

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

S.A.No.29(ET) of 2017-18.

(Arising out of the order of the ld. JCST, Sambalpur Range, Sambalpur, in First Appeal Case No. AA-/61/JSG/ET/2016-17 disposed of on 23.03.2017.)

Present: Shri Subrat Mohanty & Shri P.C. Pathy
Judicial Member-II Accounts Member-I

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

- V e r s u s -

M/s. Maa Santoshi Enterprises,
Mangal Bazar, Jharsuguda. ... Respondent.

For the Appellant : ... Shri S.K. Pradhan, Addl. S.C.(C.T).
For the Respondent : ... Shri U. Behera, Advocate.

Date of Hearing: 31.05.2018 ***** Date of Order: 01.06.2018

O R D E R

This appeal order is direct against the order of the first appeal in case No.AA61/JSG/ET/2016-17, passed by the learned First Appellate Authority/Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, 'the ld. FAA/JCST') reducing demand to Rs.6,84,220.00 from Rs.9,72,002.00 raised by the learned Sales Tax Officer, Jharsuguda Circle, Jharsuguda (in short, 'the ld. STO') vide order of assessment dated 30.01.2016 passed under section 9(C) of the Odisha Entry Tax Act (in short, 'the OET Act') for the period 01.04.2009 to 31.03.2014.

2. The brief fact of the case is that the dealer-respondent is engaged in trading of bricks, boulders, stone chips, stone metal and execution of works contract. The dealer has effected purchases of goods namely, Bricks, Boulders, Sand, Stone chips, Stone metal, Bajuri, Hardware goods, Industrial consumables, Iron bars and Rods etc apart from effecting purchases of these goods the dealer-respondent reported to have purchased machinery and equipments from outside the State. The dealer has effected purchases of goods from outside the State of Odisha

as well as from dealers inside the State. During the period in question the dealer has effected purchases of machinery and equipment worth Rs.2,27,08,096.00 from outside the State and has effected purchases of stone chips of Rs.1,23,17,960.00 and bricks worth Rs.48,54,625.00 from unregistered dealers inside the State. Basing on the findings of audit visit report the Id. STO determined purchase value by adding freight charges @5% to the tune of Rs.11,35,405.00 to the purchase price of machinery and equipment. The Id. STO has made the instant dealer liable to pay ET @2% on purchase price of machinery and equipments to the tune of Rs.2,38,43,501.00 and @1% on Rs.1,23,17,960.00 (purchase of stone chips from unregistered dealers) and @1% on Rs.48,54,625.00 (purchase of bricks from unregistered dealers) calculated entry tax of Rs.3,01,864.00. Thus, the Id. STO completed assessment by raising demand of Rs.9,72,002.00 including penalty imposed u/s. 9(c)(5) of the OET Act to the tune of Rs.6,03,728.00 and interest levied u/s. 7(5) of the OET Act to the tune of Rs.66,410.00. Being aggrieved the dealer preferred first appeal before the Id. JCST with the following grounds for consideration (i) that the order passed by the Id. Assessing Authority is not justified as the order has not been issued in proper time. The assessee has been served the order on 22.11.2016 whereas the order has been passed on 30.11.2016. Which is not proper and the order has been passed back dated hence, liable to be quashed. (ii) The Id STO has added freight charges @5% on purchases of machinery and equipment from outside the State and calculated entry tax liability thereon which is not proper.(iii) Entry Tax has been levied on stone chips and stone metals which is unscheduled goods. (iv) The Id. STO has not considered the payment of entry tax amounting to Rs.70,267.00. The Id. JCST on careful consideration has held that addition of freight charges @5% amounting to Rs.11,35,405.00 on purchase value of machinery and equipment is not tenable as the purchases have been made on FOR basis. He has also held that the instant dealer is not liable to pay entry tax on purchase of stone chips and stone metal treating the same as minor minerals inasmuch as the Id. JCST in his order has observed that the Id. STO has levied entry tax on purchase of stone chips and stone metals considering the same as minor minerals on the basis of advance ruling, but the instant dealer has effected purchases of such goods during tax period

01.04.2009 to 31.03.2010 much before the order of advance ruling. Further the ld. JCST has allowed payment of Rs.70,267.00 to the instant dealer as the ld. STO has not taken into consideration the payment of entry tax to that extent. Accordingly the appeal order resulted in demand of Rs.2,87,782.00 including penalty of Rs.1,71,418.00 under section 9(c)(5) of OET Act and interest charged to the tune of Rs.30,655.00 for delayed payment of admitted tax against the tax, penalty and interest amounting to Rs.9,72,002.00 demanded by the ld. STO.

3. Being aggrieved the State assailed the order of the Ld. JCST filing the grounds of appeal as follows:-

- (i) The order of the ld. First Appellate Authority appears to be unjust and improper.
- (ii) The ld. First Appellate Authority has simply swayed away by the contention of the dealer that sand, chips are not mineral (minor mineral) under General Act to be included under item No.59 of scheduled goods.
- (iii) **REGULATION MINERALS MAJOR MINERAL/MINOR MINERAL ACT** states that minerals are classified into two groups i) Major minerals and ii) Minor minerals. Minor mineral have been defined under section 3(e) of Mines and Minerals (Regulation and Development) Act, 1957. They include building stones, gravel, ordinary clay, ordinary sand, limestone used for lime burning, boulders, kankar, murum, brick earth, bentonite, road metal, slate, marble, stones used for making household utensils etc. Therefore, all other minerals not defined as minor minerals in the said Act are treated as major minerals. They include coal, manganese ore, iron ore, bauxite, limestone, kyanite, sillimanite, barites, chromite, silica sand, fluorite, quartz, sand used for stowing purposes in coal mines and many other minerals used for industrial purposes.

