BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A.No.96(ET) of 2014-15

&

S.A.No.50(ET) of 2016-17

(Arising out of the order of the learned Addl.CST(Appeal), South Zone, Berhampur Appeal Case Nos. AA(ET).23/2011-12 & AA (OET) 02/2012-13 disposed of on 26.04.2014 & 28.03.2016)

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

M/s. OMFED Ltd.,
Plot No-D-2, Saheed Nagar,
Bhubaneswar. ... Appellant.

-Versus –

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

For the Appellant: : Mr. R.K. Kar, Advocate.
For the Respondent : Mr. D. Behura, S.C. (CT).
: Mr. S.K. Pradhan, Addl.S.C.(C.T.)

Date of Hearing : **20.12.2023** *** Date of Order : **18.01.2024**

O R D E R

The aforesaid two second appeals have been preferred by the dealer-assessee in challenge of the orders dated 26.04.2014 and 28.03.2016 of the Additional Commissioner of Sales Tax

(Appeal), South Zone, Berhampur passed in Appeal Case No.AA(ET)23/2011-12 and No.AA(OET)02/2012-13 respectively confirming imposition of penalty inflicted in assessments framed under Section 9 C of the OET Act and under Section 10 of the OET Act. Both these appeals being related to the different tax periods involving common question of facts and law, they are clubbed together for disposal in a composite order.

2. The factual matrix of the case is that M/s. OMFED Limited, Plot No.D-2, Saheed Nagar, Bhubaneswar is a Govt. Of Odisha undertaking engaged in manufacture of pasteurized milk, flavored milk, curd, lassie, butter milk, ghee, horticulture products like turmeric power, jam, jelly, pickles etc. on use of the materials like milk, milk power, de-oil cake, oil cake, colour, salt, sugar, broken rice, biri chuni, maze, molasses, green chilly, green mango, garlic, tomato, potato, onion, turmeric, etc. The dealer-appellant was assessed under Section 9 C of the OET Act for the tax period 01.04.2005 to 31.03.2008 on the recommendation of the Audit Visit Report. Similarly, re-assessment was undertaken for the tax period from 01.04.2006 to 31.03.2008 under Section 10 of the OET Act basing on the AG audit objection.

3. **S.A. No.96 (E) of 2014-15**

This has reference to audit assessment framed under section 9 C of the OET Act for the tax period 01.04.2005 to 31.03.2008. The GTO and TTO as disclosed at ₹466,59,61,879.07 and ₹62,24,52,214.41 respectively in returns have been accepted in assessment by the ld. Assessing Authority. Entry tax having been levied at appropriate rate on TTO, the tax due stood at ₹78,70,240.65. The ld. Assessing Authority could observe that there was no entry tax paid on the sale of scheduled goods worth ₹87,81,30,187.71 during the tax period under assessment. After allowing deduction ₹15,80,73,803.41 towards sales in local area, the balance sales involving ₹72,00,56,384.30 was exigible to entry tax at the appropriate rate. On levy of tax on such taxable sales at entry tax as applicable, the ld. Assessing Authority held the dealer appellant liable to pay ₹72,16,595.52 on this account. However, as the dealer appellant was entitled to entry tax set off, an amount of ₹56,08,772.18 was allowed as set off on this account in assessment. Thus, the dealer appellant was held liable to pay ₹16,07,823.34 on sale of scheduled goods. Accordingly, the total tax due both on account of purchase of scheduled goods and sale of scheduled goods calculated to ₹94,78,063.99 against which, the dealer appellant having paid

₹78,65,306.00 at the time of filing returns, it is required to pay the balance tax due of ₹16,12,757.99. The ld. Assessing authority imposed penalty of ₹32,25,516.00 as per Section 9 C(5) of the OET Act. The total tax and penalty put together arrived at ₹48,38,273.99. The dealer appellant conceded to have not paid entry tax on sale of the scheduled goods during the material year under assessment and paid ₹11,07,393.00 on 11.02.2011 after issuance of notice for audit assessment. The ld. Assessing Authority allowed deduction of ₹11,07,393.00 from the above amount of tax due i.e. ₹48,38,273.99 and held the dealer appellant liable to pay ₹37,30,881.00(entry tax ₹5,05,365.00 and penalty ₹32,25,516.00). The ld.FAA in first appeal as preferred by the dealer appellant has affirmed the order of the ld. Assessing Authority on imposition of penalty under Section 9 C (5) of the OET Act merely deducting payment of ₹5,00,430.00 made on 22.02.2011 from the amount of tax payable of ₹37,30,881.00 determined in assessment requiring thereby the dealer appellant to pay Rs,32,30,451.00.

