BEFORE THE ODISHA SALES TAX TRIBUNAL: CUTTACK
(Full Bench)

S.A. No. 116(E) OF 2015-16

(Arising out of order of the learned JCST, Sambalpur Range, Sambalpur in First Appeal Case No. AA- 2/BGH/ET/2013-14 disposed of on dated 31.07.2015)

Present: Shri R.K. Pattanaik, Chairman,
Shri A.K. Dalbehera, 1st Judicial Member, and
Shri P.C. Pathy, Accounts Member-I

M/s. Motilal Lath,
Canal Road, Bargarh ... Appellant

-Versus-

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

For the Appellant : Sri B.B. Panda, Advocate.
For the Respondent : Sri D. Behura, Standing Counsel (CT)

Date of hearing: 26.11.2020 ***** Date of order: 28.01.2021

O R D E R

Instant appeal under Section 17(1) of the Odisha Entry Tax Act, 1999 (in short, 'the Act') is at the behest of the dealer assessee questioning the legality and judicial propriety of the impugned order dated 31.07.2015 promulgated in Appeal Case No.AA2/BGH/ET/2013-14 by the learned Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, 'FAA'), who confirmed the order of assessment dated 17.12.2012 passed under Section 9(C) of the Act by the learned Sales Tax Officer, Bargarh Circle, Bargarh (in short,

'AA') on the grounds inter alia that it is liable to be set aside for the stated reasons.

2. The dealer assessee was subjected to assessment under Section 9(C) of the Act for the tax period 01.06.2007 to 31.03.2011 after receipt of the AVR and recommendations of the Audit Unit. The AA confronted the observations of the Audit Unit reflected in the AVR and then, raised the additional demand to the tune of ₹12,95,676.00 including penalty, challenging which, the matter was carried in appeal and the FAA, since did not find any infirmity in the impugned decision, affirmed the order of assessment dated 17.12.2012. The dealer assessee being aggrieved of the assessment by the authorities below preferred present appeal and principally disputed levy of entry tax in respect of cotton yarn in hank, morefully when, it is not a scheduled goods under the Act. According to the dealer assessee, cotton yarn in hank is non-scheduled goods as defined in Section 2(m) of the Act as against the claim that it is exigible to tax as per Entry No.2, Part I of the Schedule thereof. It is also contended that cotton yarn which finds place in Entry No.2, Part I of the Schedule under the Act is a distinct commodity from cotton yarn in hank and for that, the authorities below ought not to have taxed for the latter goods and that too when, common parlance test should have been applied and that apart, when the Joint Director of Textile, Odisha, Bhubaneswar has clarified the difference and distinctiveness of the said goods. It is further contended that nevertheless assuming but not admitting the fact that cotton yarn in hank to be

taxable, the authorities below could not have proceeded to levy penalty in terms of Section 9(C)5 of the Act when there was no clarity on the subject.

3. On the contrary, the respondent State justified the levy of tax on cotton yarn in hank in the absence of any dissimilarity vis-a-vis cotton yarn as appearing in Entry No.2 of Part I of the Schedule under the Act. In support of its contention, the learned Standing Counsel for the State cited an order of the Tribunal (FB) dated 20.09.2010 in S.A. No. 277 (ET) of 2007-08, wherein, cotton yarn in hank has been held not to be different from cotton yarn and thus, made it taxable under Part I of the schedule. In contrast, the learned Counsel for the dealer assessee also brought to the notice of the Tribunal regarding some of its earlier orders in S.A. No.319 (ET) 2005-06, S.A. No.442 of 2006-07, and S.A. No.94 (ET) of 2006-07 in order to convince that in the said cases, cotton yarn in hank was not treated as cotton yarn to make it exigible to tax. Many other instances are cited which are a part of the written note of submission filed in appeal before the FAA to the effect that such a conclusion, as above, in the appeals has not been challenged by the Department. The learned Counsel for the dealer assessee further highlighted the different entries, general as well as a particular, of part I of the Schedule by urging that cotton yarn since a particular entry in Part I, the item is not to include cotton yarn in hank being a distinctly different commercial commodity. A valiant attempt has been made from the side of the dealer assessee to show that under the OST Act and OVAT Act, cotton yarn and cotton yarn in hank are two different goods. With the above reasons, the learned Counsel for the dealer assessee in absence of any

specific mention of cotton yarn in hank in Entry No.2 of Part I of the Schedule under the Act claimed that the authorities below fell into serious error in taxing the said goods and also for imposing penalty notwithstanding peculiar nature of the case.

4. Admittedly, in schedule A (List of goods) at Entry No.10 cotton yarn in hank is shown as exempted goods; at Entry No.38, Part 2 of the Schedule of the OVAT Act, cotton yarn is made taxable @4%; at Entry No. 39, cotton including all kinds (indigenous or imported) in its unmanufactured state is included. Similarly, in the OST Act, cotton yarn in hank is differently taxed but under the list of the goods (Schedule A), it is exempted, when sold to handloom weavers certified by the Director, Textile & Handloom, Odisha for its use as raw material in the production of handloom fabrics in the State and other cotton items are taxed at different rates. The learned Counsel for the dealer assessee tried to prove that under the OST Act and OVAT Act since cotton yarn and cotton yarn in hank have been differently taxed, hence, both are no similar goods and therefore, under the Act, cotton yarn in hank cannot be associated with cotton yarn as indicated in Entry No.2, Part 1 of the Schedule to levy tax. Of course, on a couple of occasions, the Tribunal did accept and place cotton yarn in hank not in the same category as cotton yarn and treated both the goods differently. But, the Tribunal in its Full Bench by an order dated 20.09.2010 in S.A. No. 277 (ET) of 2007-08 took a contrary view and concluded that cotton yarn in hank is no different than cotton yarn and therefore, it is taxable under the Act. The said view of the Tribunal does appear to be just and reasonable.

