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

S.A.No.58 & 59 (ET) of 2005-06.

(Arising out of the order of the Ld.ACST Koraput Range, Jeypore, in First Appeal Case No.AAE(KOI)53/2003-04, AAE(KOI)69/2003-04 disposed of on 28.02.2005)

Present: Shri Sashikanta Mishra, Chairman — Shri Subrat Mohanty, Judicial Member-II — Shri P.C. Pathy, Accounts Member-I

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

- V e r s u s -

M/s. Kaling Auto Services, Royal Guest House Compound, Near Bus Stand, Jeypore. ... Respondent.

For the Appellant ... Mr. M. S. Raman, Addl. S.C.(CT).

For the Respondent ... Mr. S. Sundaram, Advocate.

Date of Hearing: 14.05.2018 ***** Date of Order: .2018

O R D E R

These second appeals are filed against the order of the Learned First Appellate Authority/ Assistant Commissioner of Sales Tax, Koraput Range, Jeypore (in short, 'the Ld. FAA/ACST') passed in appeal case no. No.AAE(KOI)53/2003-04, AAE(KOI)69/2003-04 on 28.02.2005 reducing the demand to Rs.83,187.00 from Rs.6,66,951.00 raised by the learned Assessing Officer/Sales Tax Officer, Koraput-I Circle, Jeypore (in short, 'the Ld. AA/STO') on 27.12.2003 for the period 2001-02 under section 7(4) of the Odisha Entry Tax Act, 1999 (in short, 'the OET Act') and reducing to Rs.1,49,340.00 from Rs.9,76,,762.00 raised by the very Ld. AA/STO on 31.01.2004 for the period 2002-03 under section 7(4) of the OET Act. As the facts and circumstances for the two years are common nature, the Ld.

ACST heard both the matter together and disposed of in first appeal in a common order as cited above.

The brief history of the cases for the years 2001-02 and 2002-03 are as follows:-

2001-02 :

The dealer-respondent in the instant case carries on business in two wheelers, three wheelers and four wheelers spare parts and accessories of all types of vehicles including tractors, spare parts and accessories of generator sets and pump sets, pump sets and their switches, tyres and tubes of two wheelers, four wheelers, three wheelers, lubricants, helmets and some raw-materials required for manufacturing and sale of trailers. The goods dealt in were purchased from inside the State as well as from outside the State. The dealer has maintained purchase, sale and stock accounts of all the vehicles, pump sets and generator sets. Separate register was also maintained for claiming set off of tax under OST Act against the sale of vehicles against payment of Entry Tax. The dealer-respondent has filed original returns disclosing gross turnover, taxable turnover and tax due under the Entry Tax Act at Rs.6,93,37,061.24, Rs.2,46,83,601.24 and Rs. 17,62,607.62 respectively. The dealer has disclosed through revised return gross turnover, taxable turnover and tax due at Rs. 7,67,35,,906.65, Rs.3,22,21,118.66 and Rs. 22,01,936.76 respectively. The instant dealer explained that filing of revised returns were occasioned due to wrong classification of taxable turnover as Entry Tax paid goods included in original return which mistake was detected after completion of annual audit of accounts for the year and the tax due was paid later-on the ld. STO taking into consideration revised returns filed at a belated stage due to miscalculation of taxable turnover and delay in payment of tax, has come to a conclusion that the instant dealer has intentionally suppress the turnover in the original return and shown in the revised return to make delay

for payment of the tax as per its convenience and irregular claim of set off under OST Act in absence of full payment of entry tax as admitted during the year, purchase of goods, without utilising waybills and completion of assessment under the principal OST Act, by enhancing the GTO of Rs. 6,00,000.00, the Ld. STO deducting 15% towards margin of profit arrived at purchase value at Rs. 5,22,000.00. In view of the above the Ld. STO rejected the books of accounts maintained by the dealer as irregular and incorrect and completed the assessment to the best of judgment by adding Rs.5,22,000.00 to the gross turnover disclosed at Rs. 7,67,35,996.65 through revised returns. The Ld. STO has imposed penalty of Rs.6,58,544.00 under section 7(5) of the OET Act on the ground that the instant dealer had not disclose tax amounting to Rs.4,39,029.14 in its original return and paid the same at a belated stage. Thus the assessment order resulted in demand of Rs.6,66,951.00. This led the instant dealer to carry the matter in first appeal before the Ld. ACST.

