BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 27 (ET) of 2019

(Arising out of order of the learned Additional CST (Appeal),
Rourkela in First Appeal No. AA 59 (ET) RL-II/2018-19
disposed of on dated 20.08.2018)

Present: Shri R.K. Pattanaik,
Chairman

M/s. T.R. Chemicals Limited,
Barpali, Rajgangpur, Dist. Sundargarh ... Appellant

-Versus-

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

For the Appellant : Sri S.C. Agarwal, Advocate
For the Respondent : Sri D. Behura, Standing Counsel (CT)

Date of hearing: 11.02.2021 ***** Date of order: 09.03.2021

O R D E R

Introductory:

Present 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 directed against the impugned order dated 20.08.2018 promulgated in Appeal Case No. AA- 59 (ET) RL-II/2018-19 by the learned Additional Commissioner of Sales Tax (Appeal), Rourkela (in short, 'FAA'), who partly confirmed the tax demand raised by the learned Deputy Commissioner of Sales Tax, Rourkela-II Circle, Panposh (hence called 'AA') under Section 9C of the Act for the tax periods 01.04.2006-31.03.2011.

Genesis:

2. The dealer assessee is a limited company having its place of business located at Rajgangpur in the district of Sundargarh. It deals with manufacture and sale of resin catalyst and sponge iron and occasionally engaged in trading on iron ore fines. The dealer assessee, as such, effects intra and inter-State sales as well as export. In fact, an audit visit was held vis-a-vis the dealer assessee on 27.07.2011. In course of such visit, books of account and other documents maintained by the dealer assessee were examined. Lastly, the Audit Visit Report (AVR) was framed and submitted. Later to the above, a notice in Form E-30 with a copy of AVR was issued and served on the dealer assessee to appear on the date fixed. Accordingly, the dealer assessee on entering appearance furnished defence against the allegations reflected in the AVR. However, the AA raised additional demand of ₹38,94,118.00 against the dealer assessee. The above demand included interest and penalty besides the tax payable by the dealer assessee. Being dissatisfied, the dealer assessee filed appeal before the FAA, who partly allowed it and reduced the demand to ₹14,98,021.00. Still not satisfied, the dealer assessee approached the Tribunal on the ground that the additional demand to be untenable and thus, cannot be sustained in law.

Grounds of appeal:

3. It is principally confined to the points, such as, (i) entry tax paid at the commercial check gates amounting to ₹1,01,261.00 and its rejection has resulted in double taxation over and above levy of interest and penalty; (ii) freight

charges @ 15% in case of raw materials and @ 10% with respect to the consumables and capital goods to have been incorrectly added; and (iii) imposition of penalty over the tax determined to be arbitrary. In course of argument, an additional ground on the levy of interest of ₹1,19,473.00 was raised claiming it to be unwarranted.

Response of the State:

4. A cross-objection is filed upholding the impugned order dated 20.08.2018 and the grounds are to the effect that (i) the dealer assessee claimed payment for ₹1,01,261.00 by producing copies of money receipts for which it was unacceptable; (ii) the claim that freight charges not to have been added as own transport vehicles had been engaged was duly considered, inasmuch as, the dealer assessee failed to produce any documentary evidence in order to substantiate it; and (iii) with respect to leviability as to the penalty under Section 9C(5) of the Act, it is a statutory requirement irrespective of mens rea proved in view of ratio of Hon'ble Apex Court in Union of India Vs. Dharmendra Textile Processors: (2008) 18 VST 180 (SC) and Guljag Industries Vs. Commercial Tax Officer: (2007) 9 VST 1 (SC). Hence, as per the State, the grounds raised in appeal are misconceived and liable to be rejected outrightly.

Deliberation on points:

5. (i) As regards entry tax payment of ₹1,01,261.00, the dealer assessee submitted photocopies of the money receipts. It is revealed from the impugned order dated 20.08.2018 that about 448 copies of money receipts towards

payment of entry tax of ₹1,01,261.00 at different check gates were produced by the dealer assessee, who claimed for its adjustment. It was rejected as the original money receipts could not be produced. It was not accepted also for the fact that such claim was earlier been disallowed under order dated 30.01.2014 passed in Appeal Case No. AA- SNG-108/13-14 for non-production of original money receipts. The learned Counsel for the dealer assessee urged that it was incumbent on the part of the AA to find out the actual payments made or not. It is contended that both the forums cannot be absolve such responsibility and furthermore, rejection of entry tax paid would amount to double taxation and unjust enrichment of the State. The learned Standing Counsel (CT) for the State, however, would contend that rightly the claim was disallowed, since the original money receipts were not produced, genuineness of which was not verifiable from the official records of the abolished check gates. Indeed, it was for the forums below either to accept or reject the claim of the dealer assessee and in the case at hand, due to want of original money receipts, it entailed rejection. It is not forthcoming from the record as to what prompted the dealer assessee to produce only copies of the money receipts. It is not discernable from the record that the genuineness of the copies of the alleged money receipts was ever doubted by the forums below. There is no view expressed by the forums that the copies of the receipts allegedly produced by the dealer assessee to be fake or not genuine for any reason. In fact, on the failure of the dealer assessee to submit the original money receipts, as according to the FAA, its genuineness could not be verified. It is also revealed from the impugned order dated 20.08.2018

