BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 93 (VAT) of 2019
&
S.A. No. 57 (ET) of 2019

(Arising out of orders of the learned JCCT & CST (Appeal), Sundargarh Territorial Range, Rourkela in First Appeal Case Nos. AA V 07 of 2016-17 & AA V 79 ET of 2017-18 disposed of on dated 25.02.2019)

Present: Shri R.K. Pattanaik,
Chairman

M/s. Meta Sponge Private Limited,
Plot No. B-201, Industrial Estate, Kalunga,
Dist. Sundargarh ... Appellant

-Versus-

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

For the Appellant : Sri S.C. Agarwal & Sri P.C. Ratha, Advocates
For the Respondent : Sri D. Behura, Standing Counsel (CT)

Date of hearing: 11.02.2021 ***** Date of order: 10.03.2021

O R D E R

Instant appeals are clubbed together and disposed of by the following order, since parties are same and the matter relates to common tax periods.

S.A. No. 93 (VAT) of 2019:

2. Present appeal in terms of Section 78(1) of the Odisha Value Added Tax Act, 2004 (hereinafter referred to as 'the Act') read with Rule 93 of the Odisha Value Added Tax Rules, 2005 is pressed into service by the dealer assessee

assailing the impugned order dated 25.02.2019 in Appeal Case No. AA- V-07 of 2016-17 by the learned Joint Commissioner of CT & GST (Appeal), Sundargarh Territorial Range, Rourkela (in short, 'FAA') enhancing the additional demand of tax thereby confirming the order of assessment dated 03.02.2016 passed under Section 43 of the Act by the learned Sales Tax Officer, Rourkela-II Circle, Panposh (hence called 'AA') for the tax periods 01.04.2011 to 31.03.2014 on the grounds inter alia that it is not tenable in law.

S.A. No. 57 (ET) of 2019:

3. This appeal is again at the behest of the dealer assessee under Section 17(1) of the Odisha Entry Tax Act, 1999 (herein after referred to as 'the OET Act') directed against the impugned order dated 25.02.2019 passed by the FAA in Appeal Case No. AA – V-79 ET of 2017-18 vis-a-vis assessment order dated 28.08.2017 under Section 10(1) of the OET Act on the self same grounds that the additional demand to be unsustainable.

4. In fact, the dealer assessee is a private limited company having its factory at Kalunga and it is engaged in manufacturing of sponge iron by utilizing raw materials, such as, iron ore, coal and dolomite. Apart from that, the dealer assessee also effects sale of iron ore fines left out after screening of the ore. It is made to understand that the dealer assessee self assessed under Section 39 of the Act for the tax periods. Later on, it was subjected to assessment under Section 43 of the Act receiving information on escapement of turnover resulting in less payment of tax under Tax Evasion Report (TER) dated 30.11.2013. On receiving the TER and for

the discrepancies indicated therein, the dealer assessee was issued with a notice. But then, despite notice in Form VAT-307 issued and a date was fixed for appearance, the dealer assessee did not respond and ultimately, assessment was completed on the basis of the facts and figures available in the TER. Being aggrieved, the dealer assessee appealed against the assessment dated 03.02.2016 by raising number of grounds including the present ones. But, the FAA not only dismissed the grounds but at the same time, enhanced the penalty. On being dissatisfied, the dealer assessee approached the Tribunal. Hence, the appeal.

5. According to the dealer assessee, additional demand was raised in an exparte proceeding without following the norms of assessment adopted in regular assessment which has further been confirmed and hence, such an order is perverse and thus, liable to be set aside. It is contended that penalty was enhanced by the FAA without jurisdiction. It is alleged that the forums below did not appreciate the grounds or arguments advanced and more particularly, FAA confirmed and enhanced the tax demand by a cryptic order. As to the merits of the case, the AA on the strength of a report simpliciter raised the additional demand by adopting SION ratio which is a method not accepted in law in absence of corroborative evidence as to suppression of purchases and sales. It is also claimed that the decision which has been arrived at entirely being based on the report without considering the fact that the Vigilance never reported that the dealer assessee to have purchased raw materials, i.e. iron ore with Fe contents of 65% or more as production depends on the quality of the iron ore, which again varies from case to case. As per the

