BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 242 (E) of 2009-10

(Arising out of the order of the learned DCST (Appeal), Sambalpur Range, Sambalpur, in First Appeal Case No. AA 429/SAI/ET/07-08, disposed of on dtd.17.12.2009)

P r e s e n t: **Shri Ashok Kumar Panda**, 1st Judicial Member,
Shri Subrata Mohanty, 2nd Judicial Member,

&

Shri Ranjit Kumar Rout, Accounts Member-II.

M/s. Laxmi Narayan Makhanlal & Co.,
Khetrajpur, Sambalpur. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. S.K. Roy Choudhury, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 13.04.2018 ******** Date of order: 14.05.2018

O R D E R

This appeal is directed against the order dated 17.12.2009 passed by the learned Deputy Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur (hereinafter referred to as, the learned DCST) in First Appeal Case No. AA 429/SAI/ET/07-08, wherein and whereby he has dismissed the first appeal by confirming the order of the learned Sales Tax Officer, Sambalpur I Circle, Sambalpur (hereinafter referred to as, the learned STO) passed in an assessment u/s.9C of the Orissa Entry Tax Act (hereinafter referred to as, the

OET Act) for the assessment period from 01.04.2005 to 30.06.2007 raising a balance tax demand and penalty amounting to Rs.3,31,533.00.

2. The appellant-dealer M/s. Laxmi Narayan Makhanlal & Co. bearing TIN-21591703317-ET is a trader of graphite and in course of business transaction it used to extract graphite ore and used to sale the finished graphite. Basing upon an Audit Visit Report (in short, the AVR) submitted by the audit officials, Sambalpur, the learned STO initiated a proceeding u/s.9C of the OET Act against the appellant-dealer for its assessment for the assessment period from 01.04.2005 to 30.06.2007 and issued a notice to appear and to produce the books of account and in response to the notice, the authorized representative of the appellant-dealer appeared and produced the books of account which were duly been examined. As per the allegation of the AVR, though the appellant-dealer has purchased processed graphite from China in course of import valued at Rs.1,04,72,750.00, it has not paid any Entry Tax thereon and as such the audit team suggested to determine the purchase value of the goods after addition of the freight charges @ 10% and levy of Entry Tax thereon @ 1%. During assessment, when the allegation of the AVR was confronted to the authorized representative of the appellant-dealer, he submitted that, the freight charges incurred by the appellant-dealer amounts to Rs.5,78,355.00 and not 10% of the purchase price as suggested in the AVR and as such on consideration of the materials available on record, the learned STO accepted the submission of the appellant-dealer relating to the freight charges to be reasonable and proper and added the said amount of Rs.5,78,355.00 to the purchase price of the goods. As regard the non-payment of tax, on confrontation of the allegation of the AVR, the appellant-dealer took the plea that, as per the definition of entry of goods u/s.2(d) of the OET Act, there is no specific mention of the place outside the territory of India and as such the levy of Entry Tax upon the imported goods is quite improper and unjustified. In support of his plea, the appellant-dealer also cited certain case laws pronounced by the Hon'ble Apex Court and also by the Hon'ble High Courts of

different states. But, on consideration of Sec.3(1) of the OET Act which speaks of levy and collection of tax on entry of schedule goods into a local area for consumption, use and sale therein, the learned STO did not accept the contention of the appellant-dealer and levied tax @ 1% upon the imported goods amounting to Rs.1,10,51,105.00 after addition of the freight charges amounting to Rs.5,78,355.00 and as such the same came to be Rs.1,10,511.05. Then, he also imposed a penalty of Rs.2,21,022.10, equal to twice of the tax demand u/s.9C(5) of the OET Act and hence, both the tax demand and penalty came to be Rs.3,31,533.00 in total, to be paid by the appellant-dealer.

3. After the assessment, being aggrieved with the order of the learned STO, the appellant-dealer preferred an appeal before the learned DCST bearing First Appeal Case No. AA 429/SAI/ET/07-08. On hearing and on consideration of the materials on record, the learned DCST found no merit in the contention of the appellant-dealer either relating to the tax demand or relating to the imposition of penalty and accordingly dismissed the appeal by confirming the order of the learned STO. Thus, again being aggrieved with the order of the learned DCST, the appellant-dealer has preferred this second appeal.

4. No cross objection has been filed by the respondent-Revenue.

5. Heard both the sides. The learned Counsel appearing for the appellant-dealer submitted that, though the appellant-dealer has also challenged the levy of tax upon the goods in question in the present appeal, the same bears no merit in view of the judgment of the Hon'ble Apex Court dated 09.10.2017 passed in **Civil Appeal No.3381-3400 of 1998**, wherein the levy of Entry Tax on goods imported from outside the territory of the country has been upheld and being conscious of the said judgment the appellant-dealer is ready to pay the Entry Tax amounting to Rs.1,10,511.05 levied upon it by the learned STO which has further been confirmed by the learned DCST. But, challenging the imposition of penalty upon the appellant-dealer, he submitted that, the appellant-dealer had no intention of evasion of tax at any point of time and as it has not paid the tax upon the goods in question imported from outside the

territory of India with a bonafide belief of success before the Hon'ble Apex Court, the imposition of penalty at the rate of equal to twice of the balance tax demand is quite improper and unjustified in the facts and circumstances of the present case and the same needs to be deleted by this forum. The learned Counsel for the appellant-dealer further submitted that, though the imposition of penalty u/s.9C(5) of the OET Act is mandatory in nature, the same is subject to certain conditions as mentioned in sub-section (1) of Sec.9C of the Act and as no intention of evasion of tax on the part of the appellant-dealer is present in the present case, penalty cannot be levied upon it u/s.9C(5) of the OET Act. On the other hand, the learned Standing Counsel appearing for the respondent-Revenue submitted that, imposition of penalty u/s.9C(5) of the OET Act at the rate of equal to twice of the amount of the tax demand is mandatory in nature and as such no illegality has been committed by the learned forums below in imposing the same upon the appellant-dealer for non-payment of the due tax and hence, the appeal being devoid of merit is liable to be dismissed.

