BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 11 (ET) of 2015-16

(Arising out of order of the learned Addl. CST (Appeal), South Zone, Berhampur in Appeal Case No. AA (ET) 92/2009-10, disposed of on dated 28.11.2014)

Present: **Shri A.K. Das, Chairman**
Shri S.K. Rout, 2nd Judicial Member
&
Shri S. Mishra, Accounts Member-II

M/s. Lalchand Jewellers Pvt. Ltd.,
Lalchand Complex, Station Square,
Bhubaneswar ... Appellant

-Versus-

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

For the Appellant : Sri N.K. Das, Advocate &
Sri K.R. Mohapatra, Advocate
For the Respondent : Sri M.L. Agarwal, S.C. (CT)

Date of hearing: 13.01.2022 *** Date of order: 03.02.2022

O R D E R

The dealer-appellant has filed this second appeal assailing the order dated 28.11.2014 passed by the learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (hereinafter called as 'first appellate authority') in Appeal No. AA (ET) 92/2009-10 thereby enhancing the tax demand to ₹15,27,921.00 from

₹1,52,862.00 raised by the Assessing Authority (Entry Tax), Bhubaneswar Range, Bhubaneswar (in short, 'assessing authority') for the tax period August, 2006 to May, 2009 by exercising power u/s. 9C of the Odisha Entry Tax Act, 1999 (in short, 'OET Act').

2. The relevant facts of the case leading to the filing of the present appeal are that the dealer-assessee is a Private Limited Company having its place of business at Bhubaneswar and deals with both scheduled goods and unscheduled goods like gold and silver ornaments, jewellery, pen, watches, leather goods, packing materials, old gold, gold bullion, diamond set etc. and maintains purchase register both for inter-State and intra-State purchases. The tax audit was conducted in respect of the dealer-Company for the tax period August, 2006 to May, 2009 and on completion of the tax audit, assessment proceeding u/s. 9C of the OET Act was initiated and notice was issued in Form E-30 to it. On receipt of the notice, the dealer appeared through its authorized person Sri Niranjan Das and caused production of books of account consisting of purchase register supported with purchase invoices in respect of purchases made both from inside and outside the State of

Odisha. On verification of the books of account produced before the assessing authority, it found that the dealer-Company purchased goods worth ₹1,51,74,57,693.00 and ₹42,86,75,052.13 both from inside and outside the State of Odisha. Besides that the dealer also received jewellery for an amount of ₹97,04,76,412.00. Accordingly, the GTO of the dealer-Company was determined at ₹291,66,09,157.13 on which the dealer claimed deduction of ₹139,99,73,798.00 towards unscheduled goods and ₹42,34,56,201.13 towards value of goods purchased from the local area.

2(a). On confrontation of the Audit Visit Report (AVR) wherein it was alleged that the dealer-Company had not paid entry tax @ 1% on purchase of plastic goods worth ₹29,71,198.79 used as packing materials purchased from outside the State during the tax period from September, 2008 to May, 2009 although he paid entry tax upto August, 2008 and entry tax @ 2% on purchase of watches valued ₹47,75,605.00 purchased from outside the State during the period from June, 2008 to May, 2009, it was submitted that the goods purchased by the dealer during the period from September, 2008 to May, 2009 for the purpose of packing were not plastic goods and were not coming under the

category of schedule goods for which he did not pay the entry tax. The assessing authority on verification of the sample goods observed that the same was a product of rexine which was taxable @ 1% as per the entry at Sl. No. 90 of Part-I of the Schedule. So far as watches are concerned, the same might be manufactured and assembled by any electronic technician and the Company was required to pay entry tax @ 2% on purchase value of ₹47,75,605.00. The assessing authority determined the GTO for the tax period August, 2006 to May, 2009 at ₹291,66,09,157.13 and allowed deduction of ₹139,99,73,798.00 towards unscheduled goods and deduction of ₹42,34,56,201.13 towards purchase value of scheduled goods purchased within the local area of BMC. The TTO was determined at ₹109,31,79,158.00 on which tax was calculated at two taxable rates i.e. @ 1% on ₹108,09,31,679.00 and @ 2% on ₹1,22,47,479.00 and total entry tax raised at ₹1,10,54,266.00 and penalty was calculated at ₹59,424.00 on withholding tax on purchase value in respect of packing materials and the entry tax together with penalty was calculated at ₹1,11,13,690.00. The dealer having paid

