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

S.A. No. 126 (ET) OF 2015-16,
S.A. No. 136 (ET) OF 2013-14,
&
S.A. No. 76 (ET) OF 2016-17

(Arising out of orders of the learned Addl.CST (Appeal), Central Zone, Odisha in Appeal Case Nos. AA- CUIE/DCST/180/2014-15, AA- CUIE/DCST/663/2013-14 & AA- 108101610000099/2016-17 disposed of on dated 22.09.2015, 17.09.2013 & 15.07.2016 respectively)

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

M/s. Indian Potash Ltd.,
M-69, Baramunda Housing Board Colony,
Bhubaneswar
At present- Odisha Business Centre,
Rasulgarh, Bhubaneswar ... 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 M.L. Agarwal, Standing Counsel (CT)

Date of hearing: 17.06.2020 ***** Date of order: 10.07.2020

O R D E R

Instant appeals under Section 17(1) of the Odisha Entry Tax Act, 1999 (hereinafter referred to as, 'the Act') have been pressed into service by the appellant questioning the judicial propriety and legality of the impugned orders

dated 22.09.2015, 17.09.2013 and 15.07.2016 promulgated by the learned Additional Commissioner of Sales Tax (Appeal), Central Zone, Cuttack (in short, 'FAA') in Appeal Nos. AA- CUIE/DCST/180/2014-15, AA- CUIE/DCST/663/2013-14 and AA- 108101610000099/2016-17 for the tax periods 01.04.2005 to 31.03.2009, 01.04.2009 to 31.03.2011 and 01.04.2013 to 31.03.2015 respectively on the grounds inter alia that the authorities concerned exceeded in exercising jurisdiction vested under law, as a consequence whereof, not only duty on the packing materials utilized in selling non-schedule goods was imposed, but also penalty under Section 9C(5) of the Act was levied, which is grossly erroneous and thus, untenable in law and, therefore, deserve to be set aside in the interest of justice.

2. More or less, common questions are involved and therefore, the appeals have been clubbed together for its disposal by a common order, which runs as follows. In fact, the appellant, as is revealed from record, questioned the decisions primarily on the following grounds, such as, exercise of jurisdiction and proceeding under Section 9C of the Act as not maintainable in view of the fact that at no point of time returns submitted were called in question under Section 7(4) thereof; secondly, the packing materials i.e. HDPE bags used in disposing of the fertilizers have erroneously been treated as scheduled goods, as a result, tax was levied thereon and also on imposing penalty under Section 9C(5) of the Act. It is also challenged on the ground that the fertilizers have been sold on MRP which included the cost of the packing materials and in so far as the goods sold are concerned, it is a non-taxable item under the Act and for that matter, HDPE bags

could not have been assessed to tax, more particularly when, the same does not find a place in Entry 23 of Part-I of the Schedule of the Act. Precisely speaking, the appellant appears to have questioned the legality of the decisions of the authorities below on the point of jurisdiction as well as taxability of the packing materials, such as, HDPE bags. The Tribunal is to examine, whether, the contentions of the appellant to be well founded and for that matter, the authorities below erred in facts and law. In so far as the respondent State is concerned, it has taken a stand to the effect that there has been no judgmental error on the findings of the authorities below by holding HDPE bags as a scheduled goods under Entry 23, Part-I of the Schedule, inasmuch as, there is no distinction apparently found in bags and woven sacks, especially, considering the claim of the appellant that HDPE bags do not have a place in the entry in question. According to the respondent State, the claim of the appellant that the packing materials used for the fertilizer which is an unscheduled goods under the Act and for the fact that no tax can be levied on the bags when the goods are sold on MRP under OVAT Act and therefore, it cannot be subjected to tax under the Act is completely a misplaced and misconceived one in view of the fact that imposition of tax under the Act is on the entry of scheduled goods into the local area and not on sale. Thus, according to the respondent, there has been no illegality committed by the authorities below in imposing entry tax on HDPE bags and also penalty in terms of Section 9C(5) of the Act.

