BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 40 (ET) of 2016-17

(Arising out of order of the learned Addl. CST, Odisha, Cuttack in Appeal No. AA – CUII-142/2011-12, disposed of on 05.12.2015)

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

M/s. Godrej Saralee Ltd.,
(Now merged with M/s. Godrej Consumer Products Ltd.), Plot No. 38,
Badakesharpur, Manguli, Cuttack ... Appellant

-Versus-

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

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

Date of hearing : 16.01.2023 *** Date of order : 06.02.2023

O R D E R

The Dealer assails the order dated 05.12.2015 of the Addl. Commissioner of Sales Tax, Odisha, Cuttack (hereinafter called as 'First Appellate Authority') in F A No. AA – CUII-142/2011-12 reducing the assessment order of the Joint Commissioner of Sales Tax, Cuttack II Range, Cuttack (in short, 'Assessing Authority').

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

M/s. Godrej Saralee Ltd. carries on business in receiving mosquito repellent, mosquito coil, liquid, mal, tablets, aerosol, car freshner, room freshner, cosmetics, shoe polish, etc. on stock transfer basis and procuring from outside the State against 'C' form for sale thereof inside the State through stockists and distributors. The assessment period relates to 01.01.2009 to 31.08.2010. The Assessing Authority raised tax and penalty of ₹20,46,279.00 u/s. 9C of the Odisha Entry Tax Act, 1999 (in short, 'OET Act') on the basis of Audit Visit Report (AVR).

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority reduced the tax demand to ₹7,41,838.00 and allowed the appeal in part. Being aggrieved with the order of the First Appellate Authority, the Dealer prefers this appeal. Hence, this appeal.

The State files no cross-objection.

3. The learned Counsel for the Dealer submits that the orders of the Assessing Authority and First Appellate Authority are otherwise bad in law. He further submits that the additions of 4% freight charges and 10% profit margin are arbitrary and contrary to the law and facts involved. He further submits that the Dealer has maintained the books of account as per provisions of Section 21 of the OET Act r/w Sections 61, 62 and 63 of the OVAT Act. He further submits that the Dealer is a Limited Company, which is subject to audit u/s. 44AB of the Income Tax Act, 1961 vis-a-vis as per the provisions contained in Section 65 of the OVAT Act read with Rule 73 of the OVAT Rules, 2005. He further submits that levy of twice penalty in all cases are unlawful and the same can be levied only when there is wilful disobedience of provisions of law. So, he submits that the orders of the First Appellate Authority and the Assessing Authority are not sustainable in law and, therefore, the same need interference in appeal. He relies on the decision of the Hon'ble Apex Court in case of ***Appolo Tyres***

Ltd. v. Commissioner of Income-tax, reported in **[2002] 255 ITR 273 (SC); *Hindustan Steel Ltd. v. State of Orissa***, reported in [**1980] 25 STC 211 (SC)**; ***Commissioner of Sales Tax, U.P. v. Sanjeeva Fabrics***, reported in **[2010] 35 VST 1 (SC)**; and the decision of Hon'ble Bombay High Court in case of ***CIT v. Adbhut Trading Co. (P) Ltd.,*** reported in **[2011] 338 ITR 94 (Bombay)**.

4. On the contrary, the learned Standing Counsel (CT) for the State submits that the Dealer did not produce the Profit & Loss account nor produce the audited account in support of its plea. So, he submits that the Assessing Authority and First Appellate Authority rightly computed the tax liability by adding 4% towards freight charge and 10% towards profit margin in absence of any material documents. He further submits that levy of penalty is automatic and the same is mandatory. So, he submits that the orders of the Assessing Authority and First Appellate Authority need no interference in this appeal.

5. Having heard the rival submissions and on going through the materials on record, it transpires from the assessment order that the Dealer has purchased goods worth of ₹4,28,08,146.00 obtained against declaration in Form-C without adding of freight charges. Accordingly, he added 5% of the goods towards freight charges, which came to a sum of ₹21,40,407.00. The Dealer has also received goods to the tune of ₹55,96,37,347.00 against declarations in Form-F on the stock transfer basis. During the said period, the Dealer has also effected stock transfer of goods worth of ₹14,66,393.46 out of the total stock of receipt of goods. The Assessing Authority found that the Dealer has purchased/receipt of goods worth of ₹60,24,45,493.17 which includes non-scheduled goods worth of ₹48,54,757.12. The Assessing Authority found that the Dealer had received average profit of 14.43% in the

said period. So, the Assessing Authority added 14.43% to the receipt value to determine the sale price as per Section 2(j) of the OET Act.

