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

S.A. No. 88(ET)/2015-16

(Arising out of the order of the learned DCST, Sambalpur Range, Sambalpur in first appeal Case No. AA 38/SAI/ET/2014-15 disposed of on 20.05.2015.)

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

M/s. Bharat Earth Movers Ltd,
BEML Complex, N.H.-6
Bareipali, Sambalpur. ..... Appellant.

-Vrs.-

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

For the Appellant: : Mr. C.R. Das, Ld. Advocate.
For the Respondent: : Mr. D. Behura, Ld. S.C.(C.T.)

Date of Hearing : 05.08.2021 *** **Date of Order : 23.08.2021**

O R D E R

The present appeal of the dealer-appellant has been directed against the impugned order of learned Deputy Commissioner of Sales Tax, Sambalpur Range, Sambalpur (hereinafter, referred to as ld. FAA) passed on dated 20.05.2015 in Appeal Case No. AA 38/SAI/ET/2014-15 confirming the order of assessment of the Learned Sales Tax Officer, Sambalpur-I Circle, Sambalpur (hereinafter referred to as LAO) framed Under Section 9C of the Odisha Entry Tax Act in which a demand of Rs.73,08,018.00 has

been raised relating to the tax periods from 01.04.2011 to 31.03.2013.

2. Being aggrieved by the impugned order of the ld. FAA, the dealer-appellant has preferred second appeal before the Tribunal on the following grounds:-

"i. The order passed by the learned Deputy Commissioner of Sales Tax (Appeals), Sambalpur Range, Sambalpur appears to be without application of mind. As a result, said order cannot sustain in the eyes of law and deserve to be set aside.

ii. The learned appellate authority while deciding the issue violated the principles of natural justice as because the grounds put forth by the appellant in his grounds of appeal as well as in oral submission have not been considered by him. As a result, the order of the First appellate Authority cannot sustain in the eyes of the law and accordingly deserve to be set aside which confirms the demand of tax and penalty.

iii. The appellant contested the order of assessment on two grounds i.e. (i) in the facts and circumstances when stock transfer price against Form 'F' has been accepted by the Sales Tax Authorities of both end (i.e. dispatching and receiving end) and there is no mechanism to issue purchase invoice by the head office to branch office or branch office to head office, the stock transfer price is the original price of calculation of tax liability U/s. 2J of the OET Act and as such proviso to Section 2J is not applicable in the instant case, and (ii) even if arguing on sale price, entry tax to be discharged against receipt of the goods of Rs.29,83,62,273.00 the sales price is calculated at Rs.32,47,97,170.00. Consequently, the demand of tax on the goods which

have been sold during the period under appeal but received prior to the period under appeal is uncalled for. But the learned Appellate Authority while deciding the issue has not considered the grounds put forth by the appellant and confirmed the demand. As such, the order of the First Appellate Authority confirming the demand is not sustainable.

iv. The appellant having its manufacturing units at different states of Union of India and branches also spread over states of India. Branch and head office are of same status. As such, Purchase invoices cannot be raised either by the HO/manufacturing unit's or by the branches in the name of other branch. Obviously, for this reason mechanism has been provided to transfer the stock under stock transfer note under the Central Sales Tax Act. Consequently in this event price declared in the stock transfer note is acceptable as purchase price and invoking proviso to section 2-J of the OET Act is uncalled for.

(v) According to Section 6-A of the CST Act read with Rule 12 (5) of Central Sales Tax Rule 1957 for evidencing branch transfer price, the dealer company procures 'F' Forms from its Sambalpur Branch and submitted the same to its head office/ manufacturing units in other States for evidencing the price of stock transfer from such place/s to Sambalpur Branch. The details of 'F' Forms which have been prescribed are duly filed up. On perusal of the Form 'F', it is clearly visible that on the said form amongst others things, it is required to be mentioned (i) value of the goods (ii)quantity or weight of the goods (ii) description of the goods (iv) number and date of invoices (challans) or any other documents under which the goods were sent. In accordance with Section 6-A of the CST Act and Rule 12(5) of the CST Rules, the appellant duly filled up the 'F' forms and forwarded the same to other States in order to submit to Sales Tax Department, which have been

accepted by the Department. So it is not out of place to mention here that the number and date of the invoices and value thereof has been accepted by the Sales Tax Officer, Samblpur-I Circle and Sales Tax Officer of jurisdiction of head office/Manufacturing unit/Branch. Consequently, it is beyond doubt that the invoices on which the goods have been transferred on the strength of 'F' Forms is the original invoices and price thereof to be held as the correct price for discharging the Entry Tax liability. Consequently, the proviso of Section 2(j) is not applicable to the present case of the appellant company. Consequently, the demand of tax and penalty as per the assessment order is not sustainable and deserve to be set aside.