3. The learned Counsel for the appellant strongly urged that it relates to the non-schedule goods, i.e. fertilizer, and also the packing materials in the shape of HDPE bags to sale the fertilizer under the Fertilizer Control Order, 1985 and Essential Commodities Act, 1955 and moreover, no returns were filed for the alleged tax periods as per Section 3(1) of the Act, since it was dealing with non-schedule goods, but unfortunately the authorities below despite fully knowing the fact that the goods have been sold on MRP in view of the notification dated 23.09.2005 of the Finance Department, Government of Odisha (SRO No. 467 of 2005) issued under Rule 9A of the OVAT Rules, 2005 (in short, 'the Rules') read with Section 14(1) of the Act levied entry tax on HDPE bags and consequently, imposed penalty under Section 9C(5) of the Act which is unsustainable in law. Secondly, the contention as is advanced by the learned counsel for the appellant, it relates to the fact, whether, HDPE bags to be scheduled goods or not. As earlier described, inclusion of HDPE bags in Entry 23, Part-I of the Schedule has been disputed by the appellant. However, the learned Standing Counsel (CT) advanced an argument that the packing materials, such as, HDPE bags fall in Entry 23, Part-I of the Schedule and rightly the authorities below levied the tax under the Act.

4. As per Section 3(1) of the Act, there shall be levy and collection of tax on entry of a scheduled goods into a local area for consumption, use or sale therein at such rate not exceeding twelve percentum of the purchase value of such goods from such date as may be specified by the State Government, etc. In other words, entry tax is to be collected in terms of Section 3(1) of the Act on scheduled

goods when it arrives or enters into a local area for consumption, use or sale. In the instant case, the Tribunal is to determine, if any wrong was committed by the AAs in exercising jurisdiction and levying entry tax on the packing materials, i.e. HDPE bags holding it as scheduled goods under the Act.

5. No doubt, fertilizers have been sold on MRP, but the question remains, whether, with respect to the packing materials, i.e. HDPE bags, entry tax was to be levied and collected? According to the learned Counsel for the appellant when HDPE bags are no scheduled goods, like the fertilizers and when the goods as a whole have been disposed of on MRP, it was wrong on the part of the authorities below to levy entry tax on the packing materials. Under the OVAT Act, 2004, tax is levied on sale as per Section 11 and on purchase vide Section 12 and as regards the duty payable on containers and packing materials, it is as per Section 13 which speaks that where any goods is packed in any container or packing material are sold, such container or packing materials shall be deemed to have been sold or purchased along with the goods and the tax under Section(s) 11 and 12 shall be levied on the sale or purchase of such items at the same rate as applicable to the goods contained therein provided no such tax under Section 11 or 12 shall be levied if the container or packing materials is sold or purchased along with the goods exempted from tax under Section 17. In view of the above, tax can be levied on container and packing materials at the same rate like the goods, but no tax under OVAT Act, 2004 shall be realised with respect to the container or packing materials, if the goods sold stand exempted under Section 17

of the Act. The rates of VAT is prescribed in Section 14, according to which, VAT payable by a dealer under that Act shall be levied on taxable turnover in respect of different goods at the rates specified in Schedule B and C, but then, as per the proviso, a registered dealer of a particular class or category as duly notified by the State Government, may at its option, pay tax in lieu of tax payable thereunder at the rate specified in that schedule on MRP of such goods in the manner, as may be prescribed. Having read and understood the above provisions of OVAT Act, 2004, it suggested the manner in which tax is to be levied on sale and purchase in respect of the goods, which are exempted or otherwise. However, the question is, if goods are sold on MRP under the OVAT Act, 2004, does it have any bearing on the entry tax payable vis-a-vis the container or packing materials? According to the Tribunal, the contention that the packing materials cannot be taxed for the fact that fertilizers have been sold on MRP under OVAT Act, 2004 is unacceptable for the simple reason that imposition of tax under the Act is on the entry of the scheduled goods into a local area and having no nexus with the sale or purchase of the goods. The appellant cannot, therefore, be allowed to contend that the goods being sold on MRP is not liable to pay entry tax on the packing materials. So, the conclusion of the Tribunal is notwithstanding any tax paid under the OVAT Act, 2004 since the appellant received the packing materials, i.e. HDPE bags and the same entered into the local area for use, it is liable to entry tax under the Act.