₹1,09,54,828.00, extra demand of ₹1,58,862.00 was raised for the period under assessment.

2(b). The dealer-appellant being aggrieved with such finding of the assessing authority preferred appeal before the first appellate authority mainly on the grounds that tax on watches had not been paid in view of the judgment dated 18.02.2008 passed by the Hon'ble High Court of Orissa in case of M/s. Reliance Industries Ltd. in O.J.C. No. 6515/2006 (16 VST 85); that the imposition of penalty u/s. 9C(5) of the OET Act was excessive and not in accordance with law; and that the assessing authority while completing the assessment had ignored the judgment of the Hon'ble High Court of Orissa and the assessment framed was otherwise bad in law and not maintainable.

2(c). It is pertinent to mention here that the assessment order passed u/s. 9C of the OET Act for the period from 01.08.2006 to 31.05.2009 was scrutinized by the A.G. (Audit) and on such scrutiny, the assessment order was found to be erroneous resulting in under assessment of tax liability. The assessment order was objected on the ground of treating the diamond jewellery purchased from outside local area worth ₹20,49,24,582.00 as unscheduled

goods. In view of such audit objection, notice for suo motu revision of assessment order was issued by the Addl. CST (Revenue) to the dealer-appellant, who appeared and objected to the initiation of suo motu revision on the ground that the first appeal was pending before the first appellate authority against the same assessment order. The Addl. CST (Revenue) on considering such objection remitted the record of suo motu proceeding to the first appellate authority for consideration of the same along with the appeal. Learned first appellate authority on consideration of the explanation submitted by the dealer-appellant and materials on record, enhanced the tax demand to ₹15,27,921.00 from ₹1,52,862.00 as raised by the assessing authority with the following observations :-

(i) Packing materials used for packing of gold and diamond should not be forcibly dragged under the ambit of 'rexine' and the same do not fall under the scope of entry at Sl. No. 90 of Part-I of the Schedule under the OET Act and thus, not exigible to entry tax;

(ii) The appellant-Company is required to pay entry tax @ 2% on purchase value of ₹47,75,605.00 towards purchase of watches;

(iii) The purchase value of platinum disclosed by the appellant stands at ₹5,91,05,152.00, which is unscheduled goods and hence, the said value is to be deducted from the GTO; and

(iv) The purchase value of diamond worth ₹14,58,19,430.00 is exigible to entry tax @ 1% as per entry at Sl. No. 71 of Part-I of the Schedule to the OET Act.

3. The dealer-appellant being aggrieved with the aforesaid findings of the first appellate authority preferred the present second appeal mainly on three grounds that there was violation of principles of natural justice; that the FAA travelled beyond the audit visit report and that the jewellery studded with diamond not being scheduled goods was not exigible to entry tax.

4. It was submitted by the learned Counsel for the dealer-appellant that the first appellate authority has been empowered to enhance the demand by virtue of Section 16(7)(a)(ii) of the OET Act, but the said power can be