contention of the dealer assessee, less production of sponge iron has been shown without any basis and also in absence of any finding as to how it could be possible without the availability of other raw materials, such as, coal and dolomite. The determination as to the quantity of coal fines adopting volumetric method is also not a recognized one for the purpose of levying tax on production, the fact which was completely lost sight of. Hence, the impugned order dated 25.02.2019 merely confirming the findings of assessment also enhancing penalty cannot at all be sustained and therefore, it is liable to be interfered with.

5.1 Per contra, the respondent State by way of cross-objection not only justified imposition of higher penalty, but also the suppression which was factually established during Vigilance inspection. As per the State, due process was followed, while ascertaining the suppression and accepting the observations of the TER and that apart, the FAA did have the authority to enhance the penalty, which is not beyond jurisdiction and that apart, imposition of penalty is a natural consequence. With the above grounds, State's claim is that the impugned order dated 25.02.2019 needs no interference.

5.2. Similar grounds have been raised by the dealer assessee, while denying the liability under the OET Act which has been retaliated by the State and as such, are not reproduced for the sake of brevity.

6. The learned Counsel for the dealer assessee contended that there was no discrepancy in physical stock and as to the availability of raw materials was reported during the Vigilance enquiry and it is also a principle that average

production of sponge iron of 1 MT needs 2 MT of iron ore fines with Fe contents of 65% accompanied with good quality of coal and in so far as the present case is concerned, entire purchase of coal is from MCL whose quality is not of a higher grade which contains lots of dust and stone and therefore, it was not proper on the part of the authorities to hold that the quantity of production to be acceptable as per the findings of the TER. It is again urged that there was no stock discrepancy vis-a-vis finished goods, even no clandestine activity was noticed nor any excess cash was found and that being the position, the entire exercise by the authorities below appears to be an act of futility and that apart, the case is built upon the presumption that 3098.147 MT of sponge iron was produced and sold without use of other raw materials, like coal and dolomite and for that, the impugned order dated 25.02.2019 is patently and manifestly arbitrary and illegal. While contending so, decisions, such as, Ruby Chrorates (P). Ltd. Vs. CCE: 2006 (204) ELT 607 (Tri.-Chennai); ABBA Rubbers Vs CEE: 2006 (193) ELT 471 (Tri.-Bangalore) and few more have been cited. It is apprised that with exact mathematical precision between the quantity of raw materials purchased and the raw materials found in the finished product is improbable by referring to a ruling of the Hon'ble Apex Court in the case of Union of India Vs. Indian Aluminium Co. Ltd. reported in 1995 (77) ELT 268 (SC). The learned Standing Counsel (CT) for the State, on the other hand, contended that suppression was duly detected and reflected in the TER which was finally accepted in absence of the participation of the dealer assessee and later confirmed in appeal which is not to be lightly tampered with.

7. Before considering the contention of the dealer assessee regarding the quality of iron ore whether to have been of higher grade used in the production of sponge iron, the following few facts deserve mention and are needed to be put on record. Precisely stated, quality of raw iron ores and its viability for commercial exploitation is mainly determined by the chemical compositions. For commercial viability, iron ores should preferably have high Fe contents and low impurity elements in order to justify the investment during exploitation. In real practice, no minimum standard has been set for iron percentage in commercial iron ores although certain generalization may be made. However, for classification and evaluation of quality, raw iron ores can be divided into three basic categories depending on the total Fe contents, such as, (i) high grade iron ores with Fe above 65%; (ii) medium or average grade ores with varied Fe in the range between 62-64%; and (iii) low grade ores with Fe below 58%. As to the present case, according to the dealer assessee, for the year 2011-12, 2.01 MT of iron ores were utilized and considering inputs in the succeeding years of 2012-13 and 2013-14 at 2.5 MT and 2.38 MT respectively, the average consumption stands between 2.1- 2.5 MT of sized iron ores for production of 1 MT of sponge iron. As earlier mentioned, the dealer assessee questioned the quality of the coal purchased from MCL which has a direct bearing on the quantity of sponge iron produced. While claiming so, the dealer assessee made certain references as to the average consumption of iron ores said to have been accepted earlier. The question is, whether, the aforesaid aspect was ever examined by the AA? Undeniably, production of sponge iron and its quantity does

