BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 76(ET) of 2012-13

(Arising out of order of the learned Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar, in First Appeal Case No. AA-110700000000023/07-08, disposed of on dated 30.01.2012)

Present: **Shri A.K. Das, Chairman**
Shri S.K. Rout, 2nd Judicial Member
&
Shri M. Harichandan, Accounts Member-I

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

-Versus-

M/s. Gold Mohur Foods & Feeds Ltd., Plot No.56, Sahara Campus, Rasulgarh, Bhubaneswar. ... Respondent

For the Appellant : Mr. D. Behura, S.C. &
Mr. S.K. Pradhan, A.S.C.
For the Respondent : Mr. C.R. Das &
Mr. B.K. Barik, Advocate

Date of hearing: 23.02.2022 *** Date of order:03.03.2022

O R D E R

Challenge has been made in the instant appeal by the State to the order dtd.30.01.2012 passed by the Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar (hereinafter referred to as, the learned FAA)

in First Appeal Case No. AA-11070000000023/07-08, thereby deleting the entire penalty of Rs.5,72,167.00 raised by the learned Assessing Authority (Entry Tax), Assessment Unit (VAT), Puri Range (in short, assessing authority) by its order dtd.31.10.2006 for the tax period 01.04.2005 to 31.10.2005 invoking power u/s.9C(5) of the Orissa Entry Tax Act, 1999 (hereinafter referred to as, the OET Act).

2. The learned Counsel for the State in course of hearing of the appeal confined his argument only to the question, whether the first appellate authority was correct in its approach in deleting the penalty imposed by the assessing authority invoking power u/s.9C(5) of the OET Act for non-payment of admitted tax?

3. Before addressing on this issue, it is profitable to narrate some relevant facts for effective adjudication of the dispute. The respondent-dealer carries on business in aqua feeds, aqua feed supplement and poultry feeds and maintains books of account to that effect. The accounts maintained by the respondent-dealer for the tax period 01.04.2005 to 31.10.2005 were audited by the Tax Audit Team of Puri Range and audit report was submitted. On receipt of the Audit Visit Report (in short, the AVR), the Assessing Authority under Puri Range initiated assessment proceeding u/s.9C of the OET Act, where the demand of Rs.9,22,904.00 was raised including interest

and penalty of Rs.64,654.00 and Rs.5,72,167.00 respectively.

4. The respondent-dealer challenging the order of the assessing authority imposing penalty on it for non-payment of admitted tax filed first appeal before the first appellate authority who deleted the penalty on the finding that:

(a) In case of sale from the manufacturing point, the liability to pay tax comes from Sec.26 of the Act and in case of transfer to other branches the liability of the transferee branch accrues on the value of the scheduled goods received by way of transfer.

(b) There was no error either in the returns filed by the dealer or in the turnover reported in the AVR or in the turnover taken by the assessing authority for assessment. The turnover taken by the learned assessing authority was higher than the turnover reported in the AVR and this difference was due to addition of turnover for October, 2005.

(c) There was no report or suggestion in the audit report regarding incorrect tax rate or suppression of turnover.

(d) The learned assessing authority simply replicated the turnover in the return and also replicated the tax admitted in the return.

(e) In case of less payment of tax, the same cannot be considered as underassessment. The imposition of penalty is unwarranted.

5. The State being aggrieved with the deletion of penalty by the first appellate authority preferred the present second appeal. The learned Standing Counsel representing the State vehemently urged that there being contravention of Sec.9C(1) of the OET Act, the dealer was liable to pay penalty as required u/s.9C(5) of the OET Act. The assessing authority on correct interpretation of the provisions contained u/s.9C(5) of the OET Act read with 9C(1) of the said Act imposed penalty which was deleted by the first appellate authority under misconception of law. Learned Standing Counsel relying on the judgment of the Hon'ble Supreme Court in case of Union of India Vrs. Dharamendra Textile Processors, reported in (2008) 18 VST 180 (SC), vehemently urged that the penalty under the provisions of the OET Act is civil liability and for attracting such civil liability, wilful concealment is not essential ingredient. There being deliberate avoidance of payment of tax, the same amounts to contravention of the provisions contained u/s.9C(1) of the OET Act for which the imposition of penalty is justified and the Tribunal has no discretion in the matter. He submits to allow the appeal and set aside the impugned order of the first appellate authority.

6. Shri C.R. Das, learned Counsel for the respondent-dealer supporting the impugned order of the first appellate authority vehemently urged in terms of the cross objection filed by it that there is no assessment under 9C(3) and 9C(4) of the OET Act and imposition of penalty u/s.9C(5) of the said Act is illegal and unwarranted. He relying upon number of judgments of this Tribunal passed in different cases, urged that this Tribunal in similar circumstances deleted the penalty imposed by the forums below. In the present case admittedly as observed by the first appellate authority there is no suppression of purchase turnover or contravention of any of the provisions affecting the tax liability. When the conditions mentioned in Sec.9C(1) of the OET Act has not been fulfilled, exercises of power u/s.9C(5) of the OET Act cannot sustain. The imposition of penalty being illegal, unwarranted and unjustified, the first appellate authority rightly deleted such penalty. There is no illegality or impropriety in such finding of the first appellate authority. He submits to dismiss the appeal.