6. So, the next question is, whether, HDPE bags is scheduled goods and falls in Entry 23, Part-I of the Schedule. According to the learned Counsel for

the appellant, HDPE bags are not found in Entry 23, Part-I of the Schedule and therefore, it is not a taxable goods. A comparative chart is provided so as to distinguish HDPE bags and HDPE woven sacks with reference to the relevant entries under (List-C) OST Act, 1947 and Part-I of the Act. It is contended that HDPE bags and HDPE woven sacks have been differently treated under the OST Act, 1947 and so also under Entry 83, Part-II of Schedule B of OVAT Act, 2004 which provides the rate of tax on all kinds of packing materials in contradistinction to Entry 23, Part-I of the Schedule, which is only in relation to HDPE woven sacks and for that matter, it was wrong to levy entry tax on the packing materials, i.e. HDPE bags. If OST Act, 1947 and the relevant entries, such as, Serial 129 and 136 of List-C are gone through, it is made to understand that HDPE bags find place in the category of packing materials, whereas, HDPE woven sacks appear along with other items taxable at 8%. As per Serial 129, HDPE bags and all other packing materials are taxable at 4% which is at variance from Serial 136. Likewise, under the OVAT Act vide Serial 83, all kinds of packing materials including gunny bags etc. are made taxable at 5%. All other goods in Part-III of OVAT Act, 2004 other than the goods specified in Schedule-C are taxable @ 12.5%. The categorization of HDPE bags, woven sacks and different rates of tax prescribed under the OST Act and also the tax in respect of packing materials vis-a-vis the OVAT Act, 2004, undoubtedly, suggest that a clear distinction has been made on the scheduled goods. A higher rate of tax is prescribed for HDPE woven sacks than HDPE bags. It is further suggested that on the basis of grades of the scheduled goods, rates of

tax have been prescribed in OST Act, 1947. The learned Counsel for the appellant while showing the above difference and distinction in classifying the scheduled goods, such as, HDPE bags and HDPE woven sacks, contended that such is not the case in so far as Part-I of the Schedule is concerned, which only includes HDPE woven sacks and not HDPE bags. It is also contended that packing materials have not been specifically mentioned in Part-I of the Schedule and therefore, when HDPE bags do not find a place in Entry 23 thereof, it was wrong to make it taxable under the Act. The learned Standing Counsel (CT) claimed that bags and woven sacks are one and same and therefore, HDPE bags having entered into the local area for use in disposing of the fertilizers are liable to entry tax under the Act. It is also contended that the Hon'ble Orissa High Court in the case of Sosree Plastic Industry (P) Ltd. Vs. Union of India in O.J.C. No. 2755 of 1988 disposed of on 28.08.1992 have been pleased to hold and observe that HDPE woven sacks/fabrics are plastic goods and in such view of the matter, HDPE bags can also be treated as such and be made taxable as scheduled goods vide Entry 23, Part-I of the Schedule. The learned Counsel for the appellant placed reliance on a decision of the Hon'ble Court in the case of State of Orissa Vs. Auro Plastics reported in (2016) 88 VST 70 (Orissa) and contended that bags and woven sacks are different and, therefore, have been separately placed under Serial 129 and 136 of List-C of the OST Act respectively and applying it to the present case, the claim is that HDPE woven sacks as appearing in Entry 23, Part-I of the Schedule is exclusively for woven sacks and not for HDPE bags. In the decision (supra), the issue was whether

LLDPE bags are taxable as per Serial 136 of List-C of the OST Act and in that connection, the Hon'ble Court held that since there is no specific mention of it and Serial 136 includes woven sacks only, whereas, HDPE bags are found in Serial 129, the scheduled goods shall have to be treated as one under Serial 129. Having regard to the contention of the parties, the Tribunal is of the considered view that bags and woven sacks are differently treated under the OST Act, but such a distinction can hardly be borrowed to the Act and in so far as Entry 23, Part-I of the Schedule is concerned, it has to be appreciated considering the scheduled goods contained therein. If Entry 23, Part-I of the Schedule is looked at, it contains polythene, HDPE, PP including woven sacks besides plastic goods, moulded luggage but excluding plastic or moulded furniture. There is no specific mention of packing materials in any of the entries of Part-I. Entry 8 of Part-I deals with gunny bags, jute twine, jute and jute products, which may be used as packing materials. Likewise, Entry 23 which includes HDPE woven sacks, polythene, etc. may also be used as packing materials. However, one is not concerned with whether a particular item is usable as packing materials or not so as to find it taxable under the Act. The distinction in OST Act as to the rate of tax for HDPE bags and HDPE woven sacks is based on different aspects, whereas, entry tax is leviable only upon entry into the local area of such scheduled goods as mentioned in the entries of Part-I of the Schedule. According to the respondent State, woven sacks include bags. An HDPE bag is of ordinary type, whereas, HDPE woven sack is a knitted one with higher tensile strength. Of course, HDPE bags do not find a place in Entry 23, Part-I of the