The Assessing Authority added freight charges and profit margin to the GTO and determined the same at ₹68,44,29,427.33 and TTO at ₹67,81,08,276.72 after allowing deduction towards receipt of non-scheduled goods and stock transfer to other branches. He assessed ET at the appropriates rates and computed the tax demands of ₹70,06,127.06 against which the Dealer had paid ₹63,24,034.00. So, the Dealer has to pay balance amount of ₹6,82,093.06 towards ET and twice penalty, which comes to total of ₹20,46,279.00 for the period under assessment.

The First Appellate Authority reduced the profit margin to 10% and freight to 4%. Accordingly, he allowed deduction of ₹48,54,757.00 towards the turnover of non-scheduled goods and ₹14,16,393.46 towards consignment of stock transfer to other branch against Form-F from the GTO and determined the TTO at ₹64,23,57,163.73. He levied appropriate rates of tax @ 1% and 2% for which the tax demand reduced to ₹7,41,838.00 including penalty.

6. The dealer claims that the purchase made from outside the State is inclusive of freight and insurance charges. So, further addition of freight is contrary to the provisions of law.

Section 2(j) of the OET Act provides that purchase value of scheduled goods includes freight charges, insurance charges and other incidental charges. It reveals from the assessment order that the Dealer has purchased the goods with purchase value of goods worth of ₹4,28,08,146.00 obtained against Form-C without adding of freight charges. The Assessing Authority added 5% towards freight charges in absence of details of books of account. The First Appellate Authority reduced the freight charges to 4%

in appeal. The Dealer fails to substantiate its pleas by producing the relevant material documents even at the stage of appeal.

It appears that the Dealer could not produce the relevant document showing addition of freight charges on such purchases of goods before the Assessing Authority and the First Appellate Authority. So, the Dealer fails to discharge its onus to prove its case and in its absence, the First Appellate Authority has rightly added 4% towards freight charges as per the provisions of Section 2(j) of the OET Act.

7. As regards addition of 10% of profit margin, the Assessing Authority took the average profit of 14.43%, but the First Appellate Authority reduced the same to 10% in best judgment principle. The Dealer claims that it is a Limited Company, which is subject to audit in due interval and the Company is not deriving 10% profit margin.

Rule 73 of the OVAT Rules provides that the Accountant of the Dealer shall furnish a certificate along with audited accounts (Trading account, Profit & Loss account and Balance sheet) for each year at the time of audit.

In the case of ***Appollo Tyres*** cited supra wherein Hon'ble Apex Court have been pleased to observe that the Assessing Officer cannot question the correctness of the profit and loss account prepared by the assessee company and certified by the statutory audits of the company as having been prepared in accordance with the requirements of Parts II and III of Schedule VI to the Companies Act. Explanation of Section 115J provides that for the purpose of this section, 'book profit' means the net profit as shown in the profit & loss account for the relevant previous year prepared under sub-section (1A). The same view has been reiterated by the Hon'ble Bombay High Court in the case of ***Adbhut Trading Co. (P) Ltd***. cited supra.

Though he claimed that the Company-Dealer has an audited account as per the provisions of Rule 73 f the OVAT Rules r/w Income Tax

Act showing Profit & Loss account and balance sheet, but he did not produce the relevant document, i.e. balance sheet including Profit & Loss Account or the audited document as per the provisions of Income Tax Act before the Assessing Authority, First Appellate Authority nor even at this forum in course of hearing of appeal nor he has shown any material in compliance to the provision of Rule 73 of the OVAT Rules. Therefore, the appeal fails on this score.

8. As regards levy of penalty, 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 sub-sections. The word 'shall' in the section shows that imposition of penalty is mandatory.

9. So, for the foregoing discussions, we do not find any illegality in the order of the First Appellate Authority in computing the tax liability of the Dealer by adding profit margin of 10% and 4% towards freight charges including penalty to call for our interference in appeal. Hence, it is ordered.

10. Consequently, the appeal is dismissed being devoid of any merit and the impugned order of the First Appellate Authority stands confirmed.

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