6. Perused the orders of both the learned forums below and the other materials on record. There is no dispute with regard to the levy of tax upon the goods in question brought to the local area by the appellant-dealer by import from outside the territory of India. There is also no dispute with regard to the determination of the purchase value of the goods by the learned STO after addition of the freight charges amounting to Rs.5,78,355.00. The appellant-dealer has not challenged the finding and order arrived at by the learned forums below in this regard. Thus, the only dispute relates to the imposition of penalty upon the appellant-dealer u/s.9C(5) of the OET Act by the learned STO which has further been confirmed by the learned DCST at the first appeal stage.

7. Before examining the justification of the order passed by the learned forums below, it is beneficial to refer to Sec.9C(5) of the OET Act which is as follows:-

> "Without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under sub-section (3) or (4) shall

be imposed by way of penalty in respect of any assessment completed under the said sub-sections".

8. On a bare reading of this provision, it is seen that, the imposition of penalty under this sub-section is mandatory in nature. But, that does not mean that, penalty under this sub-section will be imposed in all circumstances, rather the same is subject to the conditions as mentioned in sub-section (1) of Sec.9C of the Act which speaks of detection of purchases or sales, erroneous claims of deductions, evasion of tax or contravention of any provisions of this Act affecting the tax liability of the dealer. Here, in the present case, though the appellant-dealer has imported certain amount of semi processed graphite valued at Rs.1,05,750.00 from outside the territory of India and has brought it to the local area, it has not paid any Entry Tax thereon by taking a plea that, the same is not payable on such goods. On being confronted of the allegation leveled in the AVR in this regard during the assessment, the appellant-dealer has taken the contention that, on a bonafide belief of non-levy of Entry Tax upon the imported goods, it has not paid the same and to show its bonafideness it has relied upon in the cases of **Fr. Williams Fernandez Vs. State of Kerala reported in Vol. 115 STC at page 591**, **Primus Imaging Pvt. Ltd. Vrs. State of Assam and another 9 VST 528 (Guwahati)**, **Tata Iron & Steel Co. Vrs. State of Jharkhand & others (2007) 6 VST 587 (Jhar.)**, **Central Coal field Ltd. Vrs. State of Jharkhand and others (2007) 6 VST 614 (Jha.)** and **Thressiamma L. Chirayil Vrs. State of Kerala & Others (2007) 7 VST 293 (Ker.)**. But, none of the case laws as cited by the appellant-dealer relates to the provision under the OET Act. Similarly, though the appellant-dealer has relied upon a Full Bench decision of this Tribunal passed in S.A. No.119 (ET) of 2004-05, the same is of no assistance to it in view of the fact that, the order in that case has been passed on 24.12.2010, whereas the present proceeding relates to the assessment period from 01.04.2005 to 30.06.2007, which is much prior to the order passed by this Tribunal. On the other hand, while passing the order the learned forums below have taken note

of Sec.2(d) and Sec.3(1) of the OET Act which defines the "entry of goods" and deals with the provision of levy of tax under this Act respectively. On a conjoint reading of both this provision it is very much clear that, Entry Tax shall be levied and collected on entry of scheduled goods into a local area from any place outside that local area or any place outside the State for consumption, use or sale therein. In the case of **Tata Steel Vrs. State; W.P.(C) No.15519/2010**, the Hon'ble High Court of Orissa delivered its judgment on 09.10.2012 holding that Entry Tax is leviable on goods brought to the local area from outside the territory of India and the same has further been confirmed by the Hon'ble Apex Court subsequently. Though the appellant-dealer has taken the contention that, it has not paid the Entry Tax upon the imported goods on a bonafide belief of non-levy of Entry Tax thereon, it has failed to produce any material to show that the matter relates to its own assessment was subjudice before the Hon'ble High Court of Orissa or before the Hon'ble Apex Court by the time of the period of assessment. Therefore, on consideration of the entire facts and circumstances and on consideration of the settled position of law, it is very much clear that the contention taken by the appellant-dealer is a vague one having no bonafideness.

9. In course of hearing, the learned Counsel appearing for the appellant-dealer relied upon in the case of **Hindustan Steel Ltd. v. State of Orissa (1970) 25 STC 211 (SC)**, wherein the Hon'ble Apex Court has held that -

> "….. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or

venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute ……"

10. Though there is no dispute with regard to the principle of law as decided above, the same is of no assistance to the appellant-dealer in the present case as because the act of the appellant-dealer is clearly coming under the purview of the grounds as mentioned in sub-section (1) of Sec.9C of the OET Act. The bonafideness as pleaded by the appellant-dealer for non-payment of the Entry Tax upon the imported goods is clearly found to be a vague one and as such no concession can be granted to it so far as the imposition of penalty u/s.9C(5) of the OET Act is concerned.

11. On consideration of the entire facts and circumstances and on a close scrutiny of the entire materials available on record, it can clearly be said that, both the learned forums below have considered the matter in its proper perspective and have passed the order and the same being reasonable and justified needs no interference of this forum.

12. In the result, the appeal is dismissed being devoid of merit.

Dictated & corrected by me,

(Ashok Kumar Panda)
1st Judicial Member

(Ashok Kumar Panda)
1st Judicial Member

I agree,

(Subrata Mohanty)
2nd Judicial Member

I agree,

(Ranjit Kumar Rout)
Accounts Member-II