After careful consideration the learned first appellate authority taking into account deletion of enhancement under the OST Act deleted the addition of Rs. 5,22,000.00 enhanced by the Ld. STO. As the dealer-respondent had not disclosed the tax amount in its original returns and revised returns were not filed in time and due tax was not paid in time the Ld. STO had imposed penalty one and half time of non-disclosure of Rs.4,39,029.14 which is Rs. 6,58,544.00. The learned first appellate authority taking into consideration the fact that the instant dealer had paid due tax before the assessment and the entry tax is leviable @12% on vehicles which the dealer is to pay when the vehicle in not sold and thereafter he would get set up under OST Act to meet the end of justice, he reduced the penalty reasonably to Rs.80,000.00. Accordingly the demand was reduced to Rs. 83,187.00 which covers penalty of Rs. 80,000 and tax of Rs. 3,187.00.

2002-03

The instant dealer had filed revised return under the Act on 06.11.2003 gross turnover, taxable turnover and purchase of entry tax paid goods at Rs.8,89,84,493.92 and taxable turnover of Rs.4,95,94,963.49 and Rs. 3,93,89,830.43 respectively. While examining the books of accounts the Ld. STO found that the dealer had utilised 10 waybills for purchase of two wheelers lift, watches to give on free gift while selling the vehicles as per the company gift, chain cleaning stands, air hose real, two wheeler lift, steel furniture for use in show house, oil dispenser drum, engine holding fixture and signboard for Rs.3,92,535.22 which were not shown in the purchase turnover in the revised return and not included under taxable turnover exigible to entry tax @2%, the Ld. STO had added the purchase turnover to the turnover of purchases disclosed by the instant dealer the Ld. STO has further added Rs.1,19,57,068.48 due to differential less turnover shown in revised return in gross turnover in comparison to the figures filed through original return. The ld. STO has completed the assessment to the best of her judgment by rejecting the books of account maintained by the dealer as untrue and incomplete and due to non-maintenance of stock of spare parts and purchase of four wheelers and spare parts without utilising waybills and non-surrendering two nos. of waybills and filing of revised return for every month beyond prescribed limit determined the GTO and TTO at Rs.10,13,34,097.62 and Rs.6,19,44,567.17 apart from allowances purchase of entry tax paid goods to the tune of Rs.3,93,000.00. Accordingly the Ld. STO completed the assessment for the period raising demand of Rs.9,76.762.00 which includes penalty amounting to Rs. 8,50,000.00 under section 7(5) of the Entry Tax Act i.e. one third of the differential tax due disclosed in revised return. This led the instant dealer to carry the matter in first appeal before the Ld. ACST.

The learned first appellate authority considered the contentions advocated on behalf of the dealer at the time of hearing. As the enhancement of Rs.25,00,000.00 made under the OST Act for the period was already deleted at the first appellate stage and the dealer has already paid tax due under the act before assessment and has properly explained non-production of accounts of two waybills for which indemnity bonds were filed, deleted the enhancement of Rs.1,23,49,603.00 made by the Ld. STO but considering the fact of filing of revised return and payment of tax at belated stage reduce the penalty imposed by the Ld. STO to the tune of Rs.8,50,000.00 under section 7(5) of the OST Act to Rs.1,50,000.00. The Ld. ACST considering that imposition of penalty @150% of the tax due not paid in due date is completely high and in the light of the decision of Hon'ble Supreme Court in the case of M/s. Hindustan Steels Ltd. Vrs. State of Orissa, 25 STC 211, reduced the penalty imposed to Rs.1,50.000.00 on the ground that the dealer has paid tax before the assessment and as entry tax is 12% for vehicle it is hardship to pay the same without selling the vehicles later-on getting set off under the OST Act. Accordingly the learned first appellate authority passed the appeal order reducing the demand from Rs.9,76,762.00 to Rs.1,49,340.00.

Being aggrieved with the orders of the Ld. ACST the State has preferred second appeal before this Tribunal with the following grounds:-

(i) The order of the learned ACST is unjust, illegal, arbitrary and bad in law.

(ii) The learned STO had rejected the books of accounts of the dealer and made reasonable enhancement on his returned turnover taking into consideration a number of irregularities and deficiencies in the conduct of his business and maintenance of

accounts, but the learned ACST deleted the above enhancement under the Entry Tax Act without valid and convincing reason.