exercised only after giving due notice to the dealer-assessee. The first appellate authority without giving any notice, enhanced the assessment only basing on the audit objection, which should not have been done in view of the mandate of the provisions contained u/s. 9C of the OET Act read with Rule 89(3) of the OVAT Rules and Rule 23(5) of the OET Rules. The fact mentioned in the impugned order regarding confrontation of the audit objection to the learned Counsel for the dealer-appellant at the time of hearing of the appeal, is totally incorrect and is not based on materials on record. Learned Counsel for the dealer was never confronted with the audit objection and he did not submit anything in the matter regarding enhancement. The dealer has been seriously prejudiced for non-service of notice regarding enhancement of assessment. He further submitted that the jewellery studded with diamond does not come under any of the items mentioned in Part-I of the Schedule for which no entry tax should have been levied on such transaction. The first appellate authority wrongly interpreted the entry at Sl. No. 71 of Part-I of the Schedule and illegally imposed entry tax on it. It is well settled position of law that unless a particular term or expression has been defined in the statute

itself, it should not be understood in the scientific and technical sense, but in the popular sense that is to say in the sense in which it is understood by those dealing in them. The term 'jewellery studded with diamond' having not been defined in any of the provisions of the OET Act and there being no entry to that effect in Part-I of the Schedule, no entry tax should have levied on such items. The first appellate authority committed serious illegality in raising extra demand on the item like jewellery studded with diamond. He further argued that the assessment was initiated basing on the AVR against which the dealer-assessee preferred appeal before the first appellate authority. So, both the forums below should have taken into consideration only the materials available in the AVR. The enhancement order passed by the first appellate authority taking into consideration the audit objection is illegal and unwarranted. Learned Counsel for the dealer-appellant to substantiate its contention relied upon the decision in case of **Bhushan Power & Steel Ltd. Vs. State of Orissa and others, reported in [2012] 47 VST 466 (Orissa)**.

5. On the other hand, learned Standing Counsel (CT) for the revenue, supporting the impugned

order in terms of the cross-objection filed by it, vehemently urged that the first appellate authority has clearly observed that the dealer was confronted with the materials under suo motu revision proceeding at the time of hearing of the appeal and the learned Counsel for the dealer, in reply, submitted to consider his written response filed in the suo motu revision and on the basis of such submission, the dealer was heard on merit and appeal was disposed of thereafter. In course of hearing of the appeal, the dealer-appellant being fully conscious of the fact that the question of enhancement of assessment would be considered, participated in the hearing and after due opportunity of hearing to the dealer-appellant, the appeal was disposed of on merit. So, the plea taken by the dealer-appellant that he was not given opportunity of hearing is falsified from the facts emerging from the impugned order. The law does not require service of notice in any particular manner. It only requires that the opportunity of hearing should be given to the dealer before enhancement of assessment. The dealer being conscious of fact of enhancement having participated in the hearing of appeal, no prejudice has been caused to him. He strenuously argued that there being no dispute on the

purchase of jewellery studded with diamond by the dealer-appellant, the first appellate authority did not commit any illegality in considering the question of enhancement on the basis of the audit objection. The first appellate authority did not take any new material while enhancing the assessment. It only basing on the admitted fact enhanced the assessment, which is legally sustainable. So far as the question of entry tax on jewellery studded with diamond is concerned, he submitted that the diamond is a precious gem stone which comes under entry Nos. 63 and 71 of Part-I of the Schedule. Therefore, there is no illegality in enhancing the assessment holding the jewellery studded with diamond as scheduled goods. He submitted to dismiss the appeal and confirm the impugned order of the first appellate authority.

6. In view of the rival contention of the parties, the following three issues emerged for consideration by this Tribunal:-

(i) Whether there is violation of principles of natural justice for not giving notice of enhancement to the dealer-assessee by the first appellate authority ?

(ii) Whether the first appellate authority has travelled beyond the AVR while passing the impugned order and

the same is in contravention of law laid down by the Hon'ble Court in case of Bhushan Power & Steel Ltd. (supra) ? and

(iii) Whether the jewellery studded with diamond is scheduled goods as per entry Nos. 63 and 71 of Part-I of the Schedule and is exigible to entry tax ?

