BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 165 (ET) of 2010-11

(Arising out of order of the learned Addl.CST (Appeal), North Zone, in First Appeal No. AA- 07/OET/ACST(Asst)/SA/2007-08, disposed of on 23.10.2010)

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

M/s. Bharat Earth Movers Ltd.,
Panchagachhia, N.H. 6, Baraipali,
Dist. Sambalpur ... Appellant

-Versus-

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

For the Appellant : Sri C.R. Das, Advocate
For the Respondent : Sri M.L. Agarwal, S.C. (CT)

Date of hearing : 13.10.2022 *** Date of order : 01.11.2022

O R D E R

The Dealer assails the order dated 23.10.2010 of the Addl. Commissioner of Sales Tax (Appeal), North Zone (hereinafter called as 'First Appellate Authority') in F A No. AA- 07/OET/ACST(Asst)/SA/ 2007-08 confirming the assessment order of the Asst. Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, 'Assessing Authority).

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

M/s. Bharat Earth Movers Ltd., a Government of India undertaking, deals in its own manufactured goods of earth moving machineries and their spare parts for sale inside the State of Odisha. The

period of assessment relates to 01.04.2005 to 30.11.2006. The Assessing Authority raised tax and penalty of ₹11,72,172.00 u/s. 9C(3) 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 dismissed the appeal and confirmed the assessment order. 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 challenges the appeal on the ground that the orders of the First Appellate Authority and the Assessing Authority are erroneous and contrary to the provisions of law and fact involved. He also submits that the Assessing Authority lacks jurisdiction to assess the Dealer. He further submits that the amended provision of OET Act came into force w.e.f. 19.10.2005 and, therefore, the pre-amended provisions of OET Act and Rules are applicable. He further submits that the entry tax can only be collected on the value of goods only at the point of entry, but not on the basis of any subsequent fall or rise in price of the goods. He also advances argument that levy of penalty is uncalled for. So, he submits that the order of the fora below needs interference in this appeal.

In this regard, he relies on the decision of the Hon'ble Apex Court in case of ***State of Karnataka and others*** v**.** ***Hansa Corporation,*** reported in **AIR 1981 SC 463**.

4. On the contrary, the learned Standing Counsel (CT) for the State objects the contentions of the learned Counsel for the Dealer and submits that the Dealer has not deposited any tax though he collected tax @ 2% on stock transfer to outside of the State. So, he submits that the Assessing Authority rightly imposed penalty u/s. 9C(5) of the OET Act. He further

submits that the taxable event and the measure of taxation are two different concepts. He further submits that the market value of the goods for the purpose of levy of entry could be the price paid excluding the sales tax. He further submits that the Dealer is not entitled to retain the sales tax collected against sale price. He further submits that as per provisions of Section 2(j), the incidental charges including any dues charged are to be included in the purchase value for the purpose of entry tax. He further submits that in case of branch transfer otherwise by way of purchases; the market value has to be adopted for the purpose of levy of entry tax. He also advances argument justifying levy of penalty.

In this regard, he relies on various decisions of this Tribunal, the decision of Hon'ble Karnataka High Court in case of ***Voltas Limited v. State of Karnataka***, reported in **[2008] 11 VST 267 (Kar.)**, the decision of Hon'ble West Bengal Taxation Tribunal in case of ***Rashik Lal Keshab Lal Patel v. Entry Tax Officer***, reported in **[2003] 133 STC 6 (WBTT)**, the decision of the Hon'ble Apex Court in case of ***State of Orissa v. Reliance Industries and others*** (**Civil Appeal No. 6474-6798 of 2017 decided on 28.03.2017**) and the decision of Hon'ble High Court of Orissa in case of ***State of Odisha v. M/s. Chadrakanta Jayantilal, Cuttack and another*** **(STREV No. 69 of 2012, decided on 05.07.2022)**.

5. Having heard the rival submissions and on careful scrutiny of the materials available on record, it is not in dispute that the Dealer is assigned with TIN. It is also not in dispute that Rule 34(12) of the OVAT Rules was omitted w.e.f. 25.02.2009. Prior to such amendment, as per clause (1)(b) of Rule 34(12), the Assessing Authority of the Range has jurisdiction in respect of dealers, who have been granted registration under sub-rule (1) of Rule 18 and assigned with TIN under sub-rule (1) of Rule 19. So, we are unable to accept the contention of the learned Counsel of the Dealer that the Assessing Authority lacks jurisdiction to assess the Dealer.

6. Section 2(j) of the OET Act defines 'purchase value', which runs as under :-

> ***"2(j) "Purchase value"*** *means the value of scheduled goods as ascertained from 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 :*
> *Provided that where purchase value of any scheduled goods is not ascertainable on account of non-availability or non-production of the original invoice or bill or when the invoice or bill produced is proved to be false or if the scheduled goods are required or obtained otherwise than by way of purchase, then the purchase value shall be the value or the price at which the scheduled goods of like kind or quality is sold or is capable of being sold in open market;"*

Proviso to Section 2(j) clearly provides that the scheduled goods obtained otherwise than by way of purchase, the purchase value shall be value of the price at which the scheduled goods is sold or is capable of being sold in open market.

