BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 82 (ET) of 2018

(Arising out of order of the learned Additional CST (Appeal), Central Zone, Cuttack in Appeal Case No. AA/21/OET/CUII/17-18 disposed of on dated 17.03.2018)

Present: Shri R.K. Pattanaik, Chairman

M/s. Jay Bharat Food Process Products Pvt. Ltd., Plot No. 109, Andeisahi, Jagatpur, Cuttack ... 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: 24.02.2021 ***** Date of order: 05.04.2021

O R D E R

Instant appeal under Section 17(1) of the Odisha Entry Tax Act, 1999 (hereinafter referred to as 'the Act') is at the behest of the dealer assessee assailing the impugned order dated 17.03.2018 promulgated in Appeal Case No. AA/21/OET/CUII/17-18 by the learned Additional Commissioner of Sales Tax (Appeal), Central Zone, Cuttack (in short, 'FAA') confirming the order of assessment dated 13.11.2015 passed under Section 9C of the Act by the learned Deputy Commissioner of Sales Tax, Cuttack-II Circle, Cuttack (hence called 'AA') for the tax

periods 01.04.2012 to 31.03.2014 inter alia on the grounds that it is not tenable in law and thus, liable to be set aside.

2. The dealer assessee is a private limited company and it carries on business in manufacturing of spices and other items and also effects purchase of raw materials and other goods in course of inter-State trade and commerce as well as inside the State from registered dealers. In fact, an Audit Visit Report (in short, 'AVR') was received vis-a-vis the dealer assessee raising objections and demanding additional tax. Considering the AVR, assessment under Section 9C of the Act was initiated which ultimately lead to a demand of ₹48,21,504.00 including penalty. Being aggrieved of the assessment, the dealer assessee filed an appeal under Section 16 of the Act which was finally dismissed. The dealer assessee, being unsuccessful, approached the Tribunal by filing the present appeal and challenged the findings of the authorities below including the maintainability of the assessment under Section 9C of the Act by claiming that AA travelled beyond the AVR which is impermissible.

3. State by filing a cross-objection justified the action under Section 9C of the Act as the dealer assessee is liable to pay entry tax in view of the ruling of the Hon'ble Apex Court in the case of State of Kerala and others Vs. Fr. William Fernandez etc. reported in (2018) 57 GSTR 6 (SC). The dealer assessee raised the following points, such as, whether, the AA could have travelled beyond the findings of the AVR; if at all, in the facts and circumstances of the case, assessment for escaped turnover under Section 9C of the Act could have been initiated instated of an action under Section 10 of the Act; and whether, imposition of penalty to be just

and proper. Furthermore, in course of hearing, the dealer assessee claimed that by virtue of being a micro and small enterprise, it is exempted from paying entry tax on purchase of raw materials as per the Industrial Policy Resolutions, 2007 (in short, 'IPR, 2007'), the fact, which was not duly considered by the FAA.

4. The learned Counsel for the dealer assessee contends that, a certificate dated 25.06.2008 has been issued by the GM, DIC, Cuttack as per the IPR, 2007 identifying it as a Small Scale Industry and thus, entitled to avail exemption. In support of such a contention, a memo dated 02.03.2021 along with a copy of certificate is produced before the Tribunal. The learned Standing Counsel (CT) for the State, on the other hand, contended that there is no proof on record to satisfactorily identify the dealer assessee as a Small Scale Industry in order to avail the benefit under IPR, 2007. Of course, the FAA did not consider said aspect of the matter though it was raised by the dealer assessee.

5. Turning to the point, as to the jurisdiction of the AA to initiate action under Section 9C of the Act, according to the dealer assessee, it cannot be sustained in law for having travelled beyond the AVR. The State contends that the AA acted upon on the basis of the audit materials and thus, has not travelled beyond the AVR. The learned Counsel for the dealer assessee highlighted upon the fact that there was no observation in the AVR, as is reflected and clearly discernable from the impugned order dated 17.03.2018 and in spite of that, the FAA upheld the action under Section 9C of the Act. It is a fact that FAA proceeded to confirm the assessment dated 13.11.2015 even with the observation that the suppression was

not reported in audit. A recent ruling dated 17.04.2019 in W.P. (C) No. 3661 of 2019 of the Hon'ble Court in the case of M/s. Tata Sponge Iron Ltd. Vs. Commissioner of Sales Tax, Odisha is cited. In the case supra, the Hon'ble Court observed that tax on export sale of goods cannot be levied when it was not pointed out in the AVR. An assessment under Section 9C of the Act is on account of audit inspection. It is not a reassessment under Section 10 of the Act. Only upon audit being carried out and report received, an action under Section 9C of the Act may be commenced. It is settled law that assessment shall have to be confined to the observations made in the AVR. In the instant case, as per the assessment, it is made to understand that the dealer assessee filed a revised return under the OVAT Act for the relevant periods which did not tally with the original return vis-a-vis purchase of goods in course of import into India, but then, said aspect was not reported in the AVR. The assessment under Section 9C of the Act, as earlier discussed, is always to be subject to the AVR. The AA does appear to have considered the said aspect without any observation being made in the AVR, which, according to the Tribunal, is not permissible. Only against an objection pointed out in the AVR, it is required to be examined and assessment to be held as per Section 9C of the Act. Any deviation therefrom would certainly result in travelling beyond the AVR. In the case at hand, there was no such objection in the AVR, but considering the audit materials, the AA proceeded and assessed the dealer assessee under Section 9C of the Act, which is untenable. The aforesaid aspect was also not duly examined by the FAA.

6. Having regard to the above, the Tribunal, thus, reaches at a logical conclusion that the AA by considering the audit materials without any observation in the AVR could not have exercised jurisdiction under Section 9C of the Act by raising the additional demand, which has clearly amounted to travelling beyond the findings in the audit. Having concluded so, the other points which have been raised by the dealer assessee, such as, exemption as per IPR, 2007 etc. need no examination by the Tribunal.

7. Hence, it is ordered.

8. Thus, the appeal stands allowed. As a necessary corollary, the impugned order dated 17.03.2018 passed in Appeal No. AA/21/OET/CUII/17-18 is hereby set aside. Resultantly, the order of assessment dated 13.11.2015 is quashed. Excess tax, if any, paid shall be refunded to the dealer assessee in accordance with law. 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