(iii) The dealer is found to have purchased and transported vehicles and their spare parts unaccompanied by government way bills thereby leaving no record of transport of his goods in the check gates that fall on the way or in the hands of Mobile Checking Official of the Sales Tax Department.

(iv) While bringing four wheelers from the factory of the company outside the State, no way bill was accompanied for which the dealer has taken the contention that the vehicles came running on the road by the driver of the company. But in this case nothing prevented the consigner company to send the filled in way bills with their drivers so that they could have shown the same in the check gates and got checked.

(v) Similarly in case of the spare parts and accessories etc. brought through courier, the dealer could have very well brought the same along with the statutory way bills, so that, that could have been checked by the check gate officer when the same passed through the check gate or by any field official of the Sales Tax Department while checking the transport on the road.

(vi) It has also been admitted by the dealer that although physically the goods moved in the transport, out of several number of invoices only few invoices were entered in the way bill leaving some un-entered. From the above, it is proved that only a portion of a purchase transaction of the dealer was reflected in the way bill for which record was kept in the check gate leaving substantial amount of purchase un-recorded.

(vii) On this score, the dealer cannot escape from his own responsibility by throwing the fault on the consigning company that they committed mistake in not reflecting the transactions of all the invoices in the way bill.

(viii) For the year 2001-2002 Entry tax on the purchase of two wheeler, three wheelers and four wheelers comes to Rs.21,36,106.13

whereas the set off claimed by the dealer is Rs.21,39,185.00 for which the dealer's explanation is the mistake in calculation. The above mistake admitted by the dealer himself corroborate the facts that the books of accounts of the dealer have not been maintained correctly and properly for which the learned STO has rightly rejected the same and enhanced the turnover.

(ix) The dealer has taken the contention that he received goods (spare parts and accessories) through the Agents of the Private business persons, who delivered the goods in his place of business. From the above it is clear that the dealer got ample scope to account for purchase of any amount he liked as per his own sweet will as there was no documentary evidence in shape of way bill, challan or any transport documents checked and kept in check gates thereby leaving scope for verification.

(x) On the above back ground of the adverse materials the learned STO had made very reasonable enhancement on the turnover of the dealer for both the years, but the learned ACST has deleted the same under the Entry Tax Act on a single and simply plea that no suppression of purchase or sale has been detected and established by the department and established by the department which is unjust and erroneous.

(xi) The learned STO had imposed penalty u/s. 7(5) of the E.T. Act for each year for non-filing of return and non-payment of due tax in time. But the leaned ACST drastically reduced the same without any valid reasons.

(xii) The learned ACST in his order has observed that "the dealer has filed revised statement for each month abnormally late with intention to with-held admitted tax. Non-payment of tax with monthly statement and returns as per law is treated incomplete return which attracts penal provision u/s.7(5) of the O.E. T. Acts.

(xiii) While reducing the above penalty the learned ACST has observed that payment of Entry Tax @12% is hardship to the dealer because he has to pay the same before selling the vehicles. But on the face

of the codal provision as remarked by the learned ACST in the preceding para, his action in drastically reducing the quantum of penalty with the above observation is inconsistent, irrelevant and hence not sustainable under the Act.

(xiv) The order of the learned ACST being devoid of merit may be quashed and that of the leaned STO being just and proper may be restored.

(xv) Other grounds, if any, will be urged at the time of hearing.

The learned Advocate, Mr. M. S. Raman, appearing on behalf of the appellant-State reiterated the grounds of appeal filed earlier and has taken the contention that the order of the learned ACST is unjust, illegal and arbitrary and bad in law. On the ground that the learned assessing officer had completed the assessment to the best of judgment taking into consideration a number of irregularities and deficiencies in the conduct of business and maintenance of accounts by the dealer-respondent. The deletion of enhancement was made without valid and convincing reasons. The dealer has purchased and transported the goods dealt in from outside the State unaccompanied by government waybills and has brought spare parts and accessories etc. without using statutory waybills so as to avoid checking by the check gate officers and field officials of the sales tax department. Admission of wrong claim of set off of entry tax is indicative of fact that the books of accounts have not been maintained correctly and properly by the dealer-respondent. Receipt of goods (spare parts and accessories) through the agents of private business persons who delivered the goods in the place of business of the dealer has created ample scope for the dealer to account for purchase amount of goods as per its own sweet will and the learned ACST has drastically reduce the penalty imposed under Section 7(5) of the ET Act for each year for non-filing of return and non-payment of due tax in time. It is also contended that the orders of the learned ACST being devoid of merit may be quashed and that of the

learned STO being just and proper may be restored. No cross objection has been filed by the dealer-respondent. The main thrust of argument of the Ld. Addl. Standing Counsel (C.T.) is that the Ld. ACST has drastically reduced the penalty imposed by the Ld. STO u/s. 7(5) of the OET Act for which he is not legally empowered.

