BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 40(C) of 2015-16

(Arising out of the order of the learned JCST, Sambalpur Range, Sambalpur, in First Appeal case No. AA-48/JSG/CST/12-13 disposed of on 04.05.2015)

P r e s e n t: Shri G.C.Behera, Chairman. Sri. S.K.Rout Judicial Member-II & Shri B.Bhoi, Accounts Member-II.

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

- V e r s u s –

M/s.Earth Minerals Company Ltd., Jharsuguda. ... Respondent.

For the Appellant ... Mr.D.Behura,SC.
For the Respondent ... Mr.Rahul Goel, A/R

Date of hearing: **03.01.2023** * * * Date of Order:**17.01.2023**

O R D E R

State prefers this appeal against the order dated 04.05.2015 passed by the learned Deputy Commissioner of Sales Tax (Appeal) Sambalpur Range, Sambalpur (in short, DCST/FAA) in first appeal case no.AA.48/JSG/CST/12-13, thereby allowing the appeal in part and reducing the demand to Rs.2,67,678.00 against the order of assessment dated 01.03.2012 passed by the learned Sales Tax Officer, Jharsuguda Circle, Jharsuguda (in short, STO/AO) under Section 12(4) of the CST Act relating to the tax periods from 01.01.2008 to 31.12.2010.

2. The case at hand is that the dealer appellant company is engaged in washing of coal and effects purchase of coal on own account and effects sale for washing the same in course of interstate trade and commerce as well as intrastate. The impugned order of assessment was framed on the basis of an audit visit report (in short AVR). During the period under

challenge, the appellant company was found to have effected sales of goods in course of interstate trade or commerce to the tune of Rs.8,32,08,119.00. The audit officials observed in the AVR that the appellant company failed to furnish 'C' forms in support of sales of goods amounting to Rs.4,12,99,201.00. On examination, the learned assessing officer observed that the appellant company failed to furnish 'C' forms in support of transaction of Rs.1,83,82,955.28 relating to interstate transaction of sale which was tax @4% as per the provisions of Section 8(2) of the CST Act which resulted in tax demand of Rs.7,35,318.00 on which penalty was levied of Rs.14,70,636.00 under Rule 12(3) (g) of the CST Rules. This apart, learned assessing officer also levied penalty under Section 10A of the CST Act on the ground that the appellant company had used 38.15% of the total purchase of magnetite powder amounting to Rs.18,16,524.00 i.e. Rs.6,93,003.90 for coal washing on job work basis. So when Form-C was not utilised inconformity to the restrictions stipulated under Section 8(3) of the CST Act in view of the nature of business, the appellant company was found guilty under section 10(d) of the CST Act and accordingly, a sum of Rs.1,29,938.25 or Rs.1,29,938.00 was imposed towards penalty under section 10 of the CST Act. So, levy of tax, penalty imposed under rule 12(3)(g) of the CST Rules and penalty imposed under Section 10-A of the CST Act amounts to Rs.7,35,318.00, Rs.14,70,636.00 and Rs.1,29,938.00 respectively resulting demand of Rs.23,35,892.00.

3. The dealer preferred first appeal against such demand before the learned DCST (Appeal), Sambalpur Range, Sambalpur (First Appellate Authority) who allowed the appeal in part and reduced the assessment to Rs.2,67,678.00.

4. Being dis-satisfied with the order of the learned first appellate authority, the State has preferred the present second appeal as per the grounds stated in the grounds of appeal.

5. Cross objection is filed in this case by the dealer respondent.

6. During course of argument, learned Standing Counsel (CT) for the Revenue argued that when the statute mandates penalty , there is no question of discretion for its imposition. That penalty under section 10A was an independent proceeding but in this case reasonable opportunity of being heard was extended to the dealer though separate show cause notice was not issued. So setting aside the order is appropriate but learned DCST had deleted the demand without having any further direction to initiate proceeding which is unjustified and the order should be issued to modify the same with a direction for levy of interest due to non-submission of statutory declaration forms in due course.

7. Per contra, learned counsel for the dealer respondent contended that the grounds taken by the state appellant are improper and baseless. The dealer respondent supported the order passed by the learned DCST stating that the same is just, proper and as per the provision of law. It is also submitted on behalf of the dealer respondent that quashing of penalty for non submission of declaration form-C by the learned DCST is based upon the judgment delivered by Hon'ble Court as well as the circular of the CCT, Odisha. Further contention on behalf of the respondent dealer is that penalty under Section 10A of the CST Act cannot be levied in the proceeding initiated under Rule 12(4) of the CST (O) Rules.