4. **S.A. No.50(ET) of 2016-17**

As discussed above, audit assessment for the tax period 01.04.2005 to 31.03.2008 was completed under Section 9 C of the OET Act on 28.03.2011 raising an extra demand of tax and

penalty of ₹37,30,881.00. The said demand was reduced to ₹32,30,451.00 in first appeal. AG (Audit) took up scrutiny of the order of assessment passed under Section 9 C of the OET Act. On scrutiny, the AG (Audit) pointed out excess allowance of entry tax set off to the tune of ₹10,06,592.00 in the order of assessment and non-payment of entry tax @ 1% on sale of calf feed for an amount of ₹17,84,031.25. Basing on such findings, reassessment under Section 10 of the OET Act for the tax period 01.04.2006 to 31.03.2008 was undertaken excluding the tax period 01.04.2005 to 31.03.2006 from the purview of reassessment owing to the fact that the reassessment proceeding could be taken up within five years of the escaped assessment from the end of the year to which the tax period relates as prescribed under Section 10(1) of the OET Act. The dealer appellant has deposited ₹7,26,539.00 voluntarily prior to passing of the order of reassessment admitting excess entry tax set off to have been availed due to oversight. The ld. Assessing Authority levied entry tax @ 1% on ₹17,84,031.25 against sale of calf feed treating it as cattle feed.

5. To sum up, the ld. Assessing Authority accepted the GTO and TTO disclosed by the dealer appellant at ₹336,81,09,049.75 and ₹42,02,93,626.04 respectively relating to

the tax period from 01.04.2006 to 31.03.2008. On levy of appropriate rate of tax on TTO, the tax due on purchases of scheduled goods arrived at ₹50,92,818.98. As for the sales of finished goods worth ₹66,96,42,345.38, deduction of ₹11,12,20,622.36 has been allowed against sales disclosed within the local area. The taxable turnover on this account has thus arrived at ₹55,84,21,723.02. The ld. Assessing Authority on levy of appropriate rate of tax on it, calculated entry tax of ₹56,10,135.56 against sale of finished products. Hence, the total tax due both on purchases and sales of declared goods arrived at ₹1,07,02,954.54. Set off of entry tax amounting to ₹36,36,048.41 has been allowed and thus, the balance tax due arrived at ₹70,66,906.13. The dealer appellant having paid ₹58,17,163.00 earlier, the balance tax due stood at ₹12,49,743.13. The ld. Assessing Authority considered adjustment of ₹5,05,364.00 assessed under Section 9 C of the OET Act vide assessment order dated 28.03.2011. Accordingly, after adjustment of ₹5,05,364.00 as already assessed, the balance amount of tax payable arrived at ₹7,44,379.13. The ld. Assessing Authority has imposed penalty of ₹14,88,758.26 under Section 10(2) of the OET Act being twice the amount of tax additionally assessed. The tax and penalty put together calculated to ₹22,33,137.39. The

dealer appellant has paid ₹7,26,539.00 on 06.03.2012 prior to passing of the order of reassessment dated 12.03.2012. After allowing such deduction, the amount of tax payable stood at ₹15,06,598.00 (Penalty ₹14,88,758.26 and tax on calf feed ₹17,840.13). The first appeal preferred by the dealer appellant resulted in affirmation of the order of the ld. assessing Authority passed under Section 10 of the OET Act.

6. The dealer appellant being aggrieved with the orders of the ld.FAA passed under the audit assessment and the reassessment preferred these appeals before forum contending that levy of penalty under Section 9-C (5) and 10(2) of the OET Act is not justified for the reasons being that entry tax to the tune of ₹16,07,823.00 and ₹7,26,539.00 have been paid as against tax due of ₹16,12,757.99 and ₹7,44,379.13 before completion of the audit assessment dated 28.03.2011 and reassessment dated 12.03.2012 respectively. There being no tax due at the time of assessment, imposition of penalty for ₹32,25,516.00 and ₹14,88,758.00 under Section 9C(5) and 10(2) of the OET Act is arbitrary and without authority of law. Mr. R.K. Kar, ld. Advocate who appeared on behalf of the dealer-appellant placed reliance on the decision of this Forum passed on 18.06.2022 in S.A. No.199(ET) of 2014-15 in case of ***M/s.***

Maheswari Brothers Co. Limited Vrs. State of Odisha. Mr. Kar has also relied on the decision of this forum passed in S.A. No.18(ET) of 2011-12 in case of the ***State of Odisha Vrs. M/s. Taurian Iron and Steel Co. (P) Ltd.*** wherein it is observed that proviso to Section 33(5) being a substantive provision of law under the OVAT Act, 2004, it cannot be applied *mutatis mutandis* under the OET Act. Since there is no specific provision in the OET Act as provided under the proviso to section 33(5) of the OVAT Act, the penalty imposed without giving credit of payment of tax before completion of assessment is unsustainable.

The State has submitted the cross objections supporting the orders of the ld.FAA.