At the time of hearing, Mr. S. Sundaram, the learned Advocate appearing on behalf of the dealer-respondent argued that the enhancement of turnover and imposition of penalty by the learned STO was not justified. At the time of hearing he furnished written submissions touching points in support of the order passed by the learned ACST as just and proper. He has furnished written submission touching the relevant points pertaining to the period 2001-02 and 2002-03 separately. So far as the year 2001-02 is concerned, it was argued that the learned STO has not found any discrepancies but added the purchase value of sale suppression adopted at Rs.6,00,000.00 for the very period under the principal OST Act. As the enhancement made was deleted by the learned first appellate authority under the principal Act and due to urgency the dealer-respondent brought cars and spare parts from outside the State without utilising government way bills but the dealer has entered in the books of accounts all the purchases and paid due tax on purchases of goods brought from outside the State without utilising government way bills, there is no material in the record to reject the books of accounts. Basing on some irregularities in maintenance of books of accounts and for non-maintenance of stock accounts in case of spare parts. In support of his argument he has cited the case of M/s. Khalli Mohapatra and Others Vrs. State of Orissa and the case of State of Odisha Vrs. Gourab Enterprises (1993 19 STC). Regarding imposition of penalty it has been explained that the dealer respondent has filed the revised statement/returns for different months in the financial year 2001-02 along with annual returns prior to assessment. Hence there is no mens-rea to evade

entry tax. He has brought to the notice of the bench that the provision of Section 7(5) of the OET Act and argued that the dealer respondent has filed all the monthly statement and returns and had paid due admitted tax hence imposition of penalty under Section 7(5) of the OET Act is not at all applicable. Further, he has argued that the imposition of penalty against the principles laid down by the Hon'ble Supreme Court in the case of Hindustan Steels Ltd. Vrs. State of Orissa 25 STC 211 (SC). He further took the contention that in the section the use of word 'MAY' connote that the imposition of penalty is not mandatory. The authority has to determine the amount between the minimum and maximum for imposition as penalty by exercising his discretionary power. The learned appellate authority has rightly reduced the quantum of penalty basing on the principle of natural justice as well as judicially deciding the points like levy of entry tax @12% for vehicles is a hardship on the part of the dealer-respondent without selling the vehicle later on getting set off under the OST Act.

In the written submission the Ld. Advocate on behalf of the dealer-respondent also explained that the learned first appellate authority has already deleted the enhancement of Rs. 25,00,000.00 made over and above the returned turn over under the principal Act (Odisha Sales Tax Act, 1947), he has vehemently opposed the enhancement of Rs.1,23,49,603.68 including the enhancement made under the OST Act but without explaining the reasons for enhancement of the balance amount. The enhancement merely made due to wrong entry, double entry in the books of accounts properly explained before the authorities and non-utilisation of two nos. of waybill issued from the sales tax office but not surrendered to the office from which it was issued and no transaction made through waybills were indicated even though indemnity bonds for non-submission of waybills were filed by the dealer before the forum below.

The points raised in the written submission made by the Ld. Advocate on behalf of the dealer-respondent are as follows:-

The assessee respondent deals in Bajaj 2/3 wheelers, Cars, Tractors, Pump Sets, Spare Parts etc at Jeypore since from 1993-94 onwards in undivided Koraput District and paying a higher tax. The dealer uses to purchase goods both inside and outside the State of Orissa. The respondent filed regular returns after paying due admitted tax under the OST Act.

At the stage of assessment the learned STO verified the books of account along with waybills utilized and found no discrepancies. The only findings of the learned STO is that an amount of Rs. 5,98,438.42 of spare parts effected purchases without using waybills for which the books of accounts rejected by enhancing Rs.6,00,000.00 in Gross and Taxable turnovers under the OST Act. Accordingly the learned STO enhanced purchase value of Rs.5,22,000.00 under OET Act. For late payment of Entry Tax the learned STO imposed penalty of Rs. 6,58,544.00 although it is open to the assessing officer to consider the same. In Toto the learned STO raised a huge demand of Rs.6,66,951.00 under OET Act without any reasons.

That the Ld. ACST has given relief and finally determined and reduced the demanded tax to Rs.83,187.00 by imposing tax at Rs.80,000.00 and tax at Rs.3,187.00.

Under the Principal Act (OST Act 1947) the learned STO enhanced Rs.6,00,000.00 over and above the returned turnover which was reduced by the learned ACST to Rs. Nil and simultaneously reduced under the Entry Tax Act. (ref 1st appeal order No.AA(KOI)327/03-04 & AA(KOI) 386/2003-04 touching for the period 2001-02 and 2002-03 communicated in Memo No. 977(3) dated 02.03.2005 at page 10 of 12).

Due to urgency the respondent has booked two nos. of car of Rs.6,02,677.00 and due to urgency the Company sent two Cars by Road. Likewise in case of spare parts an amount of Rs.1,61,152.00 brought through courier and the rest amount of Rs.4,37,286.00, the agents are delivered the same at the door step of the respondent. Though, these goods are not covered with the way bills, but the same are genuine entered in the books of account and paid due tax. Out of total purchase of Rs.7,67,38,181.00 an amount of Rs. 12,01,115.00 were not supported with the way bills which one is very negligible for such huge business transactions.

By taking in to account of the decision in appeal under the OST Act, the enhancement made under the ET Act amounting Rs.5,22,000.00 is deleted page No.12 of 17 of the Appeal Order under the ET Act) by the learned ACST, which one is within the ambit of the principles of natural justice.

There is no any material in the record to reject the books of account but some irregularities in maintenance of books of account. For non-maintenance of stock account in case of spare parts is not a genuine ground to reject the books of account by the authorities. Reliance placed in case of (1) The Hon'ble High Court in case of M/s. Khalli Mohapatra & Others Vrs. State of Orissa (UOSTC 1.635 Original jurisdiction Case No. 114 of 1986 decided on 02.12.1994) and (2) In case of M/s. State of Orissa Vrs. Gaurab Enterprises (1993 90 STC). So in the instant case the assessee respondent filed a detail trading account of all the goods including spare parts and the learned STO has not at all justify to reject the books of account on this score.

During the period under appeal the respondent claimed setup claimed to the tune of Rs.21,36,106.13 but not Rs.21,39,895.00 as the appellant pointed out. But in one occasion during the period the respondent collected

higher tax of Rs.3886.00 @8% instead of 4% by mistake. In the instant case the respondent paid more revenue to the exchequer.

There is no omissions and commissions in case of purchase and sales hence the learned ACST genuinely deleted the enhancement both under the OST and ET Acts.

The presumption and estimation in approximate is not a base and drag an assessee to tax net.

The imposition of penalty u/s.7(5) of the OET Act is illegal and unwarranted. The provision of Section 7(5) clearly speaks that ***"While making any assessment under sub section (4), the assessing authority may also direct the dealer to pay in addition to the tax assessed a penalty not exceeding one and a half times the amount of tax due that was not disclosed by the dealer in his return or in case of failure to submit a return one and a half times the tax assessed, as the case may be."*** In the instant case the assessee respondent filed all the monthly statements and returns as shown in the monthly statement. The assessee respondent also paid due admitted tax before filing the said returns. The respondent disclosed all the figures and submitted the returns in the officer. So the respondent is nowhere defaulter in payment of OET Admitted tax. Hence the provision of Section 7(5) of the OET Act is not at all applicable. The section 7 of the OET Act speaks ****NOT DISCLOSED BY THE DEALER IN HIS RETURN **** In this regard it is pointed out here that under OET Act the dealer is required to file monthly statements in Form E-1, E-3 etc but nowhere there is a provision to file monthly return. But the dealer is required to file Annually a return in Form No. E-6. So filing of monthly statement cannot be termed as a Return. In the said section i.e. Section 7(5) ***"not disclosed by the dealer in his return or in case of failure to submit a return one and a half times the tax assessed, as the case may be."*** **Means if the dealer not disclosed in Annual return or fails to**

submit the annual return. It is also pointed out here that the provision speaks the word RETURN but nowhere it speaks about whether it is the original return or Revised Return but nowhere it speaks about whether it is the original return or Revised Return. So from this it is known that the return means either original or revised. In the instant case the assessee disclosed all the transaction in the return and paid due admitted tax. So the penalty as provided U/s. 7(5) couldn't be attract. The said provision can operate by the learned STO by his/her own discretion. Anyhow the imposition of penalty cannot be warranted and too high and excessive.