Schedule. It may or may not be correct to hold that HDPE bags and HDPE woven sacks are one and the same. However, in the considered opinion of the Tribunal, HDPE bags if not treated as HDPE woven sacks still be made taxable under the Act as plastic goods which finds a mention in Entry 23. In Auro Plastics case (ibid), such a contention was, in fact, advanced by placing reference on Sosree Plastics Industry Pvt. Ltd. case, but the Hon'ble Court deemed it more appropriate to place LLDPE bags under Serial 126 instead of Serial 136. That apart, Serial 136, List-C of OST Act included PVC products and other plastic goods which are distinctly separate from HDPE bags and woven sacks, whereas, Entry 23, Part-I of the Schedule includes HDPE woven sacks and also plastic goods, which means if HDPE bags are not held as HDPE woven sacks, it can as well be treated as plastic goods so as to make it taxable under the Act. In any case, the logical conclusion of the Tribunal is that the distinction which is shown and apparently found in respect of the scheduled goods in List-C of the OST Act cannot straight away be applied to Entry 23, Part-I of the Schedule and in so far as HDPE bags are concerned, if they are not treated as HDPE woven sacks, it can always be held as plastic goods. In this connection, a decision of the Hon'ble Karnataka High Court may also be referred to, as relied upon by the learned Standing Counsel (CT), which is in the case of Kanoria Industries Ltd. Vs. State of Karnataka:(2000) 119 STC 117 (Karnataka) wherein it is observed that High Density Polythene is a chemical product basically made from plastic; the word 'plastic' is a genus which has various species and number of products and in common and commercial parlance such products are also

considered as that of plastic; Encyclopaedia America Volume XX, 1960 Edition defined 'polythene' as a commercial product made out of plastic; polythene materials, therefore, have to be considered as plastic; established principle of interpretation of entry is that various items have to be considered as of that particular type for which the entries are made, etc. In any case, without any doubt, HDPE bags are made of plastic, whereas, HDPE woven sacks are of similar nature, but of a different type and if both are not same, as is claimed by the appellant, then also HDPE bags would fall in the category of plastic goods so as to be scheduled goods under Entry 23, Part-I of the Schedule.

7. As regards the proceeding under Section 9C not to be maintainable for the fact that the AAs never disputed the returns so submitted under Section 7 of the Act, the Tribunal is also of the considered view that such a contention as advanced by the learned Counsel for the appellant is not at all sustainable. No doubt, the returns furnished by the appellant were not called in question, but that does not obviate a proceeding under Section 9C of the Act. If no provisional assessments were made in terms of Section 9A of the Act, or for that matter, for having not found that the returns furnished by the appellant to be incorrect or incomplete as per Section 7(4) of the Act, it does not in any way limit or affect jurisdiction under Section 9C thereof. So, the challenge on the exercise of jurisdiction on the ground that the returns furnished under Section 7 of the Act having not been held incomplete or incorrect cannot be sustained and thus, it has to be rejected outrightly. In other words, the authorities below, may be on different

reasons, but rightly treated HDPE bags as scheduled goods falling under Entry 23, Part-I of the Schedule and correctly made it taxable for having entered into the local area for its use in selling the fertilizers notwithstanding the fact that the goods along with the packing materials were subjected to tax in terms of the provisions of the OVAT Act, 2004.