7. The first two issues being pivotal issues are taken up together for adjudication. Before addressing on both these issues, it is profitable to discuss some relevant facts for effective adjudication of the dispute. The assessment proceeding u/s. 9C of the OET Act was initiated against the dealer-assessee on the basis of the AVR in which the assessing authority raised tax demand of ₹1,52,862.00 including penalty of ₹59,424.00. The dealer challenging the aforesaid demand raised by the assessing authority preferred first appeal before the first appellate authority, who enhanced the assessment to ₹15,27,921.00 from ₹1,52,862.00. It is alleged by the dealer-appellant that the first appellate authority while enhancing the assessment did not give any notice to him and no opportunity of hearing was given for which he was seriously prejudiced. It is pertinent to mention here that on the basis of the A.G.

objection, suo motu revision was initiated by the Addl. CST (Revenue) in which notice was issued to the present dealer-appellant, who on receipt of such notice, appeared before the Addl. CST (Revenue) and objected the initiation of suo motu revision proceeding on the ground that the appeal was pending before the first appellate authority against the order of assessment, which has been subject matter of suo motu revision and such suo motu revision was not maintainable in view of bar contained u/s. 18(2)(ii) of the OET Act. Learned Addl. CST (Revenue) considering such objection of the dealer-appellant transferred the suo motu revision proceeding to the first appellate authority for considering the enhancement of assessment. The first appellate authority while disposing of the appeal considered the question of enhancement and enhanced the tax demand raised by the assessing authority. It is vehemently urged by the learned Counsel for the dealer-appellant that the first appellate authority on receipt of suo motu revision proceeding from the Addl. CST (Revenue) should have issued notice to the dealer-appellant disclosing his intention to make such enhancement and should have afforded reasonable opportunity of hearing. The first appellate authority violated

the principle of natural justice by not giving a separate notice to the dealer before making enhancement. Per contra, learned Standing Counsel (CT) vehemently urged that the dealer-appellant being fully aware of the subject matter of dispute, participated in the hearing and the first appellate authority after giving due opportunity of hearing enhanced the assessment. There is no illegality or impropriety in such action of the first appellate authority. Now, the question arises whether under the above circumstances, it can be said that there is violation of natural justice on account of which the impugned order of the first appellate authority is vitiated. Before answering this question, we feel it proper to refer some relevant provisions with regard to the power of the first appellate authority to enhance the assessment and the provisions regulating the said power. Section 16(7) of the OET Act provides that –

> "(7) In disposing of an appeal, the appellate authority may after giving the appellant a reasonable opportunity of being heard and after conducting such enquiry as he may deem necessary, -
>
> (a) in the case of an order of assessment of tax or levy of interest or imposition of penalty, -

(i) confirm, reduce or annul the assessment of tax, or the levy of interest or imposition of penalty, if any; or

(ii) **enhance the assessment including any part thereof whether or not such part is the subject matter in the appeal; or**

(iii) set aside the assessment and direct the assessing authority to make a fresh assessment after such further enquiry as may be directed; or

(b) in the case of any other order, confirm, annul or modify such order."

Rule 23(5) of the OET Rules stipulates that-

"(5) Except for the procedure expressly provided in this rule in respect of appeal under Section 16 of the Act, the provisions under VAT Act and the Rules made thereunder for appeal shall, mutatis mutandis, apply."

Rule 89(3) of the OVAT Rules, 2005 provides that-

"The appellate authority shall not enhance an assessment or penalty without giving the appellant a reasonable opportunity of being heard against such enhancement."

