

BEFORE THE DIVISION BENCH:ODISHA SALES TAX TRIBUNAL:CUTTACK.

S.A.No.187(ET) of 2011-12

(Arising out of the order of the learned Deputy Commissioner of Sales Tax, Cuttack-I Range, Cuttack, in First Appeal Case No. AA-(ET)13/CUIW/2010-2011, disposed of on 09.12.2011)

Present: Shri Subrat Mohanty
1st Judicial Member

&

Shri P.C. Pathy
Accounts Member-I

M/s. S N. Das Mohapatra,
J.M. House, Madhusudan Nagar,
At/Po- Tulsipur, Cuttack-753008.

...

Appellant

- V e r s u s -

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

...

Respondent.

For the Appellant : ... Mr. S.K. Jethy, Id. Advocate.
For the Respondent : ... Mr. M.L. Agarwal, Id. S.C.(C.T).

Date of Hearing: 17.05.2019 ***** Date of Order: 20.05.2019

ORDER

The dealer assails order dtd.09.12.2011 passed by learned Deputy Commissioner of Sales Tax, Cuttack-I Range, Cuttack (in short, 'first appellate authority') in first appeal Case No. AA-(ET)13/CUIW/2010-2011, confirming the demand of Rs.4,33,734.00 raised by learned Sales Tax Officer, Cuttack-I West Circle, Cuttack (in short, 'STO') vide order dtd.03.03.2010 under Section 9(C)(3) of the Orissa Entry Tax Act, 1999 (in short, 'OET Act') for the tax periods from 01.04.2005 to 31.12.2008.

2. The dealer-appellant M/s. S.N. Das Mohapatra, Tulsipur, Cuttack bearing TIN-21371204438 is a mines owner who used to extract manganese ore from its mines situated at Kolha, Rudukela of Keonjhar District and used to sale the same both inside as well as outside the State of Odisha. Basing upon an Audit Visit Report (in short, 'AVR') Id. STO initiated proceeding u/s.9(C)(3) of the OET

Act against the dealer-appellant for audit assessment for the period from 01.04.2005 to 31.12.2008. Learned STO determined the sale figure towards sale of manganese ore at Rs.1,30,46,994.00 excluding entry tax under the OVAT Act which is also treated as the turnover under the OET Act. Besides ld. STO held the dealer liable to pay entry tax towards purchase of one weigh-bridge valued Rs.6,41,250.00 along with estimated freight charges of Rs.64,125.00 i.e. 10% of the purchase value of the weigh-bridge which the dealer appellant reported to have not disclosed in his books of accounts. Accordingly, ld. STO raised demand of Rs.4,33,734.00 which is inclusive of penalty amounting to Rs.2,89,156.00 imposed twice of the tax u/s.9-C(5) of the OET Act. The dealer carried the matter in first appeal contending that ld. STO had committed illegality by accepting the sale value to Rs.1,30,46,994.00 as the TTO for imposition of ET. It is also contended that determination of turnover including P.D. charges, 'Entry Tax' and transportation and freight charges is erroneous. It has been submitted that determination of taxable turnover to the tune of Rs.7,05,375.00 towards cost of weigh-bridge with freight charges is illegal due to non-existence of weigh-bridge. It was also submitted that the legality of imposition of entry tax was pending before the Hon'ble Supreme Court of India and as the dealer-assessee has neither collected nor paid entry tax on the ground that manganese ore are raised and extracted at the mines upon being excavated from the earth within the lessee's leasehold area and the sale is effected at the pit head i.e. the exit point after the manganese ores are stacked, sampled and verified by the statutory authorities. Learned first appellate authority heard the case and on perusal of order of assessment and grounds of appeal came to the conclusion that ld. STO has correctly made the assessment which requires no further interference at his forum.

3. Being further aggrieved, the dealer-appellant has filed second appeal on the following grounds:-

- (i) The order as framed by the learned D.C.C.T. of Cuttack-I Range is unjust and improper on the facts and in the circumstances of the case.
- (ii) The order of the D.C.S.T. neither considered our matter nor mentioned in detail about the reason for non-acceptance of our grounds of appeal.
- (iii) The order as framed by the learned Sales Tax Officer is unjust and improper on the facts and the circumstances of the case.
- (iv) The learned assessing officer illegally accepted the sale value to be Rs.1,30,46,994.00 as the T.T.O. for imposition of E.T..
- (v) The appellant had moved in appeal against the determination of sale of manganese ore inside the State.
- (vi) The determination of G.T.O. includes P.D. charges "Entry Tax" and transportation/Freight charges is illegal and extremely erroneous.
- (vii) The addition of Rs.7,05,375/- (cost of Weight Bridge Rs.6,41,250/- + F.T. charges Rs.64,125/-) is excessively arbitrary and illegal due to non-existence of weigh-bridge.
- (viii) In presence of the approval letter of the Company to give our money back addition to value of weigh bridge and freight charges Rs.64,125/- on transportation of non-existence of weigh bridge is extremely illegal, with a view to harass and against natural justice.
- (ix) Legality of imposition of "Entry Tax" is pending before the Hon'ble Supreme Court of India.
- (x) Neither we have collected nor paid any entry tax.
- (xi) Use of word "Entry Tax" in our bill for re-imburement from customers the charges paid while passing through different villages till destination. As because the Appellant had paid

such dues at the time of entrance into different villages they have used the word "Entry Tax" for re-imburement from customers.

(xii) a. There is sale at the mines pit head which is the exit point hence the order framed by the learned S.T.O. is unjust, unreasonable, unconstitutional, arbitrary is liable to be set aside.

b. The manganese ore are raised and extracted at the mines, upon being excavated from the earth within the lessee's leasehold area and the sale is effected at the pit head i.e. the exit point after the manganese ores are stacked sampled and verified by the statutory authorities of the Deputy Director of Mines, Joda, and there is no entry of goods and it is a sale at the exit point i.e. from the pit head, hence imposition of Entry Tax is arbitrary, illegal, unreasonable is liable to be set aside.

4. The respondent-State has filed memo of cross objections as follows:-

- a. There is no reasonable merit in the second appeal filed by the dealer, which is not sustainable in the eyes of law.
- b. The ld. Assessing officer has rightly completed assessment basing on the statutory provisions under the Act and Rules which has rightly been confirmed by the first appellate authority.
- c. The validity of Entry tax Act is still in force as Hon'ble Supreme Court have stayed the order of the Hon'ble Odisha High Court.
- d. The imposition of Entry Tax on manganese ore at the sale point is justified as per exiting provision of act even if at the exit point.

5. Mr. S.K. Jethy, the Id. Advocate appearing on behalf of the dealer-appellant reiterated the points raised in the grounds of appeal. On perusal of the grounds of appeal it is marked that there is repetition of grounds in both appeals. The Id. Advocate appearing on behalf of the dealer-appellant furnished a written submission indicating the following points:-

- A. With reference to appellant's written submission dt.8/12/2017 the appellant is filling herewith written submission on basis of merit of appeal.
- B. The appellant had never purchased weigh-bridge machine rather he had ordered to purchase weigh-bridge as per letter dt.09.02.2008 (attached as annexure-1) and the installation company Aditya Technologies issued a letter to the appellant on 11.02.2008 (attached Annexure-2) for sending of way bill. The appellant had received Declaration Form VAT-402A on 20.02.2008 (attached as annexure-3) from Sales Tax Officer Cuttack-I West Circle, Cuttack. The selling dealer Senlogic Automation (P) Ltd. was issued Tax Invoice on 12.03.2008 (attached as annexure-4). After that the appellant had cancelled purchased of weigh-bridge machine on 24.11.2008 (copy of cancellation letter attached as annexure-5). The appellant had surrendered the Declaration Form VAT-402A in Sales Tax Office, Cuttack-I West Circle, Cuttack on 06.10.10 (attached as annexure-6). Hence he added of Rs.705375/- (641250/-+64125/-) into Turn Over is illegal and arbitrary may be deleted.
- C. The goods were sold from mines pit head which was the exit point, hence the appellant was not liable to collect and payment of Entry Tax. (Supreme Court Judgment attached herewith) (as annexure-7).
- D. The appellant is an un-registered dealer under O.E.T. Act, hence, he is not liable to collect Entry Tax. The appellant had

also never collected Entry Tax because he is an un-registered dealer. Therefore the question of payment of Entry Tax does not arise.

- E. As an un-registered dealer the appellant is not liable to be assessed U/s.9(c)(3) of OET Act. Only registered dealer liable to be assessed U/s.9(C)(3) of OET Act.
- F. As an un-registered dealer the appellant is not liable to be audited as per provision U/r.11(1)(a) of OET Act. As per provision U/r.11(1)(a) of OET Act only registered dealer liable to be audited.

On 08.12.2017 the Id. Advocate on behalf of the dealer-appellant made written submission as follows:-

- (a) The Id. Sales Tax Officer has passed assessment order U/s.9(C)(3) of the Orissa Entry Tax Act, 1999 for the period 01.04.2005 to 31.12.2008 without giving notice for hearing of assessment in Form E-30.
- (b) Without issue of statutory notice in form E-30 as per sub-rule (1) of Rule 15B and without allowing Natural justice, the assessment order under OET Act is vitiated in law as decided by Honorable Orissa High Court in the case of YERRA FABRICS Vs. Sales Tax Officer, Cuttack-I West Circle, Cuttack, reported in STC Vol.148 page No 450 (2006) and in the case of RAMIKISSAN RAJKUMAR Vs. Assessing Authority, Cuttack-I, West Circle, Cuttack and another reported in STC Vo.139, page No.450 (2004), hence the assessment order under OET Act is not maintainable and sustainable so it may be quashed.
- (c) The merits of the appeal does not arise when the assessment order is invalid and not maintainable.

6. Mr. M.L. Agrawal, learned Standing Counsel (C.T.) appearing on behalf of the Revenue reiterated the stand taken in the cross objection filed. He submitted that Id. first appellate authority has rightly confirmed the order of assessment passed by

ld. STO under the OET Act. He produced the relevant assessment record in support of the fact that notice has already been issued under the OET Act and has properly been served and the proprietor of the business has also admitted service of notice in the authorisation letter issued in favour of Sri Iswar Chandra Mohanty, Manager (Finance) to produce books of accounts for the relevant period. Mr. Agarwal, ld. S.C. (C.T.) submitted that the dealer has applied for amendment of Registration Certificate so as to include the item electronics weigh-bridge for use in mining. As per clause-14 of the agreement executed between the proprietor of the business and the Collector of Keonjhar (photo copy placed at Page-128 in the Registration record) along with the tax invoice Proforma for electronic portable weigh-bridge (photo copy at page-127 in the Registration Record). He also contended that as the dealer is engaged in mining activities and dealing in manganese ore which is a scheduled goods the dealer-appellant is liable to pay entry tax on sale of the same inside the State out of the local area. He took the stand that the dealer-appellant is to pay tax on the entire sale amount including the so-called ET collected on the body of the tax invoice.

7. Heard the rival contentions. Gone through the grounds of appeal, written submissions filed on behalf of the dealer-appellant, cross objections filed, impugned orders of assessment and appeal, relevant records of appeal, assessment, Registration and audit visit report. Now the question before this Bench is to adjudicate as to whether the order of ld. First appellate authority, in the facts and circumstances of the case, is sustainable? So far the question of payment of entry tax on scheduled goods is concerned the matter has already been settled by the Hon'ble Supreme Court of India. It is undisputable that the dealer being the dealer engaged in mining activities which is considered as manufacturing activities is required to pay entry tax

on sale turnover other than sale effected inside the local areas whether he collects the same or not from the customers. The dealer-appellant cannot claim exemption from payment of entry tax being an un-registered dealer when the dealer-appellant is required to get itself registered under the Act being a dealer dealing in scheduled goods. Entry tax Act provides for levy and collection of tax on the entry of goods into the local areas of the State of Orissa for consumption, use or sale therein and matters incidental thereto and connected therewith. As per sub-section-2 of Section-3 of the OET Act the tax is leviable under this Act shall be paid by every dealer in scheduled goods or any other person who brings or causes to be brought into a local area such scheduled goods whether on his own account or on account of his principal or customer or takes delivery or is entitled to take delivery of such goods on such entry. Hence for levy of entry tax it is not the only requirement that a dealer must be a registered one under the OET Act.

