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

## S.A. Nos. 119(ET) & 120(ET) OF 2010-11
## &
## S.A. Nos. 140(ET) & 141(ET) OF 2010-11

(Arising out of orders of the learned DCST, Jajpur Range,
Jajpur Road in First Appeal Case Nos. AA- 267/KJB(ET)/08-09
& AA- 268/KJB(ET)/08-09 disposed of on dated 08.09.2010)

Present: Shri R.K. Pattanaik, Chairman,
Smt. S. Mishra, 2nd Judicial Member, and
Shri P.C. Pathy, Accounts Member-I

## S.A. Nos.119(ET) & 120(ET) OF 2010-11

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

-Versus-

M/s.Thakur Prasad Sao & Sons (P) Ltd.,
Guali Iron Ore Mines, 334, Kamarjoda,
Near TV Tower, Joda, Dist. Keonjhar ... Respondent

## S.A. Nos.140(ET) & 141(ET) OF 2010-11

M/s.Thakur Prasad Sao & Sons (P) Ltd.,
Guali Iron Ore Mines, 334, Kamarjoda,
Near TV Tower, Joda, Dist. Keonjhar ... Appellant

-Versus-

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

For the State : Sri M.S. Raman, Additional Standing Counsel (CT)
For the Dealer : N o n e

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Date of hearing: 21.10.2020 ***** Date of order: 20.11.2020

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O R D E R

On consent of the parties and later to the intimation received from the dealer assessee through its engaged Counsel, who forwarded a written note of

submission with a request for disposal, the above appeals are taken up combinedly for common questions of law being involved and accordingly, disposed by the following order.

2. As is revealed from the record, the dealer assessee is engaged in extraction of iron ore lumps and crushing it into sized iron ores and selling both as well as iron ore fines within the State and in course of inter-State trade and commerce. It is made to appear that audit assessments in terms of Section 9C of the Odisha Entry Tax Act, 1999 (in short, 'the Act') for the respective periods were initiated and ultimately additional demands were raised along with penalty payable as per the terms and conditions of the demand notices.

S.A. Nos. 119(ET) & 120(ET) of 2010-11:

3. Instant appeals under Section 17(1) of the Act are at the behest of the State as against the impugned orders dated 08.09.2010 promulgated in Appeal Nos. AA- 267/KJB(ET)/2008-09 and AA-268/KJB(ET)/2008-09 by the learned Deputy Commissioner of Sales Tax, Jajpur Range, Jajpur Road (in short, 'FAA') for the assessment periods 2005-06 and 2006-07 respectively vis-a-vis the assessment orders dated 15.10.2008 passed by the learned Sales Tax Officer, Barbil Circle, Barbil (in short, 'AA') on the grounds inter alia that the findings with regard to calculation of freight and incidental charges to be bad in law and that apart, the FAA was to levy penalty on account of default on the part of the dealer assessee in paying the due entry tax. No cross-objections have been filed by the dealer assessee in so far as the present appeals are concerned.

S.A. Nos. 140(ET) & 141(ET) of 2010-11:

4. Whereas the present appeals are at the instance of the dealer assessee in assailing the impugned orders dated 08.09.2010 emanating from Appeal Nos. AA- 267/KJB(ET)/2008-09 and AA-268/KJB(ET)/2008-09 for the respective periods vis-a-vis assessments dated 15.10.2008 on the grounds that entry tax is not payable in respect of the imported goods which is beyond the scope and ambit of the Act. In other words, according to the dealer assessee, the authorities below could not have levied entry tax in respect of the machineries purchased from outside the territory of India. The State filed cross-objections claiming that the FAA could not have substituted best judgment of the AA vis-a-vis the amount payable towards freight and incidental charges in absence of any reason or logical basis. Besides the above, the State challenged deletion of penalty as has been directed by the FAA with the reason that it was necessarily to be levied in terms of Section 9C(5) of the Act keeping in view the settled position of law.