8. On reading of the above provisions under the OET Act and OVAT Act, we find that the law mandates giving reasonable opportunity of hearing to the assessee before enhancement. There is no mention of giving any

statutory notice in any prescribed form to the dealer-assessee before enhancement of the assessment. Now, the question arises whether in the facts and circumstances of the present case the dealer can be said to have been given a reasonable opportunity of hearing. There is no dispute in the present case that the learned Addl. CST (Revenue) after audit objection, initiated suo motu revision for enhancement of assessment in which the dealer-assessee was noticed and on receipt of the notice, the dealer appeared and objected to the initiation of suo motu revision because of the pendency of appeal before the first appellate authority against the same assessment order, which was also subject matter of revision. There is also no dispute that the learned Addl. CST (Revenue) considering such objection of the dealer-assessee transferred the suo motu revision to the first appellate authority for his consideration while disposing the appeal. It appears from page-4 of the impugned order of the first appellate authority that it has confronted materials under suo motu revision proceeding to the learned Advocate for the dealer-appellant at the time of hearing of the appeal and in reply, learned Advocate for the dealer-appellant contended that the dealer had already filed his submission in response

to the notice for suo motu revision which hold good at the time of hearing of the appeal. In view of such finding of the first appellate authority, it cannot be said that the dealer-appellant was not aware of question of enhancement and was not given reasonable opportunity of hearing. In course of hearing of the second appeal, learned Counsel for the dealer seriously disputed this portion of the finding of the first appellate authority and contended that he had not made any submission before the first appellate authority. The finding of the first appellate authority cannot be disbelieved on mere denial of the learned Counsel for the dealer-assessee as sanctity is attached to the order of the Court and there is no allegation of malafide against the first appellate authority for observing such fact. It is clearly borne out from the record that the first appellate authority though had not given notice of enhancement to the dealer-appellant, he had given reasonable opportunity of hearing to the dealer, who being fully aware of question of enhancement, participated in the hearing of the appeal. Therefore, it cannot be said that there is violation of principle of natural justice for non-service of notice on the dealer-appellant regarding the enhancement of assessment as the provisions

contained under the OET Act does not require for giving any such notice to the dealer in any prescribed form. Simply giving opportunity of hearing to the dealer-appellant will suffice the purpose. It is further observed that the enhancement of assessment was made only on interpretation of statute on the basis of admitted facts. It is not that the first appellate authority took into consideration any new material while enhancing the assessment. The dealer-assessee undisputedly purchased jewellery studded with diamond, which according to the first appellate authority, was scheduled goods in view of entry at Sl. No. 71 of Part-I of the Schedule. The enhancement having been made on pure interpretation of statute and the appellant being fully aware of question of enhancement having participated in the hearing of the appeal, no prejudice has been caused to him and there is no violation of principle of natural justice for not giving written notice to the dealer appellant.

9. The second question which was raised before this Tribunal is that the first appellate authority travelled beyond the AVR for which the impugned order is vitiated. There is no dispute at bar that the assessing authority has

no power/authority to utilize any material against the dealer other than the materials available in the audit visit report. Learned Counsel for the dealer-appellant relying on the decision in case of **Bhushan Power & Steel Ltd. (supra)** argued that the first appellate authority could not have travelled beyond the AVR while making enhancement. On perusal of the impugned order of the first appellate authority and the materials on record, we are of the humble view that the first appellate authority has not transgressed beyond the AVR and the enhancement has been based on the basis of the AVR. No new material has been considered by the first appellate authority. The A.G. objection was raised regarding under assessment on the basis of the existing material furnished along with the AVR. The dealer was under-assessed by the assessing authority only on wrong interpretation of the statute, which was objected by the A.G. (Audit) and it was pointed out that the jewellery studded with diamond will squarely come under entry at Sl. No. 71 of Part-I of the Schedule. The first appellate authority also has not taken into consideration any new material, it only basing on the observation in the AVR and objection raised by the A.G. (Audit) interpreted some of the entries in the statute

under the OET Act and held the jewellery studded with diamond as scheduled goods and enhanced the assessment. The facts and circumstances of the judgment relied upon by the dealer-appellant is squarely different and distinguishable from the facts and circumstances of the present case. In the cited case, the assessing authority utilized the FCR dated May 2, 2011 against the dealer while making audit assessment on the basis of the AVR dated September 30, 2010. In the instant case, no new material has been taken into consideration by the first appellate authority. Therefore, it cannot be said that the first appellate authority travelled beyond the AVR. So, this issue is answered in favour of the revenue and against the dealer-assessee.