Entry 54 of Union list-I & Entry 23 of State list-II of seventh schedule of the Constitution of India empowers the Union & State Government respectively for management of minerals. Grant of mineral concession for major minerals is governed by the Rules and Regulations formulated by Central Government and are therefore same throughout the country. Rules for grant of concessions of minor minerals

are framed by the State Government as per powers delegated under section 15 of Mines and Minerals (Regulation and Development) Act, 1957. When the mineral Act states that minor minerals are the minerals in all sense, it is not understood how the Id. JCST has differed from it.

- (iv) The Hon'ble Apex Court in the case D.K. Tridevi & Sons Vs. State of Gujarat as reported in AIR 1986 SC 1323 clearly spelt the definition. The term minerals i.e. in 3(e) include minerals which are minor minerals. So it cannot be inferred that minor minerals are not minerals.
- (v) The Hon'ble Odisha Sales Tax Tribunal in ARA No.11/2012-13 dt.17.07.2013 had already observed that the stone creating stone chips are liable for payment of entry tax @1%. So the observation of the Id. First Appellate Authority is unjustified.
- (vi) When the statute mandates penalty it is to be imposed without any discretion as observed by the Hon'ble Apex Court in the case of 18 VST 180 SC Dharmendra Textiles as well as 54 VST 1 in case of Jindal Steels it must be strictly construed and followed.
- (vii) The order of the Id. First Appellate Authority may be quashed and assessment order may be restored.

4. AT the time of hearing Shri S.K. Pradhan, Ld. Addl. Standing Counsel (C.T) appearing on behalf of the State has reiterated the grounds of appeal filed. He has taken the contention that the Id. JCST is not just and proper in holding that stone chips and stone metals and sand are not scheduled goods. He took the only contention that these items are scheduled goods covered against sl. No. 59 of Part-I of schedule appended to the Odisha Entry Tax Act and exigible to entry tax @1%. As these items stone chips, stone metal and sand are minor minerals the same are covered under the broad category of minerals appearing under sl. no.59 of Part-I of schedule appended to the OET Act as scheduled goods.

5. Shri U. Behera, Id. Advocate appearing on behalf of the dealer-respondent raised the technical ground discussed against sl. no.4 at page-3 of the first appeal order. He has vehemently argued that the order passed by the Id. STO is back dated and liable to be quashed for the assessee has been served the order on 22.11.2016 whereas the order was passed on 30.01.2016. However, he has not disputed the exigibility

of these items to entry tax @1% coming under sl. No. 59 of Part-I of the OET Act as minor minerals covered under the broad category of minerals. However, the dealer-respondent has not filed cross objection.

6. Heard the rival contentions, impugned orders of assessment as well as appeal, grounds of appeal filed and records pertaining to assessment and appeal. Two points of disputes involved in this case to be adjudicated here are as to whether the ld. JCST is justified in holding the opinion that the items stone chips and stone metals are not scheduled goods as minor minerals coming under sl. no. 59 of Part-I of schedule appended to the OET Act and whether the ld. JCST is justified in deleting penalty which is mandatory in nature as per the statute? The findings of the ld. JCST is not just and proper so far taxing the items like stone chips, stone metals and sand are concerned on the following score. These items being minor minerals covered under the broad category of mineral appearing against sl. no.59 of Part-I of schedule appended to the Odisha Entry Tax Act. Hence the purchase value of these goods is exigible to tax at the appropriate rate under the OET Act It is not out of place to make a mention here that contention taken by the ld. Advocate on behalf of the dealer-respondent is not correct so far as passing of order on 30.01.2016 and service of the same on the instant dealer on 22.11.2016 is concerned. The ld. JCST discussing this matter has stated that the preliminary objection raised by the dealer-respondent is found to be technical in nature and do not hold ground as no prejudice has been caused to the dealer. At the time of hearing before the Bench the ld. Addl. Standing Counsel (C.T.) produced the relevant record from which it is noticed that the instant dealer has already received the order on 30.01.2016 and not on 22.11.2016 as contended hence the contention taken by the ld. Advocate on behalf of the dealer-respondent is not considered a fact being not corroborated by evidence. So far as the contention of non-imposition of penalty which is mandatory in nature taken by the State is concerned we are of the view that the ld. JCST has levied penalty under section 9(c)(5) of the OET Act on the entry tax payable amount arrived at by him as the ld. JCST had considered the aforesaid goods not liable to entry tax as minor minerals. Thus, non-consideration of penalty is out of the question. It is made clear that the items stone chips and stone metals

are minor minerals and exigible to entry tax so far as the sl. no.59 of Part-I of schedule appended to the OET Act is concerned. So in our considered opinion the minerals appearing in sl. no.59 is a broad one covering within it's ambit minor minerals. The items stone chips and stone metals being minor minerals cannot remain outside the ambit of the entry tax hence the contention taken by the State on the score is found reasonable and in accordance with the provision contained under the statute. In view of the above the order of the ld. JCST warrants interference.

7. In the result, the appeal is allowed in part and the order of the ld. JCST is set aside. The matter is remanded to the ld. STO to re-compute the tax, penalty and interest liability of the dealer with reference to the observations made above in accordance with the provisions contained under the law within a period of four months from the date of receipt of this order.

Dictated and corrected by me,

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

I agree,

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

Sd/-
(Subrat Mohanty)
Judicial Member-II