depend on the quality of raw materials used. It is also a fact that such production invariably depends on the Fe contents of iron ore and quality of the coal consumed in the process. The AA, apparently, in absence of the dealer assessee, without a threadbare examination of the materials on record vis-a-vis extent of finished product manufactured, deemed it proper to accept the TER and its finding and raised the additional demand to the tune of ₹66,86,388.00. The FAA, as appears, has also not examined it. That apart, the volumetric measurement was adopted considering the fact that the stocks were found dispersed and piled up at different places which proved assessment by physical means not feasible. The said method has also been challenged by the dealer assessee. The Tribunal is of the humble opinion that in such a situation, it is quite but natural to adopt a volumetric method, since it is not realistically possible to measure stocks by physical weighment of goods. However, the aspect concerning the quality of iron ores and coal and resultant production of finished goods i.e. sponge iron, whether to the extent, it was observed in the TER and accepted by the authorities below is certainly a matter to be critically examined keeping in view many other factors and supervening circumstances.

8. . With respect to the enhancement of penalty, it is discernible from the impugned order dated 25.02.2019 that the dealer assessee was served with a show cause notice to offer an explanation. It means, due opportunity was provided to the dealer assessee before enhancing the penalty. The learned Counsel for the dealer assessee, however, claims that only assessment can be enhanced and not the

penalty. On a reading of Section 77(7) of the Act, it would appear that enhancement of penalty is not denied in view of clause (b) thereof which stipulates that after giving a dealer reasonable opportunity of being heard and causing such enquiry, the assessment including any part thereof whether or not such part is the subject matter in appeal may be enhanced. Having regard to the said provision and the fact that an opportunity to show cause was duly provided to the dealer assessee, as is revealed from the impugned order dated 25.02.2019, the Tribunal reaches at a conclusion that enhancement of penalty was well within the jurisdiction of the FAA. But, again a question may be put, if, in the facts and circumstances of the case, penalty was at all to be levied? While considering imposition of penalty, an element of discretion is definitely involved, in view of the language employed in Section 43(2) of the Act. In the instant case, no real suppression was alleged, rather, under or escaped assessment has been claimed by taking into account the stocks lying scattered on being measured by volumetric method and that too when, the quantity of end product depends on multiple factors like quality of ores and coal consumed. Under the above circumstances, the Tribunal is of the humble view that penalty should not have been levied against the dealer assessee.

9. In course of hearing of the appeal, while advancing the above argument, copies of the Mining Registers and other documents were produced along with orders of the Tribunal passed in S.A. Nos. 2117-2118 of 2005-06; S.A. No. 1624 of 2005-06; S.A. No. 517 of 2007-08 and assessment orders in other cases more or less in similar set of facts. Having regard to the totality of the circumstances,

a conclusion is reached at by the Tribunal that the assessment for the alleged periods is required to be freshly determined by taking into account all such aspects of the matter.

10. No separate findings need be rendered with regard to the other appeal under the OET Act. In fact, now determination as to entry tax liability vis-a-vis the dealer assessee is dependent on the result of reassessment to be exerted under the Act.

11 Hence, it is ordered.

12. In the result, the appeals stand allowed. As a necessary corollary, the impugned orders dated 25.02.2019 passed in Appeal No. AA V 07 of 2016-17 and No. AA V 79 ET of 2017-18 are hereby set aside. Consequently, both the matters are remitted back to the AA for de novo assessment vis-a-vis tax liability of the dealer assessee for the relevant periods 01.04.2011 to 31.03.2014 in the light of the findings and observations of the Tribunal and to pass appropriate order as per and according to law, preferably, within a period of three months from the date of receipt of the above order. The cross-objections filed by the State are also disposed of accordingly.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman