

BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL:CUTTACK

S.A.No.23(ET)/2015-16

(Arising out of the order of the learned JCST (Appeal), Ganjam Range,
Berhampur in First Appeal Case No. AAE-15/2013-14,
disposed of on 13.02.2015)

Present: Shri A. K. Panda
Judicial Member-I

Shri P.C. Pathy
Accounts Member-I

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

... Appellant.

-Versus-

M/s. Sree Alankar,
At- Big Bazar, Berhampur
Dist- Ganjam.

... Respondent.

For the Appellant: : Shri. M. L. Agarwal. S.C. (C.T.)

For the Respondent: : Shri. J. Sahoo, Advocate, &
Miss K. Sahoo, Advocate.

Date of Hearing: 25.04.2018

Date of Order: 07.05.2018

ORDER

The State has filed second appeal against the order of the learned Joint commissioner of Sales Tax, (Appeal), Ganjam Range, Berhampur (in short, 'the Ld. JCST') passed on 13.02.2015 in first appeal case No.AAE-15/2013-14 reducing to Rs.4,311,191.00 the demand of Rs.7,82,199.00 raised by the learned Assistant commissioner of Sales Tax, Ganjam-I Circle, Berhampur (in short, 'the Ld. ACST') in his order dated 19.11.2012 for the period from 1.04.2009 to 31.12.2009 under section 10 of the Odisha Entry Tax Act, 1999 (in short, 'the OET Act').

2. The brief facts of this case are as follows:-

The dealer-respondent carries on business in gold ornaments, gold bullions, silver ornaments and silver bullions on retail basis by effecting purchases both from inside and outside the State of

Odisha but effecting sale inside the State only. Consequent upon receipt of adverse report against the business activities of the dealer-respondent from the sales tax officer, Enforcement Range, Bhubaneswar and the officers of the Enforcement Range, Berhampur who inspected the place of business on 21.12.2009, the Ld. ACST initiated proceeding against the dealer-respondent U/s.10 of the OET Act. The report alleged suppression of sales by the dealer to the tune of Rs.77,34,213.00. The Authorised Representative of the dealer-respondent produced books of accounts consisting of cash book, ledger, purchase and sale register and sale invoices for the impugned period which were examined by the Ld. ACST. Consequently it has been reflected in the order that the dealer-respondent has disclosed total purchase of scheduled goods like gold ornaments, silver ornaments and packing materials from outside the State worth Rs.2,35,85,362.19. As the assessment u/s.43 of the OVAT Act for the very period was completed separately simultaneously determining/estimating sale suppression of scheduled goods to the tune of Rs.81,52,323.00 deduction of 10% from the established sale suppression was made so as to arrive at the purchase value of goods for levy of entry tax at Rs.74,11,203.00. The Ld. ACST has categorically stated that in absence of any claim of deduction the gross turnover is determined at Rs.3,09,96,504.92 which is also treated as taxable turnover exigible to entry tax @1%. Accordingly, the assessment was completed u/s.10 of the OET Act at Rs.7,82,1999.00 including penalty of Rs.5,21,466.00 imposed u/s.10(2) of the OET Act, 1999 to the best of his judgment by rejecting the books of accounts produced as unreliable.

3. Being aggrieved with the order of the ld. ACST the instant dealer had preferred appeal before the ld. JCST on the following grounds:-

It was contended that under the facts and the circumstance of the case the order of the assessment passed by the ld. ACST is arbitrary and un-warranted. The entries on the slip No.23 alleged by the department was disowned. It was contended that the slip No.23 belongs to the firm and the opening balance of the goods written on the slip is correct but the figures like purchase, sale and closing balance written on the recovered slip No.23 were written mistakenly by the staff. It was contended that neither the inspecting officers nor the assessing officer verified the books of accounts of the instant dealer relating to purchase, sale and closing stock. The ld. ACST completed the assessment on the basis of the report without verifying the books of accounts maintained by the appellant. Regarding shortage of gold it was contended by the authorised representative that it happened due to the net weight of the studded jewellery taken by the inspecting officials instead of gross weight of the gold. So far as the shortage of silver ornaments and other items of silver make, the Authorised Representative contended that it happened due to improper weighment because the inspecting officials had not taken the weight of individual items on the date of inspection. On careful consideration as the purchase and sale figures are less than the figures of purchase and sales entered in the regular books of accounts of the dealer-appellant the ld. JCST came to a conclusion that the appellant has not committed any purchase suppression but committed sale suppression proved beyond reasonable doubt so far as the shortage of gold and shortage of silver ornaments and other items of silver make are concerned. Accordingly the ld. JCST passed appeal order reducing the demand of Rs.7,82,199.00 raised by the ld. ACST to Rs.4,31,191.00.