that the claim of the dealer assessee could not further be examined and copies of the money receipts and its genuineness duly verified as the check gates had by then been abolished. In the view of the Tribunal, the dealer assessee ought to have produced the original money receipts and in failing, to explain as to why copies had to be produced. No explanation is on record having been received from the dealer assessee regarding its failure to produce the original money receipts. Under the above circumstances, the Tribunal is of the humble opinion that a last opportunity should be provided to the dealer assessee in order to submit the original money receipts and in case of failure, considering the photocopies already produced before the forums, the AA is required to conduct an enquiry and receive such contemporaneous material to determine the legitimacy of the alleged claim. Merely for submission of copies of money receipts, an otherwise legitimate claim, in the event of being proved that entry tax to the tune of ₹1,01,261.00 was really paid by the dealer assessee, cannot be discarded. For that matter, the AA cannot as well abdicate its responsibility. If the alleged claim is not properly examined, it could well result in double taxation. Hence, in the facts and circumstances of the case, it would be just and proper, if such claim of the dealer assessee is freshly enquired into and accordingly, it is directed.

(ii) Respecting the freight charges @ 15% on raw materials and @ 10% on consumables and capital goods, as estimated, the learned Counsel for the dealer assessee contends that it is disproportionate as against the fact that in number of similar cases, 5% in case of raw materials and 0.5% in case of capital

goods and consumables have been added. It is made to understand that as the dealer assessee failed to adduce evidence as to freight/transport charges, the purchase value so disclosed in the AVR was finally accepted. The AA, as it appears, simply accepted the AVR on account of default by the dealer assessee in adducing evidence towards the freight charges actually incurred. According to the dealer assessee, in respect of consumables, freight charges cannot be more than 3% and as against capital goods, it ought to be @ 2%. There is no basis to fix freight charges @ 15% on raw materials and @ 10% on consumables and capital goods apparently noticed in the order of assessment dated 14.05.2012. Rather, the AA, without due examination, straight away accepted the view opined in the AVR, which according to the Tribunal, was quite not proper. Moreover, the dealer assessee claimed that lesser percentage on freight charges was applied in similarly situated cases. As a matter of fact, an instance in support of such a claim was brought to the notice of the Tribunal by producing a copy of an assessment order dated 29.09.2012 in respect of an assessee viz. M/s. Utkal Metallic Ltd., Rourkela, District- Sundargarh accompanied with the AVR. Having regard to the above, the Tribunal is of the view that both the forums ought to have determined the purchase value and the percentage of freight charges applicable vis-a-vis raw materials, consumables and capital goods independently and could not have abstained therefrom. Even in absence of any such evidence submitted by a dealer assessee, it is the bounden duty of an assessing authority to examine and assess the freight charges by applying best judgment rule. A nexus must exist with reference to the nature of trade or business and its volume

and only after considering all such aspects of the matter, a determination on freight charges is to be made. No doubt, some element of guess work is involved in a best judgment process, but it must have a nexus with the materials on record. Such an exercise does not appear to have been made, as both the forums were persuaded to accept the AVR moreover on the plea that the dealer assessee did not produce any documentary evidence. That apart, there is no evidence on record also to suggest that the dealer assessee used its own vehicles for the purpose of transportation. Thus, the Tribunal is again compelled to draw a similar conclusion that there is a need of relook and examination vis-a-vis the freight charges and percentage to be made applicable on each of the heads, while determining the purchase value.

(iii) Under Section 9C(5) of the Act, penalty is imposable, in the event of suppression of purchases or sales or both, erroneous claims of deduction, evasion of tax or contravention of law affecting a dealer's tax liability. In the instant case, as per the dealer assessee, none of the conditions of Section 9C(1) of the Act is satisfied and therefore, penalty could not have been levied. No doubt, in a civil liability, mens rea is not searched for, but before imposing penalty, as it has been the consistent view of the Tribunal, conduct of a dealer should be taken cognizance of along with the explanation offered for the alleged default. Why for freight charges on raw materials, consumables and capital goods were not included in the purchase value carrying an explanation is also not discernable from record. It is not that there was any suppression of purchases or sales of goods in the hands of the dealer

assessee said to have been alleged. The default is on account of non-inclusion of freight charges in purchase value of goods. What was the reason and why the dealer assessee failed to add freight charges to the purchase value is to be unearthed and according to the Tribunal, explanation of the dealer assessee counts a lot. In case, the conduct of the dealer assessee is such that there was a bonafide belief or mistake in including the freight charges, while determining the purchase value, as per the Tribunal, in such an eventuality, penalty should not be levied. In the instant case, the dealer assessee definitely owes an explanation to the charge for determining the purchase value without adding up the freight/transportation charges. Only upon the explanation and considering the conduct of the dealer assessee, it should be considered as to if penalty to be levied. The decision on imposing interest depends on the discretion of the AA on a finding vis-a-vis the penalty being rendered. No doubt, a dealer must have to pay interest on the admitted tax due in order to compensate the State.

6. Hence, it is ordered.

Conclusion:

7. In the result, the appeal stands allowed. As a logical sequitur, the impugned order dated 20.08.2018 passed in Appeal No. AA 59 (ET) RL-II/2018-19 is hereby set aside. Consequently, the case is remitted back to the AA for a de novo assessment vis-a-vis liability for the tax period 01.04.2006 to 31.03.2011 by providing a reasonable opportunity of hearing to the dealer assessee keeping in view the observations of the Tribunal discussed herein above and to pass appropriate order

as per and in accordance with law, preferably, within a period of three months from the date of receipt of the above order. 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