BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 172 (ET) of 2016-17
&
S.A. No. 85 (C) of 2016-17

(Arising out of orders of the learned Addl. CST (Appeal), Central Zone, Odisha, Cuttack in Appeal Case No. AA-108101510000550/2015-16 & No. AA- 107101510000549/ 2015-16, disposed of on dated 31.10.2016)

Present: **Shri A.K. Das, Chairman**
Shri A.K. Dalbehera, 1st Judicial Member
&
Shri S. Mishra, Accounts Member-II

M/s. Ennore Coke Ltd.,
Bilteruan, Nirgundi, Cuttack ... Appellant

-Versus-

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

For the Appellant : Sri S.R. Jena, Advocate.
For the Respondent : Sri D. Behura, SC (CT)

Date of hearing: 21.06.2021 *** Date of order: 02.07.2021

O R D E R

Both these appeals relate to the same party and involve common question of fact and law for which these cases were heard together and are disposed of by this common order.

S.A. No. 172 (ET) of 2016-17 :

2. This appeal is directed against the order dated 31.10.2016 passed by the learned Addl. CST (Appeal), Central Zone, Odisha, Cuttack (hereinafter called as 'first appellate authority') in Appeal Case No. AA. 108101510000550/2015-16 confirming the order of assessment passed by the Joint Commissioner of Sales Tax, Cuttack-II Range, Cuttack (in short, 'assessing authority') u/s. 9C(4) of the Odisha Entry Tax Act, 1999 (in short, 'OET Act') for the assessment period 04.04.2008 to 31.03.2011 raising a demand of ₹5,25,29,300.00 which includes penalty of ₹3,50,19,533.24.

3. The facts of the case in nutshell are that an audit team was constituted u/r. 43 of the OVAT Rules, 2005 to conduct tax audit of the present dealer-appellant u/s. 9B(2) OET Act, who on completion of the audit submitted a report indicating less payment of entry tax. The dealer-appellant was served with a copy of Audit Visit Report (in short, 'AVR') along with notice in Form E-30 for show cause and hearing. Neither the dealer nor his authorized representative appeared and filed show cause disputing the AVR. Another notice was again issued to the dealer on 25.11.2014 fixing the date of hearing to 03.12.2014. On

receipt of the notice, Mr. Rabiul Haquae, the authorized representative of the dealer along with his Advocate appeared and took time to produce the books of account. The matter was adjourned to 20.01.2015 for production of complete set of books of account and for hearing. On that date, neither the authorized representative nor the Advocate of the dealer appeared, no application for time was also moved on that date. Again another intimation was issued to the dealer-Company vide intimation No. 229 dt. 02.02.2015, fixing the date of hearing to 11.02.2015. This time also, the dealer-appellant neither appeared nor filed any petition assigning the reason for non-production of the books of account. So, the assessing authority basing on the materials available on the AVR completed the assessment exparte. Therefore, due to failure of the dealer-appellant to produce the books of account, the assessing authority accepted the AVR and raised the tax demand of ₹5,25,29,300.00.

3(a). The dealer-appellant, challenging the order of assessment dated 20.03.2015, filed appeal before the first appellate authority, who also dismissed the appeal by its order dated 31.10.2015 on two grounds i.e. for non-filing of any application for condonation of delay along with

memorandum of appeal and non-deposit of 20% of the tax in dispute as pre-condition for entertaining the appeal.

4. The dealer-appellant, being aggrieved with the aforesaid order of rejection of memorandum of appeal, has preferred this appeal. It was vehemently urged by the learned Counsel for the appellant that both the forums below have not given any opportunity of hearing to him to produce the books of account in support of his claim and in a very arbitrary and whimsical manner passed the impugned order. The first appellate authority illegally observed that there was delay in filing of appeal which is, in fact, not borne out from the materials on record. The first appellate authority has passed stereotype order without affording reasonable opportunity of being heard and illegally confirmed the order of assessment wherein the assessing authority raised obnoxious demand as well as imposed penalty in a very perfunctory and whimsical manner. He submits to allow the appeal and set aside the orders of both the forums below.

5. Per contra, learned Standing Counsel (CT) appearing on behalf of the State vehemently argued in terms of the cross-objection filed by it that there is no illegality or impropriety in the impugned orders of both the forums

below and the same have been passed on the basis of the materials available on record. He strenuously argued that the orders passed by both the forums below cannot be examined on merit as the appeal filed by the appellant is not maintainable. The first appellate authority having rejected the appeal summarily for non-filing of application for condonation of delay and for non-deposit of 20% tax in dispute, which is a pre-condition for entertaining the appeal, the present appeal against the said order is not maintainable. He submits to dismiss the appeal in limine.