4. Being aggrieved with the orders of the Ld. JCST the State has preferred appeal on the following grounds before this forum.

The order of the Ld. JCST appears to be unjust and improper. It is not understood as to why the Ld. JCST had emphasized to draw ratio between slip No.23 and books of accounts. Slip no.23 may be related to purchase from a definite source, whereas books of accounts depicts purchase from all source. So there is need of detail verification of accounts with respect to all purchase because the concerned dealer had already admitted before the reporting authority that the entries on slip No.23 excepting opening balance are written mistakenly. The credibility of the dealer is totally doubtful. The Ld. JCST had upheld the sale suppression established by the Ld. ACST. The acceptance of the dealer's contention regarding purchase aspect is illegal. The order of the Ld. JCST may be quashed and that of the STO may be restored.

5. Mr. M. L. Agarwal, the Ld. Standing Counsel (C.T.) appearing on behalf of the State vehemently argued that the order of the Ld. JCST is not just and proper. He has contended that the non-consideration of purchase figures reflected in the recovered slip No.23 is not proper for the figures written on the slip No.23 is over and above the purchase figure of goods entered in the books of accounts for the impugned period. He further contended that the deduction of Rs.6,42,07,490.00 towards purchase of entry tax paid goods is not supported by any documentary evidences available in the appeal record. This apart, the deduction allowed on the score of local purchase of gold and silver to the tune of Rs.3,01,06,182.00 from the purview of levy of entry tax is not based on any valid documentary evidences in the face of the fact. The Ld. ACST in the assessment order has stated in no unequivocal term that the dealer has disclosed the total purchase of scheduled goods from outside the State at Rs.2,35,85,302.19. To the said figure he has added purchase suppression of scheduled goods at Rs.74,11,203.00 by subtracting a

profit margin of 10% from the sale suppression estimated at Rs.81,52,323.00. The Ld. ACST in the assessment order has categorically stated that in absence of any claim of deduction the goods turnover determined at Rs.3,09,96,504.92 is also determined as the taxable turnover. The Ld. S.C. (C.T.) forcefully argued that the purchase deduction of turnover on account of scheduled goods has not been properly enquired and verified by the Ld. JCST. He has also cited the judgment of Hon'ble High Court passed in the case of **the Snow White Trading Corporation Vrs. State of Odisha decided on 31st march, 2014 in STREV No.57 of 2013**. Mr. M. L. Agarwal has also forcefully contended that furnishing of Form E-1 as prescribed under sub-rule (5) of Rule 3 along with returns under sub-rule (1) of Rule 10 is mandatory on the part of a dealer who brings the scheduled goods into the local area to prove that the goods purchased by it have already been subjected to entry tax or that the entry tax has already been paid under the Act for such goods. There is absence of identify of local sellers of scheduled goods for which deduction was allowed by the Ld. JCST without verification is not proper.

6. The dealer-respondent has not filed any cross objection in response to the notice issued. However, at the time of hearing an application for condonation of delay was filed apart from cross objection on behalf of the dealer-respondent. The filing of application for condonation of delay was attributed to inaction of Chartered Accountant in taking proper steps to file the cross objection. As the cross objection could not be filed owing to inaction of the Chartered Accountant, the Ld. Advocate is permitted to file cross objection at the stage of hearing before the bench. The ld. Advocate took the contention that initiation of re-assessment proceeding based on tax evasion report without complying with the provisions of section 10 of the OET Act is illegal, arbitrary and in violation of natural justice.

It was argued that the allegation of suppression is ex-facie illegal, arbitrary and without application of judicial mind. So far as the slip No.23 recovered from the premises of the dealer on 21.12.2009 is concerned, the dealer has already accounted for higher amount of purchases and sales in books of accounts for the relevant period. He further stated that the Ld. ACST has not actually verified books of accounts. Both the Ld. ACST as well as the Ld. JCST without due consideration of the reasons for shortage of gold and silver, alleged sale suppression of gold and silver and thus determined entry tax liability of the dealer which is in gross violation of principles of natural justice, illegal and arbitrary thus liable to be quashed in the end of justice. He further argued that sale suppression does not entail entry tax liability which is in gross violation of section 2(d) and section 3 of the Odisha Entry Tax Act, 1999.

