BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 254 (VAT) of 2010-11

(Arising out of order of the learned Addl.CST (Appeal), North Zone, in First Appeal No. AA- 06/VAT/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 is in appeal against 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- 06/VAT/ACST(asst)/SA/ 2007-08 reducing the assessment order of the Asst. Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, 'Assessing Authority).

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

M/s. Bharat Earth Movers Ltd., a Government of India undertaking, deals in sale of earth moving machineries and spare parts

thereof. The Dealer brings own stock from its outside State branches and sells the same inside the State of Odisha as an ordinary trader. The period of assessment relates to 01.04.2005 to 30.11.2006. The Assessing Authority raised tax, penalty and interest of ₹59,23,944.00 u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT 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 tax demand to ₹58,74,162.00. 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 First Appellate Authority and Assessing Authority are contrary to the provisions of law and fact involved. He further submits that the levy of tax on capital goods @ 12.5% by the First Appellate Authority is not proper. He further submits that the fora below should have allowed the credit notes of ₹5,64,623.00 under the VAT regime due to change in tax structure in absence of any effective sales for the said period. He also advances an argument that penalty will not be imposed ordinarily unless the party has any malafide intention to evade tax. He further submits that the Dealer is a Government Undertaking and the Dealer has no intention to evade payment of tax. So, he submits that the finding of the First Appellate Authority and the Assessing Authority are not sustainable in the eyes of law and the same requires interference in appeal.

In this regard, he relies on the decisions in the cases of ***Moorco (India) Ltd. v. Collector of Customs, Madras***, reported in **1994 (74) ELT 5 (SC)**; ***Western India Plywoods Ltd. v. Collector of Customs, Cochin***, reported in **2005 (188) ELT 365 (SC)**; ***Hindustan Poles Corporation v.***

Commissioner of C. Ex., Calcutta, reported in **2006 (196) ELT 400 (SC)**; ***Commissioner of Central Excise, Delhi v. Carrier Aircon Ltd.***, reported in **2006 (199) ELT 577 (SC)**; ***Mauri Yeast India Pvt. Ltd. v. State of UP***, reported in **2008 (225) ELT 321 (SC)**; ***Commissioner of Central Excise, Calcutta v. Calcutta Springs Ltd.***, reported in **2008 (229) ELT 161 (SC)**; ***Sundar India Ltd. and others v. Commissioner of Commercial Taxes and others*** (**W.P. Nos. 20157 of 2006 and others decided on 17.07.2009**); ***Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax***, reported in **1980 (6) ELT 295 (SC)**; ***Mangalore Refinery & Petrochemicals Ltd. v. C.C.E. & S.T., Mangalore***, reported in **2015 (40) STR 1093 (Tri. Bang.)**; ***Bharat Coking Coal Ltd. v. Commissioner of Central Excise, Ranchi***, reported in **2016 (335) ELT 124 (Tri. Kolkata)**; ***S.S. Sansthan v. Customs and Central Excise***, reported in **2019 (29) GSTL 289 (MP)**; ***Super Packs v. Commissioner of C. Ex., S.T. & Customs, Bangalore-II***, reported in **2019 (370) ELT 691 (Tri. Bang.)**; orders of this Tribunal passed in **S.A. No. 200 (ET) of 2013-14 dated 05.06.2020; S.A. No. 174 (VAT) of 2014-15 dated 30.06.2020; and S.A. No. 127 of 2015-16 dated 21.10.2020**.

4. On the other hand, learned Standing Counsel (CT) for the State objects the contention raised by the Dealer and submits that the First Appellate Authority and the Assessing Authority have passed a reasoned order and the same require no interference in appeal. He further submits that the goods i.e. plate and disc, engine and spares such as angels, rings, washers, wire rod etc. do not come under the definition of 'capital goods' and the fora below have rightly imposed tax @ 12.5%. He further submits that the Dealer has not been authorized to deal in iron and steel goods. Machinery does not come in the category of iron and steel. He further submits that the goods are separate commercial commodity by a class of itself and the same shall not come in the category of iron and steel. He

further submits that the imposition of penalty is automatic, if the Dealer evades tax due or for suppression of tax. So, he submits that the orders of the fora below are just and proper and requires no interference by this Tribunal.

In this regard, learned Standing Counsel (CT) for the State relies on the decisions in the cases of ***CIT v. Kalinga Tubes Ltd.***, reported in **[1996] 101 STC 162 (SC)**; ***Dy. CST (Law) v. Motor Insurance Company***, reported in **[1983] 53 STC 48 (SC)**; ***State of Maharashtra v. BASF (India)***, reported in **[2000] 117 STC 543 (SC)**; ***State of Tamil Nadu v. P.L. Malhotra***, reported in **[1976] 37 STC 319 (SC)**; ***Mohanilal @ Mohanlal Sitani v. State of Orissa***, reported in **(2021) 86 GSTR 370 (Orissa)**; ***Commissioner of Customs (Import), Mumbai v. M/s. Dilip Kumar& Co.***, reported in **(2018) 9 SCC 1**; and ***State of Orissa v. M/s. Chandrakanta Jayantilal, Cuttack and another*** in **STREV No. 69 of 2012 decided on 05.07.2022**.