5. The Tribunal, at the beginning, is to consider as to whether the decision of the AA of 5% addition towards freight and incidental charges to the purchase value so directed by the FAA as against 2% is to be restored, as is claimed by the State on the ground that there was no justifiable reason to do so. Admittedly, the FAA substituted the best judgment of the AA and reduced it to 2% additional freight and incidental charges from 5% and according to the State, such an action cannot be justified. In this connection, the learned Additional Standing Counsel (CT) cited the decision of the Hon'ble Apex Court rendered in the case of State of Kerala Vs. Fr. William Fernandez and other batch of appeals reported in (2018) 57 GSTR 6

(SC) besides State of Odisha Vs. Reliance Industries Ltd in Civil Appeal Nos. 6474-6798 of 2017 arising out of SLP (C) Nos. 14454-14778 of 2008 disposed of on 28.03.2017. It is no more in dispute as to exigibility of entry tax on goods brought from outside the territory of India and/or brought from outside and not manufactured within the State of Odisha. In fact, payment of entry tax on imported goods was the subject matter in Fr. William Fernandez case ibid, wherein, the Hon'ble Apex Court held and observed that it is exigible under law. The entry tax is payable on the purchase value as defined in Section 2(j) of the Act, which means, the value of scheduled goods as ascertained from the original invoice or bill inclusive of insurance charges, excise duties, countervailing charges, sales tax or value added tax, as the case may be, turnover tax, transport charges besides freight charges and other charges incidental to the purchase of such goods. In view of the law settled by the Hon'ble Apex Court, entry tax is payable on the imported goods on its purchase value which includes the value of the scheduled goods as reflected in the original invoice or bill along with freight and other incidental charges. The learned Additional Standing Counsel (CT) referring to the aforesaid decisions of the Hon'ble Apex Court besides Ramala Sahakari Chini Mills Ltd. Vs. Commissioner of Central Excise reported in 2016 (334) ELT 3 (SC), wherein, the word 'include' appearing in the statutory definition was held to be generally used as an extension of the meaning with no restriction, contended that the FAA committed serious illegality, while considering additional charges towards freight and other incidental expenses to the purchase of goods and without any basis, reduced it to 2% from 5%. Apart from above rulings, the learned Additional Standing Counsel (CT) cited two more decisions of Hon'ble

Gauhati High Court delivered in Numaligarh Refinery Ltd. Vs. State of Assam reported in (2019) 5 GLR 437 and (2019) 63 GSTR 97 (Gauhati) and further contended that the AA was fully justified in adding 5% on freight and other incidental charges, while determining the purchase value of the scheduled goods. In fact, the above decisions of the Hon'ble Gauhati High Court do not lay any proposition of law that in all circumstances 5% to be added to the purchase value towards freight and incidental charges. Rather, the dealer assessee, in one of cases supra, had challenged inclusion of 5% VAT for the purpose of payment of entry tax and in that context, it was held that the purchase value includes all the taxes and therefore, it cannot be excluded. In that case, the next question is, when the dealer assessee is liable to pay the entry tax on the purchase price including taxes and incidental charges, whether, the FAA was justified in reducing it to 2% from 5%. It is contended that a best judgment is not casually be substituted by another unless and until strong and compelling reasons exist. On a bare look at the impugned order dated 08.09.2010, it does not appear that there was any basis much less a reason for the FAA to reduce charges from 5% to 2%. A best judgment as is normally understood is nothing but an exercise having nexus with the materials on record though some element of guess work is involved. It is also equally a settled position of law that a best judgment is not lightly to be interfered with unless there appears a reason to it. The extent and volume of transactions and the manner of delivery of goods to the dealer assessee and such other attending circumstances and factors are to be considered and carefully gone into, while resorting to a best judgment. In the instant case, it is not clearly discernible as to on what basis either 5% or 2% was added by the authorities

below. It does not appear and evident from the record as to in what way the authorities below determined the freight and incidental charges to be added to the purchase value of the scheduled goods. In absence of any such consideration, the Tribunal is constrained to hold that neither 2% nor 5% charges to be acceptable, since the decision in that respect do not find support from any materials. In the considered view of the Tribunal, such aspect requires a fresh determination by the AA. Only to add, which has now become a mere formality, it is to exclaim that the dealer assessee cannot avoid paying entry tax with respect to the imported goods in view of the ruling of the Hon'ble Apex Court in Fr. William Fernandez case ibid. In such view of the matter, the claim of the dealer assessee merits no consideration.