It is also provided under Entry Tax Rule 11(3) that * If no return is submitted by the dealer under sub rule (1) within the time specified therein or if the returns submitted by him appears to be incorrect or incomplete, the assessing authority may proceed to assess the dealer to the best of his judgment as per the procedure laid down in sub-rule (2) of the rule 10 and may also impose penalty as laid down in sub section (5) of Section 7 of the Act." In the instant case the respondent returned GTO at Rs.7,67,35,996.65 and TTO at Rs.3,22,21,118.66 and paid full admitted tad, which has duly been accepted by the learned STO. The only enhancement is that of purchase value of Rs. 5,22,000.00 in connection with the enhancement of sales turnover of Rs. 6.00 lakhs under the OST Act due to non-maintenance of Stock Account in case of Spare Parts. So it is crystal clear that the respondent returned the correct figure and paid correct amount without holding admitted tax.

As the petitioner has filed the revised statements/returns for different months in the FY 01-02 along with annual return prior to assessment the mens-rea to evade Entry Tax does not arise as the petitioner has submitted the revised returns prior to the assessment as per the provision of law. Hence the imposition of penalty @ 150% of the tax due which has not paid in due date is completely high and excessive as regards non-utilization of discretion for imposition of penalty.

The imposition of penalty u/s. 7(5) was illegal and arbitrary. The imposition of penalty is against the principles laid down by the Hon'ble Supreme court in the case of HINDUSTANT STEELS LIMITED VRS. STATE OF ORISSA 25 STC(SC) 211.

The learned ACST is judiciously decided that as entry tax is 12% for vehicle, it is hardship to pay the same without selling the vehicles later on getting set off under the OST Act. Considering the provision and hardship to the dealer the learned ACST judiciously reduced the penalty under the Entry Tax Act.

The points explained through written submission by the Ld. Advocate on behalf of the dealer-respondent for the period 2002-03 are as follows:-

At the stage of assessment the learned STO verified the books of account along with waybills utilized and found no discrepancies. The only findings of the learned STO is that an amount of Rs. 36,17,932.00 or four wheelers and Rs.4,83,707.00 of spare parts purchased without way bills. Apart that two nos of way bills bearing No. BB0614137 and AC 0059395 although issued from the officer but not surrendered in the officer or its transactions. Keeping all these aspects the learned STO enhanced the turnover at Rs. 1,23,49,603.00 under the ET Act and for non maintenance of stock account in case of spare parts and amount of Rs.25,00,000.00 was enhanced over above the returned figures. Accordingly the learned STO assessed to tax and penalty of Rs.9,76,762.00 including a penalty of Rs.8,50,000.00 under OET Act without any reasons.

The leaned ACST has reduced the enhancement and finally determined to reduce the demanded tax to nil and imposed a token penalty of Rs.1,50,000.00 due to late payment and submission of returns under the Entry Tax Act.

Under the Principal Act (OST Act 1947) the learned STO enhanced Rs.25,00,000.00 over and above the returned turnover which was reduced by the learned ACST to Rs. Nil. (ref 1st Appellate Order No. AA(KOI) 327/03-04 & AA(KOI) 386/2003-04 touching for the period 2001-02 and 2002-03 communicated in Memo No. 977(3) dated 02.03.2005 at page 10 of 12).

Under the Principal Act (OST Act 1947) the learned STO enhanced Rs.25,00,000.00 over and above the returned turnover which was reduced by the 1st appellate Authority to Rs. Nil. (ref 1st Appeal Order No. AA(KOI)327/03-04 & AA(KOI)386/2003-04 touching for the period 2001-02 and 2002-03 communicated in Memo No.977(3) dated 02.03.2005 at page 10 of 12).

Under the ET Act the enhancement is merely due to wrong entry, double entry in the books of account which was properly explained before the Authorities. By accepting the same and the genuineness of entries the 1st appellate authority is reduced the entire enhancement under the entry Tax Act.