6. We have heard the rival submissions of the learned Counsel for the parties and gone through the materials on record. This appeal has been preferred against the order dated 31.10.2016 passed by the first appellate authority, who rejected the appeal summarily on the ground that there is delay in filing the appeal and the memo of appeal is not accompanied by the application for condonation of delay and the appellant has also not deposited 20% of the tax in dispute. Now, the question arises whether the present second appeal against summary rejection of appeal by the first appellate authority is maintainable u/s. 17(1) of the OET Act. Before answering this question, it is relevant to take note of the judgment of

the Hon'ble Apex Court in the case of Vijay Prakash D. Mehta & Jawahar D. Mehta Vs. Collector of Customs (Preventive), Bombay, reported in AIR 1988 SC 2010, wherein their Lordships in paras-9 & 13 observed as under :

> "9. Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant..."
>
> "13. It is not the law that adjudication by itself following the rules of natural justice would be violative of any right-constitutional or statutory, without any right of appeal, as such. If the Statute gives a right to appeal upon certain conditions, it is upon fulfilment of these conditions that the right becomes vested and exercisable to the appellant..."

Further, in the case of M/s. Indian Oil Corporation Vs. Orissa Sales Tax Tribunal, Cuttack and four others, 2009 (Supp.-I) OLR 928, the Hon'ble High Court of Orissa has held that-

> "In view of the above, it becomes evident that the appeal is a statutory right, which can be created only

by the Legislature and it does not lie by acquiescence/ consent of the parties or even the writ Court is not competent to create the appellate forum if not provided under the Statute. If Legislature in its wisdom has imposed certain conditions, like pre-deposit for the purpose of filing or hearing of the appeal, the Courts are supposed to give strict adherence to the statutory provisions. The purpose of imposing the pre-deposit condition is that right of appeal may not be abused by any recalcitrant party and there may not be any difficulty in enforcing the order appealed against if ultimately it is dismissed. There must be speedy recovery of the amount of tax due to the authority."

7. It is crystal clear from the law laid down in the above judgments of the Hon'ble Courts that if the legislature has in its wisdom imposed certain conditions like pre-deposit for the purpose of filing and hearing of appeal, the Courts are supposed to give strict adherence to the statutory provisions. The purpose of imposing such condition is to discourage the litigants to abuse the process of the Court and drag the proceeding by mere filing of the appeal. If statute gives a party right to appeal upon fulfilment of certain conditions then such right becomes

vested upon the party only on fulfilment of such conditions. The right to appeal though is a statutory right, it can be taken away if the pre-condition for filing or entertaining the appeal is fulfilled. In the present case, admittedly the dealer-appellant has not deposited 20% of the tax in dispute as required u/s. 16(4) of the OET Act for which the first appellate authority dismissed the appeal. Section 17(1) of the OET Act says any dealer or, person, as the case may be, the Government, if not satisfied with an order passed under sub-section (7) of Section 16 may, within sixty days from the date of receipt of such order prefer an appeal in the prescribed manner to the Tribunal. The proviso to the said section says that an appeal preferred after a period of sixty days may be admitted by the Tribunal, if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period. The order impugned in the second appeal was not passed u/s. 16(7) of the OET Act. Therefore, the dealer-appellant had no right to prefer second appeal u/s. 17(1) of the OET Act before this Tribunal. Both the forums below passed the impugned orders on the basis of materials available on record and basing on the AVR as the appellant did not produce the books of account and documents in support of his claim. The record reveals that

the appellant was given sufficient opportunity to produce the books of account and participate in the hearing, but he did not avail the opportunity afforded to him. So, both the forums below cannot be blamed for not giving opportunity to the appellant for hearing and orders passed by them cannot be faulted with.

S.A. No. 85 (C) of 2016-17 :

8. The dealer-appellant has also filed this appeal u/s. 78(1) of the OVAT Act, 2004 read with Rule 22 of the CST (O) Rules, 1957 challenging the summary rejection order dated 31.10.2016 passed by the first appellate authority in Appeal Case No. AA-107101510000549/2015-16 wherein the order of assessment dated 20.03.2015 passed by the assessing authority u/r. 12(3)(e) of the CST (O) Rules for the period from 01.04.2011 to 31.03.2013 was confirmed.

9. It reveals from the impugned order that the first appellate authority has also dismissed the appeal on the ground that the dealer-appellant preferred appeal much beyond thirty days without any application for condonation of delay and he also did not deposit 20% of the tax in dispute as required u/s. 77(4) of the OVAT Act read with Rule 22 of the CST (O) Rules, 1957. So, the summary

rejection of the appeal not being an order u/s. 77(7) of the OVAT Act, the second appeal filed u/s. 78(1) of the OVAT Act is not maintainable, as discussed in preceding paragraphs.

10. In view of the aforesaid discussions, we are of the considered view that both the appeals filed by the dealer-appellant are not maintainable and accordingly, the same stand dismissed. Cross-objections are disposed of accordingly.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(A.K. Dalbehera)
1st Judicial Member

I agree,

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