(vi) …….

(vii) The Honourable Odisha Sales Tax Tribunal, Cuttack in S.A. No.111(E.T) of 2007-08 in the case of M/s. Herbalife International – Vs- State of Odisha has already held proviso to section 2J is not applicable in case of stock transfer of goods on the strength of 'F' Forms.

(viii) Furthermore liability to pay entry tax arises in terms of section 3 of the OET Act, on entry of the schedule goods for the purpose of use, consumption or sale therein. As such liability of entry tax is only on the value of the goods entered during the period under assessment and not on the value of quantity of the goods sold. To make it more clear it is to submit that entry tax to be paid on the quantity of the goods sold. Consequently, in this case the authority has committed errors on two occasion i.e. (i) demanded entry tax on the quantity and the value of the goods sold and not considering the quantity of the goods entered and value thereof during the material period and (ii) by invoking proviso to section 2(j) of the OET Act, by ignoring the

purchase price is the stock transfer price. Consequently such erroneous order cannot sustain in the eyes of law and deserve to be annulled.

(ix) Even if arguing but not accepting that entry tax to be discharged at sales price as per proviso to section 2J of the OET Act, the sales price of the goods received shall be arrived in the following manner:

Opening Stock:	*Rs.10,52,82,156.00*
Receipt of Goods:	*Rs.29,03,19,817.00*
Total	*Rs.39,56,01,973.00*
Closing Balance	*Rs. 5,05,13,456.00*
Cost of goods Sold	*Rs.34,50,88,517.00*
Sales Price of the goods	*Rs.38,59,92,434.00*
Profit	*Rs. 4,09,03,917.00*
Percentage of profit (Aprox)	*11.85%*
Sales value of goods receive (11.85% of Rs.29,03,19,817/-)	*Rs.32,47,22,715.00*

(x) Even, if arguing but not accepting proviso to section 2J is invokable the sales price of the goods received shall be at Rs.32,47,22,715.00. As such determination of tax on Rs.43,55,38,688.00 is incorrect and illegal.

(xi) The learned authority also further committed error by demanding tax on VAT collection amount of Rs.4,93,46,770.00. That as such the order is incorrect and deserve to be set aside. The learned authority determined the sales price of Rs.43,55,38,688.00 in the following manner:

TTO- Rs.38,59,92,434.00

STC- Rs. 4,95,46,254.00

TOTAL- Rs.43,55,38,688.00

As such demand of entry tax on Sales Tax Collection/VAT amount is un called for and deserve to be set aside.

(xii) Although section 9C provides for imposition of penalty, in the facts and circumstances of the case penalty is not leviable. That, although

section provides for imposition of penalty the authority has the power to exercise to impose lesser penalty depending upon the facts and circumstances of the case. So, in the present case, the imposition of penalty is not warranted. The appellant relied on the following ratios: (a) State of Madhya Pradesh –v- Bharat Heavy Electrical Ltd., reported in 1998 (99) ELT 33 (SC), The Hon'ble Supreme Court under the Entry Tax Act while interpreting in a similar situation i.e. Expression shall be liable to pay penalty equal to ten times the amount of entry tax" in Section 7(5) of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh penalty which could be levied and the assessing authority has the discretion to levy lesser amount, depending upon the facts and circumstances of each case. (b) Commissioner of Central Excise, Tilruchirapalli-I –v- CEGAT, Chennai, 2001 (133) ELT. 536(Madra), wherein the Hon'ble High Court has held that, Section 7(5) of the Entry Tax Act providing for a penalty equal to ten times the amount of entry tax payable on goods. Amount of penalty prescribed being only the maximum amount leviable, discretion lies with the authorities to reduce the quantum of penalty, Discretion having been exercise judiciously by the Tribunal no reference lies to High Court. (c) The above view was also followed in the case of Ambuja Synthetics Mills –v- Union of India, reported in 2002(5) RLT. 133 (Gujrat).