Due to urgency the respondent placed orders thirteen nos. of cars of Rs.36,17,932.00, the Company sent Cars by Road. Likewise in case of spare parts an amount of Rs.4,83,707.00 through courier and the agents who delivered the same at the door step of the respondent. Though, these goods are not covered with the way bills, but the same are genuinely entered in the books of account and paid due tax.

The LAO in his order of assessment clearly mentioned the books of account for the year 2002-03 are accepted as true and correct. Whenever the books of accounts are accepted how can the enhancement will be made such a huge amount and how far it is justified. Hence the 1st Appellate Authority rightly reduced the enhancement.

The presumption and estimation in approximate is not a base and drag to an assessee to tax net.

It is also provided under Entry Tax Rule 11(3) that * If no return is submitted by the dealer under sub rule (1) within the time specified therein or if the returns submitted by him appears to be incorrect or incomplete, the assessing authority may proceed to assess the dealer to the best of his judgment as per the procedure laid down in sub-rule (2) of the rule 10 and may also impose penalty as laid down in sub section (5) of Section 7 of the Act." In the instant case the respondent returned GTO at Rs.7,67,35,996.65 and TTO at Rs.3,22,21,118.66 and paid full admitted tad, which has duly been accepted by the learned STO. The only enhancement is that of purchase value of Rs. 5,22,000.00 in connection with the enhancement of sales turnover of Rs. 6.00 lakhs under the OST Act due to non-maintenance of Stock Account in case of Spare Parts. So it is crystal clear that the respondent returned the correct figure and paid correct amount without holding admitted tax.

As the petitioner has filed the revised statements/returns for different months in the FY 01-02 along with annual return prior to assessment the mens-rea to evade Entry Tax does not arise as the petitioner has submitted the revised returns prior to the assessment as per the provision of law. Hence the imposition of penalty @ 150% of the tax due which has not paid in due date is completely high and excessive as regards non-utilization of discretion for imposition of penalty.

The imposition of penalty u/s. 7(5) was illegal and arbitrary. The imposition of penalty is against the principles laid down by the Hon'ble Supreme court in the case of HINDUSTANT STEELS LIMITED VRS. STATE OF ORISSA 25 STC(SC) 211.

The learned ACST is judiciously decided that as entry tax is 12% for vehicle, it is hardship to pay

the same without selling the vehicle later on getting set off under the OST Act. Considering the provision and hard ship to the dealer the learned ACST judiciously reduced the penalty under the Entry Tax Act. The provision under section 7(5) of the OET Act discussed in the written submission is not repeated here as it is same as indicated in the written submission filed for 2001-02.

Heard Mr. M. S. Raman, Addl. Standing Counsel (C.T.) appearing on behalf of the Revenue, gone through the impugned orders of assessment as well as first appeal, grounds of appeal filed and the written submissions filed by Mr. S. Sundaram, the learned Advocate on behalf of the dealer-respondent for the years 2001-02 and 2002-03 separately at the time of hearing and the relevant appeal and assessment records. It is observed that so far as the year 2001-02 is concerned, the enhancement made by the Ld. STO under OST Act to the tune of Rs. 6,00,000.00 was already deleted by the Ld. first appellate authority under the OST Act hence there is justification in deleting the enhancement/addition of Rs.5,22,000.00 made under the OET Act. The Ld. ACST correctly deleted the enhancement made on the score under OET Act. The ld. ACST has considered all the points involved in enhancing the turnover and imposition of penalty under the OET Act. The ld. first appellate authority has observed that the instant dealer has paid tax of Rs.16,48,730.00 for different months much delay against due date of payment there is justification to impose penalty under section 7(5) of the entry tax Act. But as the dealer has paid due tax before the assessment and considering the fact that the entry tax is leviable @12% on vehicles it is hardship on the part of the dealer to pay the same without selling the vehicles later-on getting set off under the OST Act. Considering the provision, the Ld. ACST reduced the penalty from Rs.6,84,544.00 to Rs.80,000.00.

