

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

S.A.No.51 (ET) of 2017-18

(Arising out of the order of the learned Addl.CCT(Appeal),South Zone,
Berhampur, in Appeal case No. AA.)ET)09/2010-11
disposed of on dtd.31.05.2017)

P r e s e n t: Shri A.K.Das, Sri. S.K.Rout & Shri S.M.Dash,
Chairman. Judicial Member-II Accounts. Member-III.

M/s.Ramakrishan Agencies,
At/Po:Jamal Lane, Jeypore,
Koraput.

... Appellant.

- V e r s u s -

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

... Respondent.

For the Appellant
For the Respondent

...N. Anand Raod, A/R.
...Mr. D.Behura, SC &
Mr.S.K.Pradhan, ASC.

Date of hearing: 21.12.2021

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Date of Order: 23.12.2021

ORDER

This appeal is directed against the order of the learned Addl. Commissioner of Sales Tax, South Zone, Berhampur, (in short, FAA Addl. CST) in first appeal No.AA.ET/09/ 2010-11 dated 31.05.2017, whereby, the assessment order passed by the assessing authority, Koraput Range, Jeypore has been confirmed imposing interest and penalty on the appellant on the amount of tax due under the OET Act for the impugned period.

2. The brief fact of the case is that the appellant is in the business of sale and purchase of kerosene oil, which is brought from outside the State i.e. from depo of Indian Oil Corporation, Vishakpatnam

situated at Andhra Pradesh. It makes no purchase within the state. The admitted position of the case is that the kerosene being a scheduled goods under the OET Act is liable for levy of entry tax at the rate of 1%. The audit visit report for the impugned period has reported that the dealer has not paid any entry tax from 05/08 to 09/09 on the ground of filing of SLP in the Supreme Court of India. Before the FAA, the appellant took a stand that the question of levy of tax on goods imported from outside the State was subject matter of controversy in a batch of writ application in case of Reliance Industries Vrs. State of Odisha before the Hon'ble High Court, (2008) 16 VST 85 (Orissa) in which the Hon'ble High Court vide para -30 of the said order have held that though OET Act is not ultra vires the Constitution of India, the legislature has no power to levy entry tax on goods coming from outside the State. The State of Odisha had challenged the decision of the Hon'ble High Court of Odisha in SLP No.14454 to 14778 of 2008 wherein, the Hon'ble Apex Court having stayed the operation of Para -30 of the judgement of the Hon'ble High Court of Odisha had directed parties/ respondents to pay 1/3 of the tax liability along with return till the conclusion of the case. The case of the appellant is that it was imp-lead in the said SLP and by virtue of being such impleadment, it has been claimed that the benefits of the interim orders of the SC as is available to the respondents, will be available to him also. The FAA having taken cognizance of the circumstances of the case, had pointed out that in the interim order of the SC, the Hon'ble Court specifically mentioned that the benefit is not available to dealers who have filed impleadments/ intervention petitions. Accordingly, he decided the GTO for the period to be Rs.10,11,30,012.00 and tax at the rate of 1% is decided to be Rs.10,11,300.00 against which the dealer has paid Rs.2,68,680/- and is required to pay balance amount of Rs.7,42,620.00. He upheld the levy of penalty at the twice rate as per 9(c) (5) of the OET Act which is calculated at Rs.14,85,240.00.

3. Being aggrieved by the order of the learned FAA, the appellant had filed the instant appeal disputing levy of tax and penalty as has been imposed on goods brought from outside the State.

4. Opening the argument, Shri N. Anand. Rao, the learned Advocate on behalf of the dealer, submitted that the entire tax demand has been paid in the meanwhile and the controversy is only with regard to payment of penalty which has been imposed by the STO and have been affirmed by the FAA. The Advocate urged that the dealer is also a petitioner in the batch case in Hon'ble High Court in the Reliance Industries case having its own writ petition bearing no. 4428 of 2010 which has been disposed of the Hon'ble Court by order dated 11.03.2010 in the decision of Reliance Industries Ltd. Vrs. State of Odisha and Others (2008) 16 VST 85 (Odisha). Thereafter, the learned Advocate submitted that though question of constitutional validity of OET Act is no more in dispute following the judgment of the Hon'ble nine judgements of the SC in the aforementioned civil appeals, the question of levy of penalty was subject matter of further controversy in entry tax matter led by WP(C) No.13736 of 2017 wherein Hon'ble High Court referred to the recommendation of the High Power Committee of the State which read as follows:

“In the light of the analysis made above the committee recommends the following guidelines for waiver of penalty, payment of interest and grant of other concessions specifying as follows:

(i) Penalty should not be levied/ imposed for non-payment of the withheld amount of Entry Tax, if there is no suppression of turnover, however, suppression of turnover, if any, should be dealt in as per law and levy of penalty should be made if permissible by law.