6. Further question is, whether, the FAA was justified in deleting the penalty leviable in terms of Section 9C(5) of the Act? According to the learned Additional Standing Counsel (CT), in view of the definition of 'purchase value' in Section 2(j) of the Act and having regard to the fact that entry tax was payable on the scheduled goods imported, the dealer assessee was duty bound to pay it statutorily, which it did not do and therefore, for such a default vis-a-vis the tax liability, penalty was necessarily to be imposed and hence, it can well be said that the FAA fell into serious error in deleting the same. As put forth for and on behalf of the dealer assessee, there was a dilemma whether to pay the entry tax or not upon the imported scheduled goods and under such circumstances, when there was non-payment of duty, penalty could not have been levied as was done by the AA, which was rightly deleted by the FAA. In this regard, apart from other decisions, a ruling of the Hon'ble Apex Court is cited from the side of the dealer assessee in the case of

CCE, Vishakhapatnam-III Vs. Andhra Pradesh Paper Mills Ltd. reported in 2015 (319) ELT 554 (SC), wherein, it has been categorically observed that when conflict of judicial opinion existed, penalty should not be imposed. In that case, the Hon'ble Apex Court considered the issue in favour of the Revenue by virtue of its judgment rendered in 2006, but considering the conflicting judicial opinion, directed deletion of penalty, while upholding payment of duty. It is also contended that when the tax liability was not admitted and apart from the fact that when there was no clear indication in the definition of 'purchase value' in Section 2(j) of the Act as to whether entry tax should be payable on imported scheduled goods, it would quite be unfair to levy penalty on determination of the admitted tax. The learned Additional Standing Counsel (CT) contended that there was no ambiguity in so far as payment of entry tax is concerned, since the purchase value included all charges incidental to the purchase of such goods. Whether, it was under a bonafide belief or impression that persuaded the dealer assessee for not paying the entry tax on the ground that it is not within the ambit and purview of the Act, the same certainly deserves an attention. Section 2(j) of the Act, apart from the value of the scheduled goods, included all such taxes and charges mentioned therein without specific reference to customs duty. Under such circumstances, it could well nigh be possible to assume that all taxes and charges are included in the purchase value, but not the customs duty. The Hon'ble Apex Court in Fr. William Fernandez case made it clear that customs duty is included under the charges incidental to the purchase value of scheduled goods and therefore, entry tax is exigible thereon. As is made to appear, the decision of the Tribunal in M/s. Hindustan Aeronautics Ltd. Vs. State of Orissa in

S.A. No. 168(ET) of 2003-04 decided on 24.12.2010 (FB) was subjected to challenge and was reversed by the Hon'ble Court in Tata Steel Ltd. Vs. State of Orissa reported in (2013) 57 VST 484 (Orissa) which was later upheld by the Hon'ble Apex Court in Fr. William Fernandez case ibid. In view of the decision in Fr. William Fernandez Vs. State of Kerala reported in (1999) 115 STC 591 (Kerala) and rulings of other Hon'ble High Courts then prevailing, entry tax was held not exigible in respect of the imported goods. In fact, one needs to fairly admit that at the relevant point of time, on account of said rulings, it was in a fluid state, whether to pay up entry tax or not on such goods. Therefore, it would not at all be incorrect to suggest that there was an air of uncertainty towards payment of entry tax on the imported goods. In the case at hand, the dealer assessee apart from claiming that the liability was never admitted contended that in view of such dilemma in interpreting Section 2(j) of the Act, the entry tax was not paid on the scheduled goods and in that respect, no malafide should be attributed against it. The learned Additional Standing Counsel (CT), on the other hand, strongly urged that there was no any ambiguity, as such, in so far as Section 2(j) of the Act is concerned, which included customs duty as well and that too when, incidental charges had been clearly interpreted by the Hon'ble Apex Court in Garware Nylons Ltd. Vs. Pimpri Chinchwad Mahanagar reported in 1995 (77) ELT 22 (SC). There is no denial to the fact that customs duty did not have specific reference in Section 2(j) of the Act. Despite the fact that one was required to understand incidental charges occurring in Section 2(j) of the Act to embrace all taxes and notwithstanding the fact that all such taxes and charges are supposedly to remain in purchase value of scheduled goods, still there was every possibility for a dealer

