BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No. 110(ET) of 2006-07

(From the order of the ld. ACST (Appeal), Puri Range, Bhubaneswar, in First Appeal Case No. AA (ET) 213/BH.II/04-05, disposed of on 09.02.2006)

Present: Smt. Suchismita Misra, Chairman,
Sri Subrata Mohanty, 1st Judicial Member
&
Sri R.K. Pattnaik, Accounts Member-III

M/s. Orissa State Co-Operative
Milk Producers Federation Ltd.,
D-2, Sahid Nagar, Bhubaneswar. ... Appellant

- V e r s u s -

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

For the assessment period: 2000-01

For the Appellant ... Mr. R.K. Kar, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 07.08.2019 **** Date of order: 16.08.2019

O R D E R

S. Mohanty,
1st Judicial Member

A confirming order of assessment u/s.7 of the Orissa Entry Tax Act, 1999 (hereinafter referred to as, the OET Act raising demand of tax of Rs.52,94,655.00 is under challenge by the unsuccessful dealer before both the fora below in this appeal.

2. The case of dealer is, it is a registered dealer engaged in processing/manufacturing and sale of pasteurized milk, ghee, butter etc. For the purpose of manufacturing of the goods, it purchases milk

powder, plastic goods, chemicals, machinery, packing materials etc. from outside the State of Odisha. For the assessment period 2000-01, the dealer was subjected to assessment under OST Act and consequentially was also subjected to assessment under the OET Act. In the assessment, the assessing authority found that, the appellant has purchased raw-materials worth of Rs.4,54,90,634.00, purchase of schedule goods other than raw-materials for Rs.2,72,68,311.50, purchase of machinery and spares worth of Rs.1,36,13,241.80 and also sold schedule goods worth of Rs.54,90,76,869.02. It is further found that, the appellant has paid entry tax on purchase of spares for Rs.57,73,904.95 and treated the same to be taxable @ 1% instead of 2%. Similarly, the appellant has treated purchase of mini mix worth of Rs.19,04,399.00 as tax free. The assessing authority did not accept the same and treated the spares and machinery as exigible to tax @ 2%. The assessing authority further found that the appellant purchased raw materials for manufacturing. So he levied entry tax on the consumables and machinery as per rates applicable. the dealer has sold its products like pasteurized milk worth of Rs.48,92,084.50 and butter and ghee worth of Rs.5,98,29,784.52 during the year. As the same are schedule goods and liable to entry tax @ 1%, the assessing authority brought the above goods to the tax net of 1%. Accordingly, he completed the assessment to the best of judgment and purchase value of schedule goods and sales turnover of schedule goods are determined at Rs.8,63,72,188.26 and Rs.54,90,76,871.02 respectively. Computing entry tax on it at appropriate rates, the total amount payable comes to Rs.62,63,170.00. As the dealer has paid Rs.9,68,515.00, the balance amount of Rs.52,94,655.00 is raised as demand.

3. Being aggrieved with the demand, the dealer knocked the door of the first appellate authority, but to his ill luck, the first appellate authority did not interfere with the order of assessing

authority and as a result the demand of tax as raised remained undisturbed.

When the matter stood thus, the dealer preferred this appeal. Dealer's contention are, learned authorities below should have hold that, there is no reason for the authorities below to levy tax @ 2% on the purchase of machineries. Similarly, the mini mixture which treated as a machine actually is not a schedule goods but a food product on which no tax liability is there. The goods produced by the dealer are sold within the local area of Bhubaneswar Municipality, hence not exigible to Entry Tax. So, the TTO as determined by the fora below being erroneous, the tax liability as assessed is wrong. An additional ground as advanced in the hearing of the appeal such as, the very initiation of the proceeding under OET Act is erroneous without notice or assessment under the OET Act.

4. The appeal is heard without Cross Objection. However, in the argument Revenue has supported the findings in the impugned order.

5. On the facts and circumstances of the case, the substantive questions of law and facts raised for decision in this appeal are-

(i) whether the very initiation of assessment u/s.7 of the OET Act is erroneous for want of notice and as such the assessment is to be vitiated?

(ii) whether the impugned order which is an exparte order by the first appellate authority is not maintainable as proper opportunity of being heard was not extended to the dealer?

(iii) whether there is imposition of tax on selling of the goods in the local area as such the determination of tax liability is erroneous?

(iv) whether the mini mixture was wrongly treated as machinery is taxable under the OET Act though it is a food product.