So far as the assessment period 2002-03 is concerned, the Ld. ACST has deleted the enhancement

to the tune of Rs1,23,49,603.00 made under the OET Act basing on the enhancement made under the principal Act already deleted by the learned first appellate authority under the OST Act as well as addition of further turnover due to filing of the revised return without accepting explanation for wrong entry and double entry and return of goods properly explained to the sales tax officer at the time of assessment. The Ld. Assessing Officer has also taken a view that due to non-production of accounts of two waybills indicates unaccounted transaction which led to enhancement of turnover under the OET Act. As the enhancement has not been based on factual evidence but on the grounds of filing of revised returns at belated stage and non-payment of tax in time, the Ld. ACST has accepted the gross turnover and taxable turnover returned by the appellant for the period at Rs.8,89,84,493.92 and Rs.4,95,94,963.49 respectively but reduced the penalty imposed by the Ld. STO under section 7(5) of the OET Act from Rs.8,50,000.00 to Rs.1,50,000.00 on consideration of the fact that the dealer has paid tax before the assessment and entry tax is @12% for vehicles it is hardship to pay the same without selling the vehicles later-on getting set off under OST Act. Considering the provision under section 7(5) of the OET Act and the decision of the Hon'ble Supreme Court delivered in the case of M/s. Hindustan Steels Ltd. Vrs. State of Odisha, 25 STC 211, the Ld. ACST held that imposition of penalty of Rs.1,50,000.00 is justified against the higher imposition of penalty by the Ld. STO. As the dealer has not filed revised returns in time and has caused delay in deposit of due tax amount.

As per the findings of the Ld. ACST the enhancement made under the principal Act i.e. the Odisha Sales Tax Act, 1947, and filing of revised return and payment of tax before assessment and in consideration of section 7(5) of the OET Act the imposition of penalty of Rs.80,000.00 for the period 2000-01 is proper. We do not find any incongruity in

the findings of the Ld. ACST and considering the use of the word 'MAY' under section 7(5) of the OET Act the reduction of penalty amount is considered proper as the Ld. ACST in consideration of the facts and circumstances and in absence of any concrete evidence of purchase or mala-fide intention of the instant dealer as reduced the penalty to Rs.80,000.00 for the period. Hence, there is no reason to interfere in the findings of the Ld. ACST. So far as the period 2002-03 is concerned due to deletion of enhancement under the principal Act and without any concrete evidence on purchase on out of account deduction of tax and penalty by the Ld. ACST is justified. However, it is observed that out of the enhancement of Rs.1,23,49,603.00 enhancement to the tune of Rs.3,92.535.22 relates to scheduled goods purchased like lift, watches, steel furniture, signboard and machinery by utilising waybills for use in showroom, were not reflected either in the purchase turnover disclosed in the revised returns nor included under the taxable turnover exigible to entry tax @2% the findings of the Ld. ACST in this regard is found incorrect for the Ld. STO has added this amount not reflected in purchase register over and above the turnover disclosed through revised return. Hence the taxable turnover for the period determined by the Ld. ACST appears to be less by Rs.3,92,535.22 which is exigible to tax @2% under the OET Act. The findings of the Ld. ACST for the period 2000-01 is accepted being justified. A reading of section 7(5) of the OET Act makes it evident that by use of the word 'MAY', penalty imposable has been placed within the discretion of the Ld. Assessing Authority. It is an enabling provision and not a direction. The provision of Section 7(5) clearly speaks that ***"While making any assessment under sub section (4), the assessing authority may also direct the dealer to pay in addition to the tax assessed a penalty not exceeding one and a half times the amount of tax due that was not disclosed by the dealer in his return or in case of failure to submit a return one and a half times the***

tax assessed, as the case may be." In view of the provision the Ld. ACST is justified in reducing the penalty amount imposed for both the years basing on the spirit of the law and the judgment of the Apex court cited by the instant dealer and the discretionary power exercised in the face of facts. There is no reason to interfere with the findings of the Ld. ACST for the period 2001-02. In respect of the year 2002-03 the order of the Ld. ACST is required to be modified to the extent that the turnover of purchase of scheduled goods indicated above not reflected in the gross turnover returned by the instant dealer is to be added to the gross turnover and taxable turnover for the purpose of calculation of tax.

As a result, the appeals are partly allowed and the order of the Ld. ACST is set aside and remanded to the Ld. STO to re-compute the tax liability of the dealer only for the period 2002-03 under the OET Act within a period of four months from the date of receipt of this order. As both appeals involved issues common in nature pertaining to a dealer the same are disposed of in this common order.

Dictated and corrected by me,

(P. C. Pathy)
Accounts Member-I

(P. C. Pathy)
Accounts Member-1

I agree,

(Sashikanta Mishra)
Chairman

I agree,

(Subrat Mohanty)
Judicial Member-II