8. In so far as imposition of penalty is concerned, the Tribunal is of the firm opinion that it has to be subject to the rigours of Section 9C of the Act, inasmuch as, suppression of sales, purchases or both, erroneous claims of deduction or evasion of tax etc. shall have to be proved to the hilt. Many a time questions have been raised regarding the discretion involved or not, while imposing penalty in terms of Section 9C(5) of the Act. So far as the levy of penalty is concerned, if it is a civil liability and the statute being clear that it has to be automatic, in that case, no discretion lies with the authority. However, if the language is clear and it manifests an enquiry to be conducted with an opportunity of hearing to the assessee and a scheme of thing is prescribed in law, then, the imposition of penalty cannot be said to be an inevitable consequence without any role of discretion to play. It is also a settled law that if there is a bonafide belief of existence of a particular circumstance, or exemption available to an assessee, or the acts of the assessee in its entirety show that there was never an intention to avoid the liability, penalty may not have to be imposed. The penalty and its levy, therefore, depend on the conduct of the assessee and whether, such liability failed to be discharged bonafide or it was actuated with malafide intent. In this regard, it

would be profitable to quote a decision of the Hon'ble Apex Court in the case of Cement Marketing Co. of India Ltd Vs. Assistant Commissioner of Sales Tax, Indore and others reported in 1980 SCR (1) 1098, wherein, it has been categorically held that if there is an arguable contention or the contention taken up by the assessee not to be frivolous merely to avoid the liability to tax, or there exists a bonafide belief that the tax not to be payable, under such circumstances, it would not be proper to impose penalty. So far as Section 9C of the Act is concerned, an enquiry is indeed required to unearth as to why the assessee defaulted in discharging the tax liability and whether, it was under a bonafide opinion or impression or belief, or driven by an act of malafide. As to the present case, the appellant does appear not to have submitted the returns with regard to the purchase of HDPE bags primarily on the grounds that it to be a packing material and not a scheduled goods and used as such in packing and selling fertilizers which is again a non-scheduled goods under the Act; that the cost of the packing materials is a part and parcel of the tax liability already discharged, while selling the fertilizers in terms of OVAT Act, 2004; and that, at no point of time ever the returns so submitted by it during the previous assessment periods even been held to be incorrect or incomplete. As earlier discussed, there is no entry as to packing material under the Schedule of the Act and as it seems, the appellant was under the impression that HDPE bags not to be scheduled goods under Entry 23, Part-I of the Schedule, which only included HDPE woven sacks and since a contention was raised before the authorities below that only polythene, HDPE, PP including woven sacks not even HDPE woven sacks

as a separate and distinct goods to be the scheduled goods taxable thereunder, the Tribunal is of the considered view that it was indeed a bonafide belief and not purposefully a frivolous ground. The contention so raised by the appellant appears to be an arguable one. It is not that the appellant was to pay tax on unscheduled goods in order to avoid being held liable for penalty which, in the considered opinion of the Tribunal, can never be comprehended in law. In fact, in the decision (supra), the Hon'ble Apex Court observed that levy of penalty in such peculiar circumstances was never intended by the law makers as it would lead to absurdity and creating a catastrophe and further concluded that if the assessee raises bonafide contention that a particular item is not liable to be included in the taxable turnover and still he would have to show it in the returns and pay tax thereupon on pain of being held liable for penalty in case its contention is ultimately found not to be acceptable surely could never have been intended by the legislature. In the instant case, when returns were accepted by the assessing authority and previously at no point of time, it was held to be incorrect or incomplete; that, the appellant continued furnishing returns of each assessment year; that, it was under a belief that HDPE bags not being scheduled goods as a packing material not to be taxable, particularly, in absence of any specific entry in Part-I of the Schedule; lastly, under the impression that liability under OVAT Act, 2004 has been discharged which included the cost of HDPE bags, the Tribunal, under such special or peculiar circumstances, arrive at a logical conclusion that it truly appears to be a bonafide belief in not furnishing the returns vis-a-vis HDPE bags and thus, it would really be

unjustified to impose penalty on its taxable turnover which has been assessed on account of audit inspections.

9. Hence, it is ordered.

10. For the reasons aforementioned, the appeals stand allowed in part. As a necessary corollary, the impugned orders dated 22.09.2015, 17.09.2013 and 15.07.2016 promulgated in Appeal Nos. AA- CUIE/DCST/180/2014-15, AA-CUIE/DCST/663/2013-14 and AA-108101610000099/2016-17 are hereby partly set aside to the extent of imposition of penalty vis-a-vis taxable turnover on HDPE bags. Consequently, the AA is directed to undertake recomputation with regard to the respective assessment periods vis-a-vis the appellant preferably within a period of three months from the date of receipt of the above order.

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