7. We have heard the rival submissions of the parties, gone through the impugned orders of first appellate authority vis-a-vis the grounds of appeal and other materials on record. The sole question that was posed before us for adjudication, whether in the facts and circumstances of the present case the first appellate

authority was justified in deleting the penalty imposed by the assessing authority by invoking power u/s.9C(5) of the OET Act. It is pertinent to mention here that the provisions u/s.9C(5) of the OET Act provide for imposition of penalty equal to twice the amount of tax assessed under sub-section (3) or (4). Sub-section (3) of Sec.9C of the OET Act provides that where the dealer to whom a notice was issued under sub-section (1) to produce books of account and other documents, the assessing authority may, after examining all the materials as available with him in the record and those produced by the dealer and after causing such other enquiry as he deems necessary, assess the tax due from that dealer accordingly. Sub-section(4) provides if the dealer fails to appear or produce the books of account as required under sub-section (1), the assessing authority may proceed to complete the assessment to the best of his judgment basing on the materials available in the Audit Visit Report and other materials as may be available and after causing such enquiry as deems necessary. Both the sub-section (3) and (4) speaks about issuance of notice under sub-section (1) of Sec.9C of the OET Act. Section 9C(1) provides 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 of the provisions of this Act affecting the tax liability of the dealer, the assessing authority notwithstanding the

fact that the dealer may have been assessed u/s.9 or 9A, serve on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report requiring him to appear in person or through his authorised agent on the date and place specified therein and to produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings. The provisions contained under sub-section (1) of Sec.9C clearly envisage about detection of suppression of purchase or sales or both, erroneous claims of deductions, evasion of tax or contravention of any of the provisions of this Act affecting the tax liability of the dealer as a condition precedent for assessing the dealer u/s.9C(3) or (4) of the OET Act and imposing penalty u/s.9C(5) of the said Act.

8. On conjoint reading of all the provisions, we are of the view that unless there is detection of purchases or sales, erroneous claims of deductions, evasion of tax or contravention of any of the provisions of this Act affecting the tax liability of the dealer, the dealer cannot be assessed u/s.9C(3) or (4) of the OET Act and penalty cannot be imposed u/s.9C(5) of the OET Act. For imposing penalty by invoking power u/s.9C(5) of the OET Act conditions mentioned in Sec.9C(1) of the OET Act must be fulfilled, otherwise the imposition of penalty would be unreasonable. In the instant case, the first appellate authority in para-5 of the impugned judgment clearly

observed that there is no report or suggestion in the audit report regarding incorrect tax rate or suppression of turnover. The learned assessing authority simply replicated the turnover in the return and replicated the tax admitted in the return which is, in fact, a less payment of tax and the same cannot be considered as underassessment.

9. The learned Standing Counsel for the State quoting Sec.9C(1) of the OET Act vehemently urged that the case of the dealer-respondent would fall within the ambit of contravention of the provisions of the Act affecting its tax liability. He drew our attention to Sec.7(1) and explanation appended thereto and argued that the return filed by the dealer-respondent being not accompanied by proof of full payment or tax due in respect of tax period, shall not be deemed to a return for the purpose of this section. Therefore, the imposition of penalty u/s.9C(5) of the OET Act is justified. The contention raised by the learned Standing Counsel for the State is not legally tenable in view of the plain and unambiguous meaning of the provisions contained u/s.9C(5) of the OET Act. Simply contravening any of the provisions of the OET Act is not sufficient to impose penalty u/s.9C(5) of the OET Act. The provision for imposition of penalty is permissible only when the contravention is of such nature that the same affects the tax liability of the dealer-respondent. Admittedly, the

dealer-respondent has not paid the admitted tax but same does not amount to contravention of the provision affecting the tax liability. The assessing authority rightly imposed interest for non-payment of the admitted tax but the imposition of penalty on that ground cannot be accepted.

The learned Counsel for the dealer-respondent filed several judgments of this Tribunal to show that penalty imposed by the authorities below was deleted, holding that when there is no suppression of purchases, sales or erroneous claim of deduction with malafied intention to evade tax, imposition of penalty is unwarranted. Most of the judgments relied upon by the learned Counsel for the respondent-dealer is not applicable to the facts and circumstances of the case except the judgment rendered in case of M/s. Mahindra & Mahindra Ltd. Vrs. State of Odisha in S.A. No.200 (ET) of 2013-14 dtd.05.06.2020. In this second appeal the Tribunal in the similar facts and circumstances was of the view that in case of non-payment of admitted tax simpliciter, no guilty intent can be attributed and the same is not definitely relatable to any of the counts mentioned in sub-section (1) of Sec.9C of the Act. In case of default in payment of admitted tax, it cannot be said that the liability was avoided or evaded or any suppression was made or any law was contravened. This Tribunal having already held in the aforesaid judgment

that in case of non-payment of admitted tax, no penalty can be imposed, no other view is permissible. The judgment rendered in the case of Mahindra & Mahindra Ltd. having not been set aside in any higher forum, the same is binding on this Tribunal and keeping in view the principles of consistency, the same should be followed in other case of similar nature.

10. For the foregoing reasons, we are of the unanimous view that the first appellate authority rightly deleted the penalty imposed by the assessing authority u/s.9C(5) of the Act, in the absence of contravention of any of the conditions mentioned in Sec.9C(1) of the said Act. Therefore, the appeal filed by the State being devoid of merit stands dismissed and the impugned order of the first appellate authority is hereby confirmed. Cross objection filed by the dealer-respondent is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member

I agree,

Sd/-
(M. Harichandan)
Accounts Member-I