5. Having heard the rival submissions of the parties and on careful scrutiny of the materials available on record, it is not in dispute that the Dealer is a Govt. Undertaking and deals in earth moving machinery and spares. The audit relates to the assessment period 01.04.2005 to 30.11.2006. The AVR shows that as per sale register, the turnover for the material period is ₹42,95,06,010.99 whereas the Dealer has disclosed the turnover as ₹42,73,66,499.99. So, less turnover of ₹21,39.511.00 was detected in the AVR. The Assessing Authority levied 4% tax over the goods under Sl. Nos. 1 to 5 and levied 12.5% under the goods of Sl. Nos. 6 to 12. The Assessing Authority assessed tax of ₹19,41,405.43, interest of ₹99,727.30 and penalty of ₹38,82,810.86 and the same came to ₹59,23,944.00.

6. The First Appellate Authority observed that the Assessing Authority confirmed the levy of tax @12.5% on (i) sale of engine as capital

goods; (ii) machineries spares under Part-III of Schedule-B of the OVAT Act.

6.1. The Dealer claims tax @ 4% on sale of iron and steel as the plates, discs, angle, rings, washers and wire rods relate to entry at Sl. Nos. 68 and nuts, bolts, screw and fastner relate to entry at Sl. No.115 of Part-II of Schedule-B appended to the OVAT Act.

The Dealer relies on a catena of decisions on the point that the clause contemplate goods which may be satisfying more than one description or it may be satisfying the specific and general description and the entries, the most nearer to the description should be preferred. He also cited a decision that when there is no other provision expressly or by necessary implication applies to the goods in question, then the residuary tariff entry will come into play. He also places reliance on the decision, if there is ambiguity with regard to rate of tax to be collected, benefit shall go to the assessee. He relies on the decisions in ***Moorco India Ltd., Western India Plywoods Ltd., Hindustan Coal Corporation, Mayuri East India Pvt. Ltd., and Commissioner of Central Tax, Calcutta*** cited *supra* on that score.

6.2. Revenue vehemently objects the claim of the Dealer to be improper. The Revenue objects on the ground that those goods will not come under entry at Sl. Nos. 68 and 115. The Revenue further submits that the rule of construction ex-VISERRIBUS ACTUS shall be applicable.

6.3. In applying these rules, it has to be remembered that as far as possible nothing can be read and nothing can be implied in a taxing statute and one can only look fairly at the language used. Where there is a specific provision in a statute as well as a general provision and the case is covered by the specific provision, it is the specific provision which must govern the case and not the general one.

The words and expressions used in schedules must be construed in the meaning in which they are understood in the trade, by the dealer and the

consumer in view of the decision in the case of ***Delhi Cloth and General Mills Co. Ltd. v. State of Rajasthan***, reported in **[1980] 46 STC 256 (SC)**. The Hon'ble Apex Court also in the case of ***Madanlal Manoharlal v. State of Haryana***, reported in **[1990] 77 STC 157 (SC)**, held that unless contrary intention is clearly expressed by the legislature words in taxing statute having scientific/technical meaning as well as ordinary meaning according to common parlance must be interpreted to mean its ordinary meaning only.

It is also well settled principle of law that in interpreting different entries, attempt shall be made to find out as to whether the same answers the description of the contents of the basic entry and only in the event it is not possible to do so, recourse to the residuary entry should be taken by way of last resort.

In view of the decisions cited supra, the ordinary meaning should be preferred according to the commercial parlance. In the case at hand, the Dealer deals in earth moving machineries and spares thereof and Part-II of Schedule B does not contain any entries of machineries and spares in the OVAT Act.

6.4. Learned Counsel for the Dealer urges that the 'machine' will come within the purview of 'capital goods' under Sl. No. 24, plate under Sl. No. 68 (vii), disc and rings under Sl. No. 68 (viii) and wire rods under Sl. No. 68(xv) of Part-II of Schedule-B. The Assessing Authority and the First Appellate Authority assessed the tax of plate and discs, machine and spares such as angles @ 12.5%, but bearing, nut bolts and hoses @ 4%.

Considering the provisions contained in Section 2(8) vis-a-vis the entry at Sl. No. 24 of Part-II of Schedule-B, the First Appellate Authority excluded machine and levied tax @ 12.5% against the claim of 4% by the Dealer on the ground that in absence of materials of the purchaser. So, we do not find any infirmity or illegality in the order of the First Appellate Authority confirming the assessment order on this score.

6.5. Learned Counsel for the Dealer also urges that the fora below considered Sl. No. 115 and accepted 4% tax on bearing, nut & bolts and hoses, but refused spares such as angles, rings, washer and wire rods under Sl. No. 68 of Part-II of Schedule-B. It is not in dispute that both the fora below have accepted 4% on bearing, nut & bolts and hoses due to specific entries in Sl. No. 115 of Part-II of Schedule-B. It is also not in dispute that the Dealer is not dealing in iron and steel goods so as to attract tax @ 4% as claimed. So, the machines and spares i.e. angles, rings, washer and wire rods will not come in any entry of Part-II of Schedule B under the OVAT Act. Therefore, we do not find any wrong in the finding of the fora below.