So far the contention of non-existence of electronic weigh bridge is concerned it appears from AVR itself that information was obtained from registration record. No statement was recorded from the dealer-appellant in this connection. Without proper discussion or findings whether the dealer-assessee has actually effected the purchase which is required as a capital goods for the business activity, ld. STO has jumped to the conclusion that the dealer is liable to pay entry tax towards purchase of one weigh bridge valued Rs.6,41,250.00 which the dealer has not disclosed in his books of accounts. The dealer-appellant vehemently argued to have not purchased the weigh-bridge for which the RC was amended. The Asst. Commissioner of Sales Tax, Cuttack-I West Circle, Cuttack (in short, 'ACST') in the AVR submitted in Form E-27 has indicated in the last Para of second page of AVR against Sl. No.14 that there is no purchase effected by the dealer. The total

sale effected during the said period under the OVAT and CST Act. So far as the purchase of one weigh-bridge is concerned the observation of the ACST in the AVR under the OET Act against Sl. No.14 at Para-2 of page-3 of the AVR runs as follows:-

“Besides the above the dealer is found with purchase of one weigh bridge as per the proforma Invoice found placed in the Regn. Record of the dealer as submitted by him at the stage of application for amendment of same filed. The receipt value of one SF32 weigh bridge as per the Proforma Invoice no. SLA/CH/07/07-08/077 Dt.12/03/08 for Rs.6,41,250/- is now added with the transport charges @10% of the value (in the absence of production of the evidence of freight) that comes to Rs.64,125/- making the sum total of Rs.7,05,375/- which is now added to the turnover under the OET Act and also is taxed @2% under the Entry Tax Act as the same has not been disclosed in the way bill utilization statement. Its way bill utilisation with entry in the purchase register is required to be verified with payment of said Entry Tax whether made or not. This goods is amended in the OVAT Regn. as capital goods w.e.f. 24/07/2008 (as per the application for amendment) for which its actual final purchase with final Invoice is to be verified with date of receipt of goods whether effected after the amendment or not failing which the penal proceeding is to be initiated as per the provisions under the Act.”

On perusal of appeal order it is found that ld. first appellate authority has not discussed the objections/grounds taken by the dealer-appellant but has simply confirmed the order without discussing the points/objections raised by the dealer-appellant. There is no evidence of entry of weigh-bridge into the local area. The facts like contention of the dealer-appellant that no weigh-bridge was purchased even though it was required for the

business as gathered from the amendment petition filed by the dealer available in the registration record. The incidence of taxation under the OET Act is on entry of the scheduled goods into the local area for use, consumption or sale. Nobody is competent/authorised to shift the point of taxation. As ld. first appellate authority has not passed a reasoned order discussing the grounds taken by the dealer-appellant. The appeal order warrants interference. So far as levy of tax on electronic weigh-bridge is concerned the dealer is to adduce proper evidence as to why he didn't go for purchase of the same and how the dealer could manage mining activities without weigh-bridge for which it had sort amendment under the CST Act. The use of way-bills, mode of payment for obtaining weigh-bridge and mode of transportation and entry of the scheduled goods into local area are the aspects to be verified for the purpose of levy of entry tax under the Act. The turnover of sale determined by ld. STO being just and in accordance with the provision under the law is now upheld.

8. In the result, the appeal is allowed in part. The matter is remanded to ld. STO to decide afresh the limited issue discussed above after hearing objections from the instant dealer with reference to the observation made in AVR in accordance with the provision under the law within a period of three months from the date of receipt of this order.

Dictated and corrected by me,

Sd/-
(P. C. Pathy)
Accounts Member-I

Sd/-
(P. C. Pathy)
Accounts Member-I

I agree,

Sd/-
(Subrat Mohanty)
1st Judicial Member