7. It is not in dispute that the original invoice is not available for ascertaining the purchase price of scheduled goods. The Assessing Authority recorded a finding that the Dealer received the stock worth of ₹36,28,31,304.00 from its own branches outside the State and had paid entry tax of ₹72,56,626.00. The Assessing Authority also recorded a finding that the Dealer had collected entry tax of ₹76,47,350.00 from sale value of goods. The Dealer does not dispute the said facts in all the forums including before this Tribunal.

8. The AVR shows that the sale value of the goods as per invoices of the Dealer was for a sum of ₹39,00,14,860.00 including entry tax of ₹76,47,350.00. So, the net sale value of the goods comes to a sum of ₹38,23,67,510.00 (₹39,00,14,860.00 – ₹76,47,350.00). The Dealer has already paid ₹72,56,626.00. So, the balance amount of ₹3,90,724.00 was raised as additional tax due. The Assessing Authority imposed two times penalty of ₹7,81,448.00 u/s. 9C(5) of the OET Act. The First Appellate Authority confirmed the order of the Assessing Authority.

9. Proviso to Section 2(j) provides that in absence of invoice or bill, the price at which the scheduled goods of like kind or quality is sold or is capable of being sold in the open market shall be purchase value of the scheduled goods.

In the case at hand, it is not in dispute that this is a case of stock transfer and the market value shall be the purchase value of the scheduled goods. The Dealer has not produced any materials to show the contrary rather does not dispute that the scheduled goods were sold at ₹39,00,14,860.00. So, the Dealer has to pay differential entry tax of ₹3,90,724.00. The Dealer has not paid the differential entry tax voluntarily although collected the tax on sale of scheduled goods, which negates the bonafideness of the Dealer. The Assessing Authority and First Appellate Authority assessed the purchased value of the scheduled goods and raised the tax demand. So, the contention of the learned Counsel for the Dealer that the same was not point of consideration at the time of assessment and in appeal cannot be accepted.

10. So, in view of the decision of the Hon'ble Court in the case of ***State of Odisha v. M/s. Chandrakanta Jayantilal*** **in STREV No. 69 of 2012 passed on 05.07.2022**, the penalty is automatic. Therefore, the orders of the Assessing Authority and the First Appellate Authority suffer from no infirmity and the same require no interference in appeal.

11. Section 7(5) of the pre-amendment OET Act provides that the Assessing Authority may direct the Dealer to pay in addition to the tax assessed a penalty not exceeding one and half times amount of tax due that was not disclosed by the Dealer in his return or in the case of failure to submit a return one and half times of the tax assessed, as the case may be.

Similarly, Section 9C(5) of the OET Act provides to impose penalty an amount equal to twice of the amount assessed in respect of any assessment completed under sub-section (3) or (4). In the case at hand, the

Dealer has already paid tax of ₹72,56,626.00. He is only required to pay a differential tax due of ₹3,90,724.00. Generally, penalty should not be imposed unless there is any malafide intention of evasion of tax. The Dealer has already paid a substantial amount of tax dues and no materials are available regarding any malafide intention of the Dealer to evade the tax liability. So, the Dealer cannot be fastened with two times penalty, rather the penalty ought to have been imposed one and half times as per the pre-amended provisions of Section 7(5) of the OET Act, i.e. for the period 01.04.2005 to 18.10.2005).

12. The learned Counsel for the Dealer, Sri Dash, also raises a contention that the Assessing Authority and the First Appellate Authority lacks jurisdiction as Rules 15B came into force on 19.10.2005.

Record shows the assessment period relates to 01.04.2005 to 30.11.2006. Section 9C came into force w.e.f. 19.05.2005 relating to audit assessment whereas the corresponding Rules 15B of the OET Rules came into force w.e.f. 19.10.2005.

13. Now the question remains for adjudication whether the audit assessment for the period 01.04.2005 to 18.10.2005 shall not be taken for assessment in view of Rule 15B, which came into force on 19.10.2005. It is settled law that substantive provisions shall prevail over the procedural rules. The same view has reiterated by the Hon'ble Apex Court in the case of ***Chunni Lal Parshadi Lal v. Commissioner of Sales Tax. U.P., Lucknow,*** reported in **[1986] 62 STC 112 (SC)**.

The First Appellate Authority also specifically observed that the audit assessment was made in compliance to the provision of Section 9C of the OET Act, which was already in force w.e.f. 19.05.2005. So, the finding of the First Appellate Authority cannot be said to be unlawful. Therefore, we find no justification in the contention of the learned Counsel for the Dealer on this score.

14. On the foregoing discussions, we have already recorded a finding that the penalty of one and half times should have been imposed as per the pre-amended provision u/s. 7(5) of the OET Act for the period 01.04.2005 to 18.10.2005. Besides this, we do not find any infirmity or impropriety in the order of the First Appellate Authority in confirming the assessment order of the Assessing Authority and the finding of the First Appellate Authority suffers from no infirmity to call for any interference in appeal. Hence, it is ordered.

15. In the result, the appeal is allowed in part to the extent levy of penalty of one and half times of the tax assessed as per the pre-amended provisions of Section 7(5) of the OET Act and the impugned order of the First Appellate Authority stands modified to that extent. The Assessing Authority is instructed to recompute the tax liability 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