7. As regards the question of credit notes, the First Appellate Authority observed that the VAT regime came into force w.e.f. 01.04.2005. So, he disallowed the credit notes and confirmed the finding of the Assessing Authority on this score. The Dealer does not dispute the fact that OST Act, 1947 has been repealed by the OVAT Act, 2004 w.e.f. 01.04.2005. The Dealer claims to have issued the credit notes during VAT regime though the sales related to the years 2003-04 and 2004-05.

7.1. Revenue vehemently objects the stand of the Dealer and submits that the credit notes can only be allowed from return so filed within the prescribed period u/s. 2(i) explanation read with Rule 4-A of the OST Rules. A bare reading of Section 2(i) of the OST Act r/w 4-A of the OST Rules, the return of goods shall be claimed within one month from the date of purchase. The word ‘shall’ shows the provision is mandatory.

7.2 Revenue relies on the decision of the Hon’ble Apex Court in ***CIT v. Kalinga Tubes Ltd. case*** cited *supra* wherein the Hon’ble Apex Court observed at para-164 that the assessment shall be in the mercantile system of accounting and the deduction shall be confined to the relevant assessment year.

7.3 Revenue also relies the decision of Hon'ble Apex Court in ***Dy. CST (Law)*** case cited *supra*, wherein the Hon'ble Apex Court have been pleased to observe that the deduction in respect of goods sold by the dealer in course of inter-State trade in the assessment year but returned by the purchaser in the succeeding year must be claimed in the assessment year itself and not in the succeeding year. The same view has been reiterated by the Hon'ble Apex Court in ***State of Maharashtra v. BASF (India)*** case cited *supra*.

7.4. Therefore, the case in hand, the Dealer does not dispute that the turnover relates to the years 2003-04 and 2004-05 and he issued the credit notes in VAT regime. So, the Dealer is not entitled to claim any credit in respect of such sales as it does not relate to the period under assessment. Thus, the Assessing Authority has not committed wrong in disallowing such claim, which has been rightly confirmed by the First Appellate Authority.

8. As regards levy of penalty, the First Appellate Authority also confirmed the two times penalty as per Section 42(5) of the OVAT Act. It is not in dispute that the Dealer is a Public Sector Undertaking under Ministry of Defence, Government of India. It is also settled principle of law that ordinarily penalty is imposed against a dealer if the dealer has any malafide intention to evade the tax liability. Hon'ble Apex Court in the case of ***Hindustan Steel Ltd. v. State of Orissa***, reported in **AIR 1970 SC 253**, categorically observed that penalty does not arise merely upon the proof of default and hence, not to be imposed unless the party acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct or acted in conscious disregard of its obligation in a case with reference to Section 9(1) and 25(1)(a) of the OST Act, 1947.

Section 42(5) of the OVAT Act prescribes that an amount equal to two times of 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. Section 42(3) provides that the Assessing Authority may proceed under sub-section (1) of Section 42 for assessment to complete the assessment to the best of his judgment basing on the materials available in the AVR and such other materials available and after causing such inquiry as he deems necessary, if the dealer fails to appear or cause appearance or fails to produce or production of the books of account and documents as required under sub-section (1). Section 42(4) provides that when a notice is issued under sub-section (1), the dealer produces the books of account and other documents, the assessing authority may after examining all the materials available with him in the record and those produced by the dealer and after causing such other inquiry, as he deems necessary, assess the tax due from the dealer accordingly.

Bare reading of the aforesaid provision of Section 42(5) and the words "shall be" show that imposition of penalty is mandatory for any assessment made under sub-sections (3) and (4) of Section 42 of the OVAT Act. Our Hon'ble Court in case of ***State of Orissa v. M/s. Chandrakanta Jayantilal*** (**STEV No. 69 of 2012, decided on 05.07.2022**) observed that penalty is automatic in the assessment u/s. 42(5) against the tax due. Therefore, the decision relied on by the learned Counsel for the Dealer on this score is not applicable in the present facts and circumstances of the case. Thus, we do not find any wrong in imposing penalty by the fora below.

9. Coming to the dispute with regard to credit of TDS for an amount of ₹10,409.00 deposited on 16.02.2006 by MCL vide challan No. 891727 dated 11.02.2006. The First Appellate Authority appears to have not given any finding on that score. So, without expressing any opinion on its merit, we feel it proper to remit the matter to the First Appellate Authority for disposal afresh only on account of aforesaid TDS amount in accordance with law. Hence, it is ordered.

10. Resultantly, the appeal is allowed in part and the impugned order of the First Appellate Authority stands modified to the extent of adjustment of TDS deposit as per law within a period of three months from the date of receipt of the order.

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