assessee to assume that it does not include customs duty. If under a bonafide belief or impression, tax is not paid and subsequently, it is found that such tax is payable and the belief is on account of a volatile situation as to its exigibility, in the considered opinion of the Tribunal, it would not at all be justified to levy penalty against a dealer assessee. Admittedly, the tax due was not cleared by the dealer assessee after the decision of the Hon'ble Court in Tata Steel Ltd. case ibid. It is also admitted that the dealer assessee did not pay its entry tax dues even later to the ruling of the Hon'ble Apex Court in Fr. William Fernandez case ibid. It is equally true that the Hon'ble Court in Reliance Industries Ltd. Vs. State of Orissa reported in (2008) 16 VST 85 (Orissa) directed the assessee to deposit 1/3$^{rd}$ tax as per returns filed. It is also a fact that the dealer assessee did not challenge the constitutionality of Section 2(j) of the Act. However, having regard to the fact that the decision was pending with the Hon'ble Court till 2013 and again it was carried to the Hon'ble Apex Court, where the matter remained till 2017, it was quite but natural for the dealer assessee not to pay the tax under the Act. Even after 2017, when the dealer assessee did not pay the entry tax, in the considered view of the Tribunal, it cannot be treated as an adverse circumstance for the purpose of considering levy of penalty, more particularly when, the State had also appealed against the impugned orders dated 08.09.2010 with respect to additional charge payable @ 2% so substituted by the FAA. The learned Additional Standing Counsel (CT), at this juncture, cited the ruling of the Hon'ble Apex Court in the case of Union of India Vs. Dharmendra Textile Processors reported in (2008) 18 VST 180 (SC) in order to contend that the penalty must have to be levied which cannot be avoided since it is a civil liability. There is no

tenebrosity in the settled principles of law that mens rea plays no part or role in case of civil liability. However, in the considered view of the Tribunal, which is also its recent and consistent view, the conduct of the dealer assessee must have to be taken into account. If there is a mistake or error or wrong committed which is not malafide or under an honest belief or impression that the tax is not payable and a reasonable explanation is offered, it has to be sincerely appreciated before imposing penalty. As earlier discussed, since the dealer assessee, in the present case, was not of the view having any tax liability and furthermore, it was on account of uncertainty which was more or less prevailing at the relevant point of time, notwithstanding the fact that it had not approached any Court of law challenging the validity of Section 2(j) of the Act, the Tribunal is of the humble opinion that the FAA did not commit any illegality or error in deleting the penalty imposed by the AA.

7. The next consideration is, whether, interest is to be levied or not, as according to the State, the dealer assessee should be made liable. In this regard, the learned Additional Standing Counsel (CT) cited the rulings such as Nalini Kanta Muduli Vs. Bhubaneswar Development Authority: 2008 (II) OLR 18; Haji Lal Md. Biri Works Vs. State of UP: (1973) 32 STC 496 (SC); STO Vs. Dwarika Prasad Sheo Karan Dass: (1977) 39 STC 36 (SC); and Commissioner of Trade Tax Vs. Kanhai Ram Thekedar: (2005) 141 STC 1 (SC) and contended that when the tax due is finally determined against the dealer assessee, interest should automatically be levied so as to compensate the State, inasmuch as, liability to pay interest arises by operation of law. Apart from the above, rulings in Royal Boot House Vs. State of J&K: (1984) 56 STC 212 (SC); and Indian Commerce & Industries Co. Pvt. Ltd. Vs. The Commercial

Tax Officer: (2003) 129 STC 509 (Mad.) besides few more are cited for the State, while demanding levy of interest. It is the settled position of law that in case of a final adjudication of tax liability which was initially avoided by a dealer assessee, interest is to be levied without fail. In fact, a question may arise as to why interest is to be demanded, when penalty was not levied. Interest and penalty are understood differently and carry distinct connotations. As a matter of fact, interest is not in the nature of penalty but compensable in nature. In such view of the matter and having regard to the settled position of law and referring to the rulings cited for and on behalf of the State, the Tribunal, thus, arrives at a definite conclusion that even though the dealer assessee is not saddled with penalty, nevertheless, it must have to pay the interest on the admitted tax due with respect to the scheduled goods in order to make good the loss suffered by the State.

8. Hence, it is ordered.

9. In the result, S.A. Nos. 119(ET) & 120(ET) of 2010-11 filed by the State are allowed in part. S.A. Nos. 140(ET) & 141(ET) of 2010-11 filed by the dealer assessee, however, stand dismissed. The cross-objections filed by the State are accordingly disposed of. As a necessary corollary, the impugned orders dated 08.09.2010 promulgated in Appeal Nos. AA- 267/KJB(ET)/08-09 and AA-268/KJB(ET)/08-09 are hereby set aside to the extent indicated above. Consequently, the AA is directed to undertake recomputation of the tax liability vis-a-vis the dealer assessee for the tax periods under consideration in accordance with law and in the light of the findings and observations of the Tribunal preferably within a period of

three months from the date of receipt of the present order after providing a reasonable opportunity of being heard to the dealer assessee.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(Smt. S. Mishra)
2nd Judicial Member

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