(xiii) Quantum of penalty can be lower if there is no mensrea. Penalty is allowed by law does not mean that penalty must be imposed. Lenint view should be taken if the violation is technical in nature. That the Hon'ble Supreme Court in the case of Hindustan Steel Ltd. –v- State of Orissa, reported in 1970 (25) STC, 211 (SC) has held that, the discretion to impose penalty must be exercised judicially. A penalty will ordinarily be imposed in

case where the party acts deliberately in defiance of law. But not in cases where there is technical or venial breach of the provision of the Act or where the breach flows from a bonafide belief that the offender is not liable under the Act. An order imposing penalty for failure to carry out a statutory obligation is the result of quasi-judicial proceeding. Penalty will not be ordinarily imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious of dishonest or acted in conscious disregard of its obligation.

3. The brief fact of the case is as follows:-

M/s. Bharat Earth Movers Ltd., Sambalpur is a public sector undertaking under the Ministry of Defence, Govt. of India, engaged in trading of spare parts of heavy earth moving machines inside the State, receiving the goods from its various manufacturing units located outside the State by way of branch transfer on the strength of Form-F.

At the assessment stage, the dealer produced books of account with relevant documents. The LAO, on examination of ET returns and payment details, observed that it has received scheduled goods of Rs.29,83,62,273.00 from its various units other than by way of purchase during the material period. He further observed that, it has paid ET on the stock transfer value as reflected in the waybills for the tax periods from April'11 to Dec'11 and from April'12 to Feb'13 but for the rest periods i.e. Jan'12 to Mar'12 and for the month of March'13, it has paid ET on the sale price of the scheduled goods

that showed that the dealer has intentionally and deliberately violated the law flouting the proviso to Sec.2(j) of OET Act. Accordingly, he determined the sale value of scheduled goods at Rs.43,55,38,688.00 on which he calculated the tax at Rs.87,10,774.00. Since the dealer has deposited Rs.62,74,768.00 before assessment, he demanded the balance tax of Rs.24,36,006.00 with penalty of Rs.48,72,012.00, totalling to Rs.73,08,018.00.

4. Being aggrieved by the assessment order, the dealer preferred first appeal before the ld. FAA who after due examination of the case confirmed the demand raised by the LAO.

Being further aggrieved with the order of the ld. FAA, the dealer knocked the door of the Tribunal by filing second appeal.

5. In course of hearing at second appeal, referring to the grounds of appeal, written note of submission with different cited case laws, the ld. Counsel for the appellant raised the following issues for better appreciation of his contention:-

i. Whether, the goods received on Despatch Advice (issued under Section 6A of the Central Sales Tax Act) accompanied with Excise Duty Invoice, shall be held as the 'purchase value' under Section 2(j) of the OET Act, 1999 for discharging of Entry Tax liability under Section 3 of the OET Act, 1999 or the 'sales price' of the appellant under the OVAT Act to be held as the 'purchase value'?

ii. Whether the Authorities under the Odisha Entry Tax Act is correct to reject the Despatch Advice (issued under Section 6A of the Central Sales Tax Act) accompanied with Excise Duty Invoice as 'purchase value' under section 2(j) of the OET Act for payment of entry Tax under Section 3 of the OET Act, when selfsame Authority has accepted the Despatch Advice accompanied with Excise Duty Invoice under OVAT Act and CST Act as the purchase value/stock Transfer Value?

iii. Whether the Authorities under the OET Act is correct to demand entry tax, on the 'sales price' of the appellant, when entry tax is payable on the 'purchase value' at the time of its entry in to the local area, when proviso to Section 2(j) of the Act stipulates that goods sold and capable of being sold in open market at the time of entry.

iv. Whether the Learned Authorities are correct to demand entry tax on the 'sales price' including the VAT components collected under OVAT Act?

v. Whether the Authorities are correct and legal to demand Entry Tax on the value of goods sold by the appellant, when entry tax is payable on the value of goods entered into the local areas for the period under appeal, without considering the opening stock and the closing stock of the appellant?

vi. Whether the order of imposition of penalty under Section 9C(5) the OET Act is correct when the conditions laid down under Section 9C(1) of the Act are not satisfied?

6. Per contra, Mr. D Behura, the ld. Standing Counsel appearing on behalf of the respondent-Revenue vehemently argued in support of first appellate order.

However, in order to deal with the above issues on a rational manner, it is relevant to take note of the applicable sections under the OET Act while adjudicating this case.

As per section-3 of the OET Act, it is the entry point of scheduled goods which is relevant for the purpose of entry tax and when the goods are already entered into the local area or brought into the local area by the instant dealer, the tax liability under entry tax has begun. Further, as because there is no purchase value as per the first part of the definition of term 'purchase value' under section 2(j) of the OET Act, then on application of the proviso, the purchase value is determined. During the impugned period, it is observed that the appellant has received scheduled goods from outside the State otherwise than by way of purchase on stock transfer basis against Form-F. It is, thus relevant to quote section 2(j) of the OET Act in order to determine the value on which entry tax is leviable.