7. The orders of the forums below are gone through. The grounds of appeal together with the materials available on record are perused. On perusal of the assessment order passed under 9C of the OET Act, it is observed that the dealer appellant is not in dispute as to payment entry tax on purchases of scheduled goods and has accordingly discharged its tax liability. But in case of discharging of tax liability against sales of scheduled goods, the dealer appellant is conceded to have not paid any entry tax and accordingly, the dealer appellant paid entry tax for

₹16,07,823.00 after service of notice for tax audit. Similarly, as for the reassessment framed under Section 10(1) of the OET Act, the dealer appellant is not in dispute as to allegation of excess allowance of entry tax set off in the order of assessment passed under Section 9 C of the OET Act. So also exigibility of entry tax on the sale turnover of calf feed is not in dispute. The dealer appellant is seen to have paid ₹7,26,539.00 on 06.03.2012 prior to passing of the order of reassessment dated 12.03.2012. In both of the cases as stated above, the payment of ₹16,07,823.00 in case of assessment under Section 9 C of the OET Act and ₹7,26,539.00 in case of reassessment under Section 10 of the OET Act made before the orders of assessment/reassessment have not been taken into account while computing tax due holding that the provision of Section 33(5) of the OVAT Act is applicable *mutatis mutandis* to the provision of the OET Act as mandated under Rule 34 of the OET Rules which speaks that "*For any other matters not specified under these rules but required for the carrying out the purposes of the Act and these rules, the provision under VAT Act and the rules made thereunder shall* mutatis mutandis *apply"*. In view of said provision prescribed under the statute, penalty of ₹32,25,516.00 and ₹14,88,758.26

has been imposed under Section 9C (5) and 10(2) of the OET Act respectively.

8. In the above premises, we feel it essential to adjudicate on issue whether the entry tax paid before passing of the orders of assessment or reassessment as the case may be would be taken into account before computation of tax due. We find it relevant to refer to the decisions of this Tribunal delivered in ***S.A. No.199(ET) of 2014-15*** in case of *M/s. Maheswari Brothers Co. Limited Vrs. State of Odisha*, ***S.A. No.18(ET) of 2011-12*** in case of the *State of Odisha Vrs. M/s. Taurian Iron and Steel Co. (P) Ltd* and ***S.A. No.101 (ET) of 2015-16*** in case of State of Odisha vs. M/s Bajrangbali Wire Products Pvt. Ltd. This forum in ***S.A. No.101 (ET) of 2015-16*** provides as under***:-***

> *"7. Section 33 of the OVAT Act corresponds to Section 7 of the OET Act. Similarly sub-section (5) of Section 33, which deals with furnishing of revised return in case of omission, error etc. corresponds to Section 7(2) of the OET Act. Provision similar to the proviso to Sub-Section (5) of Section 33 of the OVAT Act is absent in Section 7(2) of the OET Act. Therefore, the Legislature must be deemed to have omitted the provision deliberately in the OET Act. In any case, the omission cannot be sought to be made good by taking recourse to Rule 34 of the OET Rules. The position which emerges thus is, the dealer is precluded from making a voluntary disclosure regarding higher amount of tax due after receipt of notice for tax audit*

under the OVAT Act, but there is no such bar under the OET Act. I am, therefore, unable to accept the contention advanced by Sri Raman in this regard."

9. In view of the above dictum, it is inferred that since there is no specific provision in the OET Act as provided under proviso to Section 33(5) of the OVAT Act, imposition of penalty under Section 9C (5) and 10(2) of the OET Act on entry tax paid before assessment framed under Section 9 C or 10 (1) of the OET Act is not justified. It is needless to say that OMFED is a Govt. of Odisha undertaking. It may not foster any *malafide* intention to contravene any provision of the Act wilfully or profess any illegal means to evade payment of tax. In the present case, the dealer appellant is found to have paid the legitimate dues soon after the erroneous claims are brought to its notice. Accordingly, provision of sub-section (2) of Section 10 of the OET Act is not applicable under the fact and circumstances of the case. It is also noted that Section 9C (5) of the OET Act provides for imposition of penalty in respect of any assessment completed under sub-section (3) or (4) of Section 9 C. The penalty that the forums below imposed in the instant case is on admitted tax deposited by the dealer-assessee. It is not justified. Accordingly, the contention taken by Mr. Kar, ld. Advocate for the dealer-assessee deserves consideration. Hence, it is ordered as under.

10. Resultantly, the second appeals filed by the dealer-assessee are allowed. The impugned orders of the ld.FAA are set aside. The impugned cases are remitted back to the ld. assessing authority to re-compute the tax liability of the dealer-assessee for both the periods under assessment in the light of the above observations within three months from the date of receipt of this order and allow refund, if admissible as per the provision of law. Cross objections are accordingly disposed of.

Dictated & 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