6. To begin with, the learned Counsel for the dealer Mr. R.K. Kar argued that, the authority in M/s. Ram Kishan Rajkumar v. Assessing Authority and another decided on 23rd June, 2004 the Hon'ble Court has held that, separate notice under OET for assessment has to be given notwithstanding notice of assessment under OST statute and in the result, the Hon'ble Court has quashed the assessment and directed the taxing authority to initiate the proceeding a fresh by giving notice in accordance to law. Learned Counsel vehemently argued that, in application of the authority above, the present assessment should be annulled. On the other hand, learned Addl. Standing Counsel Mr. Raman appearing for the Revenue argued that, once the dealer has participated in the assessment proceeding and challenged the order of assessment before the appellate forum, he cannot raise the question on such technical latches on the part of the assessing authority afterwards. At the same time, learned Addl. Standing Counsel also advanced authority in Queens Collection annexed, wherein the Hon'ble Court has taken a view in consonance to authority in M/s. Ram Kishan Rajkumar (supra) but in the end directed the petitioner to appear and participate in the assessment proceeding. If both the authorities above taken into consideration, here it is held that, once it became an admitted fact that, no separate notice under OET assessment was given to the dealer, then the assessment by the assessing authority suffers from inherent defect, consequently it should be vitiated and the assessment should be done afresh by extending the dealer an opportunity of being heard.

7. Be that as it may, here it is held that, the assessment proceeding as adopted by the assessing authority is not in accordance

to law and the matter need to be remitted back to the assessing authority for assessment afresh.

8. The next question raised by the dealer is, the impugned order is an exparte order passed by the first appellate authority without affording an proper opportunity of being heard to the dealer, thereby there was violation of principle of natural justice. It is a fact that, the impugned order is passed setting the dealer exparte. The law is well settled that, an exparte order can be challenged in appeal and in the appeal the appellate court found that, the dealer should be given an opportunity of being heard. In that case, the impugned order before the appellate authority should be set aside and a fresh opportunity should be given to the dealer and as because a forum cannot deny to the dealer, so in the event the dealer pressed for remand of the case, the appellate court should consider the prayer sympathetically in favour of the dealer. However, in the case in hand, when the matter is remitted back to the assessing authority, then there is no need for remanding the matter back to the appellate authority.

9. The contention of the dealer is, the dealer sold goods in the local area and in accordance to sec.26 of the OET Act as it is held in the matter of Indian Metal & Ferro Alloys in OJC No.3995/2000 held by the Hon'ble Court, the goods produced by the dealer if sold within the local area is not exigible to Entry Tax. The Hon'ble Court has settled the principle while deciding the vires of the constitutional validity of the OET Act as follows.

In the case in hand, the assessing authority in absence of the dealer and without books of account produced before him has treated all the goods produced and sold by the dealer exigible to Entry Tax. Similarly, the first appellate authority in its exparte order also confirmed the order of the assessing authority so as to levy tax on the whole goods produced and sold by the dealer. Learned Counsel for the

dealer submitted that, the dealer is ready to furnish the books of account and connected documents which will reveal the exact amount of goods produced and sold by the dealer in the local area. On application of the ratio laid down by the authority in Indian Metal and Ferro Alloys (supra), the assessing authority in the remand case will scrutinize the register and connected documents of the dealer to decide the quantum of goods sold by the dealer in the local area on which Entry Tax will not be levied. Local area should be determined in accordance to the definition as per sec.2(f) of the OET Act.

10. The next plank of argument by the learned Counsel for the dealer is, the 'mini mixture' treated as machinery and levied with Entry Tax by the assessing authority is under misconception of the fact relating to the nature of goods. It is not mini mixture, a machine but mineral mixture, a food product of the dealer company, so it is not exigible to Entry Tax. Avoiding further discussion on this point, it can safely be held that, in the remand case the assessing authority will verify this point and give a finding that, whether mini mixture is a machine or is a product of the dealer and accordingly decide the tax liability, if any on it.

11. From the discussion above, we can sum up the findings as follows. (i) For want of notice for assessment under OET Act, the entire assessment is vitiated and the assessing authority is directed to assess the dealer afresh by giving proper opportunity of being heard to the dealer. However, no further notice is required in view of the decision in Queens Collection (supra) and the dealer is to appear before the assessing authority as narrated below. (ii) The exparte order by the first appellate authority as raised by the dealer-appellant is of no consequence in view of the remand of the case to the assessing authority. (iii) The sale of goods in the local area as levied with tax invoking sec.26 of the OET Act is to be reappraised, reinvestigated and recalculated in the light of the observation given by

the Hon'ble Court and to the extent the goods sold in the local area is to be treated as non-taxable. (iv) The nature of goods like mini mixture or mineral mixture is to be re-scrutinized and in the event it is found that, the goods is not a machinery but a product of the dealer, then it is to be treated as not taxable.

With the observation hereinabove, it is ordered.

The appeal is allowed on contest. The impugned order is set aside. The matter is remitted back to the assessing authority for assessment afresh in the light of observation hereinabove. The dealer is directed to appear before the assessing authority suo motu without waiting for any notice of hearing. The assessing authority is directed to dispose of the matter within a period of four months hence.

Dictated & corrected by me,

Sd/-
(Subrata Mohanty)
1st Judicial Member

Sd/-
(Subrata Mohanty)
1st Judicial Member

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

Sd/-
(R.K. Pattnaik)
Accounts Member-III