7. The Ld. Advocate on behalf of the dealer-respondent quoted the relevant provision under section 7(5) of the OET Act, 1999, re-producing the relevant provision and laying stress on the fact that interest was levied by the Ld. JCST without ascertaining the fact that the dealer-respondent had failed without sufficient cause to pay the amount of tax due as per the return.

Section 7(5)

“(5) Where a dealer required to file return under this section fails without sufficient cause to pay the amount of tax due as per the return for any tax period or fails to furnish return, such dealer shall be liable to pay interest in respect of--

- (i) the tax, which he fails to pay according to the return; or
- (ii) the tax payable for the period for which he has failed to furnish return,

[at the rate of two per centum per month] from the date the return for the period was due to the date of its payment or the date of order of assessment, whichever is earlier”.

8. Heard the rival contentions, gone through the impugned orders of the assessment as well as first appeal, grounds of appeal and cross objection filed by the Ld. Advocate on behalf of the dealer-respondent at the time of hearing before the bench. It is marked that the Ld. JCST has deleted penalty u/s. 10(2) of the OET Act but has held the dealer-respondent liable to pay interest u/s. 7(5) of the OET Act to the tune of Rs.1,53,833.00 and has imposed penalty u/s. 7(6) of the OET Act to the tune of Rs.2,77,358.00. The Ld. JCST has also allowed deduction of Rs.6,42,07,490.00 and Rs.3,01,06,182.00 towards purchase of gold and silver from registered dealers inside the State and local purchase of gold and silver respectively. He has further observed in the appeal order that so far as the report of the STO, Enforcement Wing, is concerned, the appellant reported to have not committed any purchase suppression but committed sale suppression so addition of any amount to the return figure in absence of suppression of purchase is not correct. On verification the Ld. JCST has observed that the appellant has purchased silver ornaments of 14630.00 grams for Rs.2,22,764.00 from the registered dealers of Odisha but wrongly disclosed the said purchase as interstate purchase and paid entry tax on it. The appellant has not filed revised return for the said mistake and added in taxable turnover returned and paid tax. Even though in the appeal order, it was stated that the dealer-respondent has effected purchase of gold and silver from the registered dealers inside the State to the tune of Rs.6,42,07,490.00 and has effected local purchase of gold and silver to the tune of Rs.3,01,06,182.00, there is no details of purchases of scheduled goods inside the State and within local area available in the appeal record.

The incidence of taxation as per the section-3(1) of the OET Act is on entry of the scheduled goods into local area for use, consumption or sale and nobody is competent/authorised to shift the point of taxation. So far as the local purchase of gold and silver is concerned, it has not been made clear in the appeal record whether the dealer-respondent has effected such purchases from registered dealers or from sellers identifiable inside the local area. It transpires that no show-cause notice was issued for levy of interest u/s.7(5) of the OET Act nor even the fact was recorded in any form of statement from the dealer-respondent or its authorised representative but it has been mentioned in the appeal order that at the time of the appeal hearing when asked for late payment of admitted tax the Authorised Representative could not offer any satisfactory explanation. Interest as prescribed u/s. 7(5) of the OET Act has been levied without extending reasonable opportunities of hearing. In view of the facts stated above it is evident that the clear picture in respect of the purchase of scheduled goods by the dealer-respondent is required to be ascertained for arriving at the tax liability the dealer-respondent under the OET Act. The Ld. JCST has correctly deleted the levy of tax and penalty on the determination of purchase value of goods involved in sale suppression established. The Ld. JCST is marked to have not provided reasonable opportunities to the dealer-respondent in ascertaining the existence/non-existence of sufficient cause in the failure on the part of the dealer-respondent to pay the amount of tax due as per the return. The Ld. STO is at liberty to take separate action in accordance with provisions under the law extending reasonable opportunity of being heard to the dealer-respondent for the purpose of levy of interest u/s.7(5) of the OET Act.

9. Accordingly the appeal is partly allowed and the impugned order of the Ld. JCST is set aside and the matter is remanded to the Ld. ACST to determine the tax liability in the light of

the observations made above in accordance with the provisions under law within a period of four months from the date of receipt of the order. The cross objection is disposed of accordingly.

Dictated and Corrected by me.

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

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

I agree,

Sd/-
(A. K. Panda)
Judicial Member-I