(ii) The parties are liable to pay interest as per Section 7(5) of the Odisha Entry Tax Act on the withheld amount @ two per centum per month till 30.06.2012 and @ one per centum per month thereafter as the

act was amended with effect from 01.07.2012 reducing the rate of interest will full discharge of their tax liability.

(iii) Additional time of up to a maximum of 5 years from the date of the order of the Hon'ble Apex Court, i.e. time up to 28.03.2022 or for convenience upto 31.03.2022 may be give on the request of parties by the Commissioner of CT and GST on case to case basis, for discharge of the tax dues along with interest @ one per centum per month for the entire period of delay on suitable monthly/ quarterly instalments till full discharge of their tax dues.

(iv) These recommendations may be applicable to the parties who had obtained a stay or interim order from the Hon'ble Supreme Court or Hon'ble High Court, regarding observation of the Hon'ble High Court in Para-30 of the order dated 18.02.2008 in W.P (C) No.6515/ 2006.

(v) These recommendations will be submitted to State Government for appropriate decision. Neither these recommendations nor the decision of the State Government thereon shall be cited as preceding in other cases under the Odisha Entry Tax Act, 1999 or any other tax Act.”

The Hon'ble Court after the perusal of the recommendations made by the high power committee of the Government has admitted the matter for consideration directing as follows:

“The petitioners will pay the tax amount as directed by the Hon'ble Supreme Court as well as interest w.e.f. 28.03.2017, on or before 31st of July, 2019.”

xxxxxx Interest for the period from 2010 to 2017 will be decided at final hearing. xxxxxx

On the strength of above submission, the appellant urged that the levy of penalty needs to be deleted.

5. Per contra, the Standing Counsel of the State, Shri D. Behuria, vehemently urged that the appellant is not entitled to any benefits by virtue of the interim order of the Supreme Court dated 28.03.2017 as it was not an appellant but was merely imp leaded in the

case and as such as per law he is not entitled to any concession flowing from that judgment of Hon'ble Apex Court. Secondly, he argued that there is no evidence that the appellant is a batch petitioner in Reliance Industries case to be covered by the concessions given by the Hon'ble High Court regarding the payment of penalty(supra).

6. We have carefully considered the contentions of the rival parties along with the assessment and appeal records. The undisputed position of the case is that the constitutional validity of the ET tax has been upheld by the Hon'ble Apex Court in their order dated 28.03.2017 by which the controversies regarding levy of ET has already been set at rest. The only surviving question is the payment of penalty as per the statute and payment of interest during the pendency of the matter before the Hon'ble High Court of Odisha and the Hon'ble Supreme Court of India. So far as the payment of penalty is concerned, the high power committee has categorically mentioned (supra) that no penalty would be levied or imposed for non-payment withheld amount of entry tax in paragraph no. 1 of the report as has been referred to by the Hon'ble High Court (supra). This recommendation of the State has been accepted by the Hon'ble High Court in their order dated 24.04.2009 arising in WP(C) No.13736 of 2017, wherein they have categorically directed (i) that interest shall be paid w.e.f. 28.03.2017 (ii) interest for the period 2010 to 2017 will be decided at the final stage of the hearing.

7. On the basis of aforementioned legal evolution, we are of the considered view that no penalty is to be imposed on the appellant which is to be deleted. Secondly, appellant will be liable for interest from 28.03.2017 to the present date at the operating statutory rate as per order of High Court (supra). Third issue is levy of interest from 2010 to 2017 i.e. during the pendency of case in various forum. This issue is left open to be decided by the Hon'ble High Court at the final stage of hearing by them. Therefore, the said issue i.e. levy of interest from 2010 to 2017 is left open since superior court is session of the matter. Whenever, Hon'ble Court

decides the issue, the present appellant who is petitioner before the Hon'ble High Court will be governed by such order and will be binding on him.

8. In view of this, the penalty of Rs.14,85,240.00 imposed by the STO and confirmed by the FAA is hereby deleted and the matter is remitted to the Assessing officer to calculate interest on the outstanding tax dues till the payment was made. The issue of levy of interest from 2010 to 2017 is left open and the appellant will be amenable to the final order of the Hon'ble High Court in this issue.

Dictated and Corrected by me,

**Sd/-
(Shri S.M.Dash)
Accounts Member-III.**

**Sd/-
(Shri S.M.Dash)
Accounts Member-III.**

I agree,

**Sd/-
(Shri A.K.Das)
Chairman.**

I agree,

**Sd/-
(Shri. S.K. Rout)
Judicial Member-II**