Admittedly, cotton yarn is exigible to entry tax under the Act as per Entry No.2, Part I thereof. It is also admitted that under the OST Act both cotton yarn and cotton yarn in hank have been separately treated as the latter was exempted from sales tax w.e.f.07.10.2002, if sold for specific purposes as a means of promoting handloom industry in the State. In other words, cotton yarn in hank is not exempted from sales tax under the OST Act, when it is sold to any other person other than handloom weavers certified by the Department of Textile and Handloom. The Tribunal is in agreement with the view that exemption of sales tax vis-a-vis a particular goods would have to be confined under the specific Act. Insofar as cotton yarn is ordinarily understood, it is nothing but a thin thread spun from cotton which is used for weaving clothes and when it is kept in coil or skein of a specified length, it becomes cotton yarn in hank, inasmuch as, the nature of the goods is not changed thereby. So, basically cotton yarn in hank is cotton yarn but kept in hang in a particular way and of a certain length. Both the goods may have different usages but shall have to be considered as cotton yarn for its taxability under the Act.

5. As to the levy of penalty, it is contended by the learned Counsel for the dealer assessee that it ought not to have been directed by the authorities below in the background of the facts, when there was no clarity and consistency in law on the point. As per Section 9C(1) of the Act, in case of suppression of purchases or sales or both, erroneous claims of deductions, evasion of tax, or for contravening any provisions of the Act affecting a dealer's tax liability being proved and established, penalty as well as interest may be

levied as per sub-Section (5) thereof which shall be an amount equal to twice the amount of tax assessed under sub Section (3) or (4), as the case may be. That being so, only upon one or more condition(s) of Section 9C(1) of the Act is/are fulfilled to show tax evasion, a dealer shall be visited with penalty and interest may also be levied. It is settled law that penalty is not to be automatically imposed on account of a default which depends on the conduct of a dealer. Section 9(C) of the Act and its each and every provision are to be properly read, understood and interpreted to give effect to the real purpose of the audit assessment and the circumstances under which penalty and interest may be levied. In Hindustan Steels Ltd. Vrs. State of Odisha reported in (1970) 25 STC 211 (SC), it is held and observed that an order imposing penalty for failure to carry out a statutory obligation is a result of quasi-criminal proceeding and penalty may not ordinarily be imposed unless it is established that the dealer either acted deliberately in contravention of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. Of course, in a case of civil liability, mens rea does not pay any role. But for that matter, the conduct of a dealer cannot be entirely brushed aside or ignored, while considering the imposition of penalty. If, a dealer makes any mistake or commits an error without any malafide or in other words, its conduct appears bonafide and it is, prima facie, revealed that on account of a particular belief or impression tax liability has not been honoured, in such a case, when default being pointed out in paying tax, penalty is not to be straight away levied. In the instant case, it seems that the dealer assessee did not appear to have

deliberately avoided paying tax but failed to discharge the obligation under a bonafide belief or impression that cotton yarn in hank is a different commodity than cotton yarn as the distinction is evident from the OST Act and OVAT Act and due to favourable opinions to the effect that cotton yarn in hank is not a taxable item rendered by the Tribunal and other forums. In the aforesaid backgrounds of the fact, the Tribunal is of humble opinion that though rightly the authorities below treated cotton yarn in hank as cotton yarn and made it taxable but ought not to have levied penalty. However, for the alleged period since tax liability was not discharged in respect of cotton yarn in hank, according to the Tribunal, the dealer assessee should be made liable to pay interest in order to compensate the State to make the loss good. Without elaborating further, the Tribunal arrives at an inescapable conclusion that the impugned order dated 31.07.2015 is required to be set aside to the extent indicated, while upholding the tax liability vis-a-vis the dealer assessee with respect to cotton yarn in hank. The Tribunal does not find any real and compelling reasons to take a different view than the opinion expressed by it in S.A. No.277 (ET) of 2007-08.

6. Hence, it is ordered.

7. In the result, the appeal stands allowed in part. As a logical sequitur, the impugned order dated 31.7.2015 passed in Appeal Case No.AA2/BGH/ET/2013-14 vis-a-vis the dealer assessee for the tax period is hereby set aside to the aforesaid extent. Consequently, the AA is directed to recompute the tax liability with respect to the dealer assessee and to pass appropriate order in accordance with law and in the light of the observations

made hereinabove and to complete the exercise, preferably, within a period of three months from the date of receipt of the order of the Tribunal. The cross objection filed by the State is accordingly disposed of.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(Sri A.K. Dalbehera)
1st Judicial Member

I agree, Sd/-
(P.C. Pathy)
Accounts Member-I