8. Heard the contentions and submissions of both the parties in this regard. Perused the orders of fora below and the materials available on record. On scrutiny, it becomes evident that the dispute in the instant case is the failure on the part of the dealer respondent to furnish 'C' declaration forms at the time of assessment even if dealer had effected sales of coal in course of interstate trade or commerce. So due to such failure of submission of 'C' declaration forms, the learned assessing officer levied tax on such sales at the appropriate rate of tax. The AVR report reveals that the dealer respondent failed to furnish the declaration form-C for an amount of Rs.4,12,99,201.00 against sales of coal made in course of interstate trade or commerce. The assessment order reveals that the dealer respondent failed to furnish 'C' forms to the tune of Rs.1,83,82,985.28 in support of sales of

goods made in course of interstate trade or commerce during the period under challenge before the learned assessing officer. So tax @4% on the said turnover was levied under Section 8(2) of the CST Act. It is further more clear from the order of the learned first appellate authority that during course of hearing of the first appeal, the dealer furnished 'C' declaration forms amounting to Rs.49,99,043.00 leaving a balance of Rs.1,33,83,912.00 and tax levied @ differential rate of 2% calculating to Rs.2,67,678.24 or Rs.2,68,678.00 which were accepted. With regard to levy of penalty under rule 12(3) (g) of the CST (O) Rules relating to non-production of 'C' forms appropriate tax is to be levied by applying higher rate of tax as prescribed under Section 8(2) of the CST Act. But imposition of penalty for non-submission of 'C' forms is not appropriate on the ground that without suppression of purchase or sale or both and erroneous claim of exemption or deduction, such levy of penalty is not at all warranted. So the learned first appellate authority has rightly deleted the penalty imposed by the learned assessing officer under Rule 12(3)(g) of the CST (O) Rules to the tune of Rs.14,70,536.00. This apart, it reveals from the order of the learned first appellate authority that the dealer respondent had purchased magnetite powder amounting to Rs.18,16,524.00 from outside the State which he had used for the purpose of washing of coal on job work basis and for washing of coal on own account for sale. So the learned assessing officer levied penalty under 10A of the CST Act to the tune of Rs.1,29,938.00 for such irregularity. On this score, learned first appellate authority basing on the submissions raised by the respondent dealer observed that the learned Sales Tax Officer, Jharsuguda Circle, Jharsuguda being not a registering authority of the dealer was not competent to levy penalty under Section 10A of the CST Act. Moreover, learned first appellate authority observed that it is mandatory under Section 10A of the CST Act to issue show cause notice to the dealer but without issuance of show cause notice, the learned Assessing Officer levied penalty. Apart from this, the officials of audit team had also not recommended for any such penalty in the AVR. So when penalty was imposed without issuance of show cause notice, the learned first appellate authority has rightly deleted the penalty of Rs.1,29,938.00 imposed under

Section 10A of the CST Act for which the order of assessment was reduced to Rs.2,67,678.00.

So after a thorough scrutiny of the order of the learned first appellate authority, deletion of penalty is genuine.

Moreover, the decision of the Hon'ble High Court of Himachal Pradesh decided in the case of **Gujurat Ambuja Cement Ltd. and Another Vrs. Assessing Authority cum Assistant Excise and Taxation Commissioner and Others reported in (2000) 118-STC-315 (HP)** clearly entails that the dealer is not liable to pay penalty if he fails to furnish the declaration form.

Here fact remains that, to our view, Section 10(A) of the CST Act is a separate proceeding which cannot form a part of assessment. With regard to the contention raised by the appellant revenue relating to the levy of interest upon the respondent dealer for non-filing or delay filing of the statutory declaration forms, noteworthy that as per the provision of sales tax law, a registered dealer is entitled to get exemption or concession for payment of tax on the strength of certain statutory declaration forms. A dealer cannot be deprived of the said exemption or concession if for some good reasons, the same could not be produced before the assessing authority and was produced subsequently at the appellate stage or even before the Tribunal at the second appeal stage. Sub-Rule(7) of Rule-12 of the Central Sales Tax Act (Registration and Turnover) Rule, 1957 which is relevant in this regard as extracted below:

"The declaration in Form-'C' or Form-'F' or the certificate in Form E-1 or Form E-II shall be furnished to the prescribed authority within three months after the end of the period to which the declaration or certificate relates…."

Provided that, if the prescribed authority is satisfied that the person concerned was prevented by sufficient cause from furnishing such declaration or certificate within the aforesaid time, that authority may

allow such declaration or certificate to be furnished within such further time that the authority may permit." So it becomes clear that the law permits a dealer to produce the statutory declaration forms at any stage of the proceeding showing sufficient cause, it is not desirable to levy interest upon the respondent dealer for non-filing or delay filing of the same in absence of any clear statutory provision on that behalf. Moreover, in the case of **Bengal Energy Ltd. Vrs. State of Odisha** in S.A.No.71C of 2013-14, the Full Bench of this Tribunal has considered the non-submission of the required declaration in Form-C and has rejected the plea of the revenue for levy interest considering the fact that a dealer assessee is at liberty to furnish the required declaration forms at any stage of the proceeding showing sufficient cause and further considering the fact that there is no specific provision in the Central Sales Tax Act for levy of interest in case of failure to furnish the same. This Tribunal has also expressed the same view in several other cases. In the case of **M.G. Brothers Vrs. Commissioner of Income Tax (1985) 154 STC–ITR-695 at page 712** while considering the provision of Section-215 of the Income Tax Act and Rule, 40 of the Incomes Tax Rules and Section 139 of the Income Tax Act and Rule 117-A of the income tax rules, a division bench of the Hon'ble Andhra Pradesh High Court has held that charge of interest is not a matter of automatic consequence and that a assessee has a say in the matter before the interest is actually charged. Similarly, before charge of interest, the Income Tax Officer should give an opportunity to the assessee to show cause, why interest should not be levied and the interest can only be levied after considering the representation of the assessee.

9. In the present case, no such occasion has arose as the matter for levy of interest was not at all for consideration before the learned forums below. This apart while dealing with a matter relating to the Income Tax, the Hon'ble Madras High Court in the case of **Ramanujan Vrs. Commissioner of Income Tax (1999) 238 –ITR-978** has held that without an opportunity of show cause, no interest can be levied on an assessee.

10. With regard to imposition of interest as emphasized by the learned Standing Counsel for the Revenue that the dealer is liable to pay interest as required declaration in Form-'C' has not been filed by the dealer within the statutory period. So, now question comes whether in such a case dealer is liable to pay interest. To support such claim, the learned Standing Counsel for revenue has relied upon the decisions decided in the cases of **Royal Boot House Vrs. State of Jammu and Kashmir reported in (1984) 56 STC-212 (SC). Indodan Industries Ltd. Vrs. State of U.P. reported in (2010) 27 VST 1 (SC) and Indian Commerce and Industries Co. (p) Ltd. Vrs. The Commercial Tax Officer reported in (2003) 129 STC 509 (Mad)**. In the case of **Royal Boot House Vrs. State of J.K.**, it is held as follows:

" *Whether the tax payable on the basis of a quarterly return is not paid before 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 8(2) of the Act on the amount of such tax from the last date for filing the quarterly return prescribed under the Act."*

Likewise, in the case of **Indodan Industries Ltd. Vrs. State of U.P.**, it is held that

" *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 interregnum period and that the assessee enjoys that amount during the said period and in order to recover the lost revenue, the levy of interest is contemplated. On the other hand, Rule 8 of CST (O) Rules provides for levy of interest if a registered dealer fails without sufficient cause to pay the amount of tax due as per the return furnished by it.*

So, when the dealer has failed to support its claim of concessional tax, imposition of interest is automatic. This is by operation of law and not by decision of any authority.

If reliance is placed upon the case of **Indian Commerce and Industries Co. (P) Ltd. Vrs. The Commercial Tax Officer (supra)** , the Hon'ble Madras High Court have held as under"

" Liability to pay interest under Section 24(3) is automatic and arises by operation of law from the date on which tax was required to be paid. The petitioner opted to pay tax by self assessment and filed return including the taxable turnover in respect of the works contract. The assessee paid tax on works contract turnover upto August and though filed return disclosing turnover of works contract after September failed to pay tax thereon. The petitioner assessee is bound to pay tax and in default have to pay interest. The department is entitled to recover interest under Section 24(3)..."

11. In view of the above analysis and placing reliance to the verdict of the Hon'ble Courts relied upon by the revenue, we are of the unanimous view to interfere with the impugned order to the extent indicated herein above.

12. In the result, the appeal preferred by the State is allowed. The case is remanded to the learned assessing authority with a direction to levy interest on the tax due as per law and raise fresh demand for the period under assessment. Accordingly, the cross objection is disposed of.

Dictated and Corrected by me,

(Shri S.K.Rout)
Judicial Member-II

(Shri S.K.Rout)
Judicial Member-II

I agree,

(Shri G.C.Behera)
Chairman

I agree,

(Shri B.Bhoi)
Accounts Member-II