepted the purchase/receipt value of scheduled goods return at ₹343,03,97,004.00, added the freight charges of ₹4,94,95,762.00, ₹1,69,48,479.00 towards self consumption of finished goods and ₹434,87,56,407.00 towards sale value of finished goods and determined the GTO at ₹784,55,97,652.00. The Assessing Authority allowed deduction of ₹144,92,45,040.00, ₹14,51,01,380.00 and

₹43,03,315.00 towards purchase value of scheduled goods from the registered dealers inside the State, import of scheduled goods and tax exemption sales respectively. The Assessing Authority determined the TTO at ₹624,69,47,917.00. The Assessing Authority assessed the TTO at the appropriate rates of tax, allowed set off of ₹50,44,055.00 and payment of tax of ₹5,90,12,385.00 and raised the tax demand of ₹16,90,277.00 including penalty and interest for the period under assessment.

15. The First Appellate Authority found that the Assessing Authority had not levied tax on purchase of scheduled goods brought from outside the country for ₹14,51,01,380.00 for which he issued notice to the Dealer. The First Appellate Authority re-determined the TTO at ₹639,20,49,297.00. The First Appellate Authority levied tax on the turnover of imported goods @ 2% and re-determined the tax payable at ₹6,74,17,385.00, allowed set off of ₹50,44,055.00 and ₹6,23,73,330.00 towards entry tax paid and assessed the tax liability of ₹33,60,945.00. The First Appellate Authority reduced the interest levied to ₹14,325.00 from ₹3,13,523.00 levied by the Assessing Authority. The First Appellate Authority did not levy any interest on the enhanced tax demand of ₹29,02,027.00 in appeal as the demand was not raised. The First Appellate Authority upheld the levy of penalty of ₹9,17,836.00 and raised tax demand of ₹42,93,106.00.

16. The Dealer challenges the impugned order on the following grounds :-

(i) Levy of ET @ 2% of ₹29,02,028.00 on imported non-scheduled goods, which are raw materials;

(ii) Levy of ET of ₹17,93,252.00 on the purchase value of ₹20,65,87,056.00;

(iii) Levy of ET of ₹6,19,932.00 by adding estimated/notional freight of ₹4,94,95,762.00 over and above the gross value as per purchase invoice;

(iv) Levy of ET of ₹1,52,053.00 and ₹17,432.00 on self-consumption of cement, sponge iron and refractory;

(v) Levy of ET of ₹20,969.00 for non-submission of E-15;

(vi) Levy of interest of ₹14,325.00 u/s. 7(5) of the OET Act; and

(vii) Levy of penalty of ₹9,17,836.00 u/s. 9C(5) of the OET Act.

In course of hearing, the Dealer did not press grounds **Nos. (ii), (iv), (v) and (vi) above**. So, the same are not required for any adjudication.

17. Now, we shall proceed to examine ground **Nos. (i), (iii) and (vii)**.

As regards ground No. (i) imposition of ET @ 2% of ₹29,02,028.00 on imported non-scheduled goods, which are raw materials instead of 0.5%. The Paper Book reveals that the Dealer had a taken before the First Appellate Authority that the value of imported scheduled goods for a sum of ₹14,51,01,380.00 consists of raw materials of ₹13,16,03,990.00, scheduled goods falling under Part-I of the Schedule other than raw materials are for ₹7,56,460.00 and scheduled goods falling under Part-II of the Schedule other than raw materials are for ₹1,27,40,930.00. The Dealer has taken a plea that he is entitled to concessional of fifty percentum of the rate to which such goods are exigible under sub-rule (3) and (2) for use as raw materials by manufacturer, but the Assessing Authority and First Appellate Authority assessed the ET @ 2%. It appears that they have not examined if the raw materials for ₹13,16,03,960.00 will at all come within the purview of Rue 3(4) of the OET Act. So, we are of the unanimous view that the same requires fresh adjudication to determine the tax liability of the Dealer.

