

**BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.
S.A.No. 125(ET)/2015-16**

(Arising out of order of the Id.DCST (Appeal), Sambalpur Range, Sambalpur, in
Appeal No. AA.99/SAI/ET/08-09,
disposed of on dtd.31.07.2015)

Present: Sri S. Mohanty
2nd Judicial Member

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

-Versus-

M/s. T.P. Minerals (P) Ltd.,
Hospital Road,
Dist. Sambalpur. ... Respondent

For the Appellant : Mr. S.K. Pradhan, Addl. Standing Counsel (C.T.)
For the Respondent : None

Date of Hearing: 10.05.2018 *** Date of Order: 11.05.2018

ORDER

Revenue has preferred this appeal against the order of learned First Appellate Authority/Deputy Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur (in short, FAA/DCST) in First Appeal Case No.AA.99/SAI/ET/08-09 dtd.31.07.2015 in confirming the order of assessment passed by the Sales Tax Officer/Assessing Officer, Sambalpur-I Circle, Sambalpur (in short, STO/AO) in a proceeding u/s.9(C) of the Odisha Entry Tax Act, 1999 (in short, OET Act).

2. The brief fact of the case are : initially the dealer was subjected to assessment u/s.9(C) of the OET Act on the basis of an Audit Visit Report (AVR) submitted by STO (Audit), Sambalpur Range, Sambalpur for the tax period 01.04.2005 to 31.03.2007 relating to the dealer. As per the AVR the dealer had not paid entry tax on the Graphite powder sold by him. The AO on confrontation of the allegation in AVR to the dealer and on verification of the books of account and connected documents of the dealer's found that, the dealer had sold Graphite powder worth of Rs.27,72,259.22 during the tax period in question. The entry tax payable on it at Rs.27,772.59 was not paid. Hence, he raised the demand of tax and besides that he imposed penalty twice of the tax amount

levied u/s.9C(5) of the OET Act. The total demand became raised to Rs.83,169/-

The matter was carried in appeal before the FAA in First Appeal Case No.AA.99/SAI/ET/08-09. The FAA confirmed the order of AO vide it's order dtd.12.12.2009.

Being aggrieved by the order of FAA, the dealer had preferred Second Appeal No.248(ET)/2009-10 before the Division Bench of this Tribunal. The Division Bench remanded the matter to the FAA vide it's Order dtd.30.06.2015. After that, the remand appeal was heard by the FAA and decided in the impugned Order dtd.31.07.2015, which is under challenge in this appeal by the Revenue.

3. The contention of the Revenue is, the FAA was wrong in his opinion that Graphite powder is not a schedule goods not exigible to tax. So, the order should be modified.

4. The appeal is heard without cross objection from the side of the Revenue. The impugned order as it reveals, the FAA has taken into consideration of the following points :

The goods which are not produced in Odisha but brought into the State from outside, if exigible to tax or not keeping in view the order of the Hon'ble Court in **State of Orissa Vrs. Reliance Industries Case** in W.P.(C) No.6515/2006 and (iii) If the entry tax collected by the dealer from his purchasing dealer should be refunded to the dealer or not ? and If the Graphite powder should be treated as schedule goods as minerals or not ?

5. The backdrop of the case mentioned above and from the orders passed by the authorities from time to time, it is found that, the case is being lingered and moved from one forum to other and remanded again to the FAA by the Division Bench of this Forum on mechanical pleas and observation. The dealer was found to have purchased Graphite and converted it to the Graphite powder and sold it outside the State. The sale price received by the dealer during the tax period is Rs.27,72,259.22. Entry tax payable on it Rs.27,722.59. Above is the allegation in the AVR. AA found the dealer had purchased other 16 numbers of schedule goods from outside Orissa with purchase price of

Rs.26,07,167.02. Tax on it was calculated at Rs.30,136/-. The dealer was found to have paid that amount of tax.

As per the assessment order the dealer had advanced a peculiar claim before the AA that the tax paid by him of Rs.30,136/- should be adjusted against the entry tax payable on sale of Graphite powder. That submission itself is an admission of the dealer that, he had wanted to pay entry tax on sale of Graphite powder and he has no objection to the levy of entry tax on the sale of Graphite powder of Rs.27,72,259.22. If that be, findings on the question like whether the Graphite and Graphite powder are two different things, whether the Graphite powder is not a mineral or schedule goods, whether the Graphite has undergone changes through a manufacturing process to form as Graphite powder, all these questions are redundant. However, taking cue from the definition of manufacture under OST Act, Sec.2(ddddd), Sec.2(c) of the OET Act and Sec.28 of the OVAT Act and from the authorities like **Bherhaghat Mineral Industries Vrs. Divisional Deputy Commissioner of Sales Tax & another (1990) 79 STC 156 MP**. In **Chowgule & Co. Pvt. Ltd. Vrs. Union of India (1981) 47 STC 124**, it can safely be said that, the Graphite and Graphite powder cannot be segregated from each other in term of its character and use. Hence, it is exigible to entry tax.

The next question determined by the FAA like the goods not produced in Odisha when purchased from outside of the State, if exigible to tax or not has been set at rest by the Apex Court in the case of **Jindal Stainless Ltd. & another Vrs. State of Haryana & Others (2016) Vol.2 SCALE-1**.

Keeping in view the authoritative pronouncement of the Apex Court mentioned above here in this case, it can safely be said that, the dealer is liable to pay tax to which he has admitted before the AA i.e. to the tune of Rs.27,723/- , whereas the penalty u/s.9C(5) of the OET Act as imposed is mandatory in nature, which needs no interference.

Pertinently the dealer has not preferred any appeal against the impugned order. In that event, while confirming the assessment order and the impugned order as well, it is held that, the appeal preferred by the State is mechanical and sands merit. Accordingly, it is ordered.

The appeal preferred by the State is dismissed ex-parte as of no merit.

Dictated and Corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

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