

**BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL,
CUTTACK.**

S.A. No.55 of 2015-16

(Arising out of the orders of the learned JCST,
Cuttack-II Range, Cuttack in First Appeal Case
No.AA/CUII/125/2008-09, disposed of on
21.07.2015)

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

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

..... Appellant.

-Vrs. -

M/s. Sky Automobiles, Pratapnagari,
Bhanpur, Cuttack.

..... Respondent.

For the Appellant: : Mr. D. Behura, S.C.(C.T.)

: Mr. N.K. Rout, A. S.C.(C.T.)

For the Respondent :

: Mr. A.K. Mahapatra, Advocate.

Date of Hearing : 06.12.2023 * Date of Order : 30.12.2023**

O R D E R

The State is in appeal against the order dated 21.07.2015 of the Joint Commissioner of Sales Tax, Cuttack II Range, Cuttack (in short, 'Ld. FAA') passed in First Appeal Case No. AA/CUII/125/2008-09 on levy of surcharge under Section 5 A of the Odisha Sales Tax Act (in short, 'OST Act') on tax due after allowing set off of entry tax paid.

2. The factual matrix of this case is that M/s. Sky Automobiles, Pratapnagari, Bhanpur, Cuttack, RC No.CUII-5320

deals in Motor Vehicles, Spare parts and accessories of vehicles manufactured by M/s Maruti Udyog Ltd., Gurugaon, Haryana. The dealer-assessee was assessed under Section 12(4) of the OST Act for the year 2004-05 raising extra demand of ₹6,01,354.00. The claim of set off amounting to ₹6,28,979.00 against entry tax paid on cars purchased during the year 2003-04 and sold during 2004-05 was disallowed in assessment by the learned assessing authority. The ld.FAA after due verification of the details of sales of cars could arrive that as many as 23 nos of cars purchased during 2003-04 paying entry tax of ₹6,28,979.00 have been sold during 2004-05 at ₹58,81,856.00 levying OST amounting to ₹7,05,822.00. The ld.FAA has, therefore, allowed set off of ₹6,28,979.00 as claimed by the dealer-assessee over and above the set off of ₹47,01,616.79 allowed in assessment relating to the year 2004-05 culminating to total set off of ₹53,30,595.79. The amount of tax due as assessed was at ₹3,12,69,324.64 against which, the ld.FAA allowed deduction of ₹53,30,595.79 towards set off of entry tax paid. The amount of net OST payable arrived at ₹2,59,38,728.85. Surcharge @10% thereon under Section 5 A of the OST Act calculated to ₹25,93,872.88. The total amount of OST and surcharge put together worked out to ₹2,85,32,601.73 in first appeal.

3. The State assailing the order of the ld.FAA as not justified preferred second appeal before this forum contending that levy of surcharge after allowing set off of entry tax against sales tax in the present case by the ld.FAA is illegal. Mr. D. Behura, Standing Counsel representing the State placed decisions of the Hon'ble High Court of Odisha delivered in W.P.(C) No.2225, 2229 and 2233 of 2017 and W.P.(C) No.3804 of 2018 wherein the Hon'ble

Court observed that surcharge under Section 5-A of the OST Act is to be levied before deducting the amount of entry tax paid by the dealer-assessee.

There is no cross objection filed by the dealer-respondent.

4. Having gone through the order of assessment as well as the order of the first appellate authority, it is pertinently made clear that both the forums below have levied surcharge under Section 5-A of the OST Act after setting off the entry tax against the gross tax assessed. The State is not in dispute as to allowing set off of entry tax paid against tax due as per Section 4(1) of the Orissa Entry Tax Act which provides that where an importer of motor vehicle liable to pay tax under sub-section (3) of Section 3 being a dealer in motor vehicles becomes liable to pay tax under the Sales Tax Act by virtue of sales of such motor vehicles then his liability under the sales Tax Act shall be reduced to the extent of tax paid under this Act. The State disputes on incidence of levy of surcharge under Section 5-A of the OST Act. It is argued that surcharge is sought to be levied before setting off entry tax against sales tax payable. The Hon'ble Supreme Court vide order dated 28.10.2016 in case of the **Commissioner of Commercial Taxes Vs. Bajaj Auto Ltd. AIR 2016 SC 5014** held that the surcharge under Section 5-A of the OST Act is to be levied before deducting the amount of entry tax paid by the dealer. In view of such verdict of the Hon'ble Apex Court, the orders of the forums below levying surcharge after setting off entry tax from sales tax payable is not justified. Accordingly, the Id. Assessing authority is required to re-compute the tax liability of the dealer-assessee levying surcharge before setting off entry tax against the amount of sales tax payable by the dealer.

5. Under the above eventuality, the second appeal filed by the State is allowed. The order of the ld.FAA is set aside. The impugned case is remanded back to the ld. assessing authority with direction to re-compute the tax liability of the dealer-assessee in the light of the observation made in the foregoing paragraph within three months from the date of receipt of this order.

Dictated and corrected by me.

**Sd/-
(Bibekananda Bhoi)
Accounts Member-I**

**Sd/-
(Bibekananda Bhoi)
Accounts Member-I**

I agree,

**Sd/-
(G.C. Behera)
Chairman**

I agree,

**Sd/-
(S.K. Rout)
2nd Judicial Member**