18. As regards ground No.(iii), levy of ET of ₹6,19,932.00 by adding estimated/notional freight of ₹4,94,95,762.00 over and above the gross value as per purchase invoice. Section 2(j) of the OET Act defines ‘purchase

value' which includes transport charges, freight charges and all other charges incidental to the purchase of such goods. Rule 17(1) of the OET Rules provides that the 'purchase value' shall be determined on the basis of the invoice unless the same are rejected for reasons to be recorded in writing and after giving reasonable opportunity of being heard to the Dealer. The Circular dated 04.01.2001 was issued by the Commissioner of Commercial Taxes, Odisha to the Assessing Authority to determine the 'purchase value' of scheduled goods (i) when the transportation and other incidental charges are available in the invoice; (ii) when the same is not available in the invoice; and (iii) when there is no purchase invoice or when purchase invoice is liable for rejection after enquiry u/s. 17(1) of the OET Rules. The Assessing Authority has to include transportation cost, insurance charges and etc. in the purchase price of the scheduled goods for the purpose of levy of entry tax when the same is reflected in the invoice by the consignor.

When the same are not reflected in the purchase invoice and if the Assessing Authority feels that the invoice does not correctly reflect the value and transportation charges etc., then he should take action to reject the invoice u/r. 17(1) and no other enquiry except that u/r. 17(1) is to be conducted for that purpose.

When there is no purchase invoice or purchase invoice is liable for rejection after inquiry u/r. 17(1), the Assessing Authority has to determine the purchase value of scheduled goods depending upon the value of such scheduled goods or transportation or other incidental charges.

The Assessing Authority has to reject the invoice u/r. 17(1) and no other enquiry except that u/r. 17(1) is to be conducted for determining the purchase value only when the charges are not reflected in the purchase invoice and if the Assessing Authority feels that the invoice does not correctly reflect the value. The word 'and' is conjunctive to the pre-condition when the 'purchase value' is not available in the invoice and only

when the Assessing Authority feels that the invoice does not correctly reflect the value and transportation charges etc.

In the case at hand, the orders of the Assessing Authority and the First Appellate Authority show that that the transportation and other incidental charges are not reflected in the invoice. The assessment order shows that the Dealer could not produce any material evidence to show the freight/incidental charges, but tendered an evasive reply that the seller has had sent the consignment. The assessment order further reveals that though the Assessing Authority has not specifically mentioned regarding rejection of the invoice, but the order reveals that the Assessing Authority has rejected the invoice and estimated the price of the goods on the best judgment principle by adding 3% freight charges, which suffers from no infirmity.

19. As regards ground No. (vii) regarding imposition of penalty of ₹9,17,836.00 u/s. 9C(5) of the OET Act, Section 9C(5) provides that 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 said sub-sections. The case of the Dealer comes under sub-section (3) of Section 9C of the OET Act. In this case, the Assessing Authority examined the books of account of the Dealer and assessed the entry tax liability. The word ‘shall’ appears in sub-section (5) of Section 9C shows that penalty is mandatory. So, the Assessing Authority has to impose penalty on the amount of tax so assessed. In the case at hand, the Assessing Authority will recalculate the tax liability and then shall impose penalty as per law.

20. So, for the foregoing discussions, we are of the unanimous view that the Dealer is liable to pay interest for non-submission of statutory declarations under the CST Act. Likewise, under the OET Act the Dealer is liable to pay freight charges and penalty as per law. Further, we are of the

considered view that the liability to pay ET on the claim of raw materials, it requires fresh examination by the Assessing Authority in accordance with law, for which the matter is remitted to him.

21. Resultantly, the appeals under both the Acts are allowed in part and the impugned orders of the First Appellate Authority are hereby modified to the extent observed supra. The matters under the OVAT Act and OET Act are remitted to the Assessing Authority for computation of tax liability of the Dealer as per law keeping in view the observations above. The Assessing Authority shall allow due opportunity of hearing to the Dealer and complete the reassessment within a period of three months from the date of receipt of the order. Cross-objections are 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/-
(B. Bhoi)
Accounts Member-II