10. The most important and crucial point is raised in the present appeal is whether the jewellery studded with diamond is exigible to entry tax or not. On perusal of the impugned order of the first appellate authority, we find that it has treated the jewellery studded with diamond as scheduled goods as per entry at Sl. No. 71 of Part-I of the Schedule making it exigible to entry tax @ 1%. Learned Counsel for the dealer-appellant challenging the impugned

order vehemently urged that the entry at Sl. No. 71 says that jewellery made out of gold and silver is scheduled goods and is exigible to entry tax. The jewellery studded with diamond cannot be said to be scheduled goods as per entry No. 71 and the order of the first appellate authority cannot be justified being against the sanction of law. He vehemently urged that in taxing matter unless the term and expression has been defined in the statute itself, it should be understood in their commercial parlance and with reference to their use and not to be understood in the scientific and technical sense. The jewellery made out of gold and silver cannot be equated with the jewellery studded with diamond as both the ornaments are different and distinct. The first appellate authority committed serious illegality in treating the diamond jewellery as scheduled goods under entry No. 71 of Part-I of the Schedule. On the other hand, learned Standing Counsel (CT) for the State supporting the impugned order of the first appellate authority urged that the diamond jewellery would also come within the entry at Sl. No. 71 as well as entry at Sl. No. 63 of Part-I of the Schedule. Diamond being a precious gem stone, it would squarely come under entry Nos. 71 and 63 of Part-I of the

schedule. In view of such submission of the learned Counsel for the parties, it is to be seen whether jewellery studded with diamond is scheduled goods or not. So, before answering this question, it would be proper to refer some of the dictionary meaning of the 'jewellery'.

11. The word 'jewellery' as has been defined in New Webster Dictionary of English Language, 1981: "Articles made of gold, silver, precious stones, or similar materials for personal ornaments". In Concise Oxford Dictionary, 'jewellery' is defined as "jewels or other ornamental objects especially for personal adornment, regarded collectively". From the above definition, it is clear that in the ordinary use of English language, the word 'jewellery' would cover collectively gold and gems sold by jewellers just as it covers jewels made of into article of adornment. Entry No. 71 says that jewellery made of gold and silver is scheduled goods. The diamond jewellery is also made of gold studded with diamond. Therefore, it would come under entry No. 71 of Part-I of the schedule. Moreover, entry No. 63 of Part-I of the Schedule says that precious or semi-precious gem stones are scheduled goods. There is no dispute that the diamond is a precious gem stone. Therefore, jewellery studded with

diamond would cover under entry No. 63 of Part-I of the Schedule. The first appellate authority rightly interpreted the entry No. 71 of Part-I and made the jewellery studded with diamond exigible to entry tax. There is no illegality in such finding of the first appellate authority. Law is well settled that when a particular expression is not given in the statute, it must be understood in its popular common sense i.e. in the sense how that expression is used everyday by those who use or deal with those goods. Unless the term and expression has been defined in the statute itself, it should not be understood in scientific and technical sense, but in the popular sense. The diamond jewellery is commonly understood as the jewellery made of gold studded with diamond. Therefore, the first appellate authority was fully correct in its approach in making the diamond jewellery exigible to entry tax holding it as scheduled goods under entry No. 71 of Part-I of the Schedule. The first appellate authority on the basis of observation made in the AVR has decided the issue and enhanced the assessment. It has not taken into consideration any extraneous material other than the facts mentioned in the AVR. The first appellate authority has not travelled beyond the AVR while enhancing the

assessment by the assessing authority. So, the impugned order of the first appellate authority does not warrant any interference.

12. In view of the foregoing reasons, the appeal filed by the dealer-appellant being devoid of any merit stands dismissed and the impugned order of the first appellate authority enhancing the assessment is hereby confirmed. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

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

I agree,

Sd/-
(S. Mishra)
Accounts Member-II