Section 2(j) :-

"Purchase Value" means the value of scheduled goods as ascertained from original invoice or bill and includes insurance

charges, excise duties, countervailing charges, sales tax, [value added tax or, as the case may be, turnover tax] transport charges, freight charges and all other charges incidental to the purchase of such goods:

Provided that where purchase value of any scheduled goods is not ascertainable on account of non-availability or non-production of the original invoice or bill or when the invoice or bill produced is proved to be false or **if the scheduled goods are [required] or obtained otherwise than by way of purchase, then the purchase value shall be the value or the price at which the scheduled goods of like kind or quality is sold or is capable of being sold in open market**;"

Since, the appellant has received scheduled goods by way of stock transfer without purchasing the same, as per aforesaid proviso, he has to pay the entry tax on the value or the price at which the scheduled goods of like kind or quality is sold or is capable of being sold in open market. As such, it attracts provision contained in Sec-2(46) of OVAT Act that defines sale price as under:-

"SALE PRICE" means the amount of valuable consideration received or receivable by a dealer as consideration for the sale of any goods less any sum allowed as cash discount or trade discount at the time of delivery or before delivery of such goods but inclusive of any sum charged for anything done by the dealer in respect of

the goods at the time of or before delivery thereof and the expression **"PURCHASE PRICE"** shall be construed accordingly."

In view of Provision contained under Section-2(46) of OVAT Act and explanation appended to it under Clause (d), we are of the view that the amount of VAT should be excluded from the sale value to determine the purchase price as well as the purchase value. Moreover, it is clarified by the Commissioner of CT & GST, Odisha, Cuttack vide letter No.Pol-53/3/2017-Policy-CCT-(Part-1) 6322/CT, Dated 21/4/2018 that VAT is to be excluded while determining the sale price under the OET Act. Accordingly, this Tribunal deletes the VAT of Rs.4,95,46,254.00 collected by the appellant from the gross turnover determined by the LAO.

7. It is further observed by the Tribunal that while calculating the gross turnover, the LAO has taken into consideration the opening balance and closing balance of scheduled goods which is a misconception and contrary to the provision of law as the Statute provides imposition of entry tax soon after entry of scheduled goods into a local area. Both the fora below should have determined the sale price of scheduled goods brought from outside the State on stock transfer basis amounting to Rs.29,83,62,273.00 during the impugned period as per entries made in the books of account supported with relevant documents without taking into consideration the opening balance and the closing balance.

After addressing all the factual issues involved in this case, now a question may be put, if, in the facts and circumstances of the case, penalty was at all be levied? It is understood from the Statute that imposition of penalty u/s. 9C(5) is dependant on the conditions laid down in section 9(1) assessed u/s.9C(3) of the OET Act. Section 9C(1) of the Act says "where the tax audit conducted u/s.9B results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions, evasion of tax or contravention of any provisions of this Act affecting the tax liability of the dealer, the assessing authority……. serve on such dealer a notice….. with a copy of the AVR……" In the instant case, no suppression of purchases or sales could be determined nor there was erroneous claim of deductions etc. The fact remains that the appellant, a central PSU under the Ministry of Defence, Govt. of India had a bonafide belief that he is liable to pay entry tax on scheduled goods brought from outside the State by way of stock transfer on the strength of excise duty invoice & dispatch advise using Govt. waybills. Moreover, both the appellant as well as fora below have erred in determining the actual sale price on scheduled goods received by the appellant by way of stock transfer. The violation is purely technical in nature that requires proper interpretation of the statute by both the rival parties. Under the above circumstances, the Tribunal is of the humble view that penalty should not have been levied against the dealer appellant.

8. Hence, it is ordered.

In the result, the appeal filed by the appellant is allowed. As a necessary corollary, the impugned order dtd.20.05.2015 passed by the Ld.FAA in Appeal case No.AA 38/SA-I/ET/2014-15 is here by set aside. Consequently, the matter is remitted back to the LAO to re-assess the appellant in the light of above findings and observations of the Tribunal and to pass appropriate order as per and according to law, preferably, within a period of three months from the date of receipt of the order after giving the appellant a reasonable opportunity of being heard.

The cross objection filed by the State is also disposed of accordingly.

Dictated & corrected by me,

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

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

I agree,

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(Sweta Mishra)
2nd Judicial Member