



Both these appeals have arisen out of the same order and involve common points of dispute. Therefore, both were heard together, and are disposed of by this common order.

**S.A. No. 20 (ET) of 2009-10 -**

2. The dealer assails order dt. 28.11.2008 passed by Asst. Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (in short, 'first appellate authority') in First Appeal Case No. AA. (ET) 106110811000025/2007-08 in reducing the demand to `60,41,858.00 from `1,77,93,829.00 raised by Assessing Authority, Puri Range, Bhubaneswar-II Circle (in short, 'assessing authority') u/s. 9C of the Odisha Entry Tax Act, 1999 (in short, 'OET Act') for the tax period from 01.04.2005 to 31.07.2006 vide order of assessment dt. 13.03.2007.

**S.A. No. 106 (ET) of 2009-10 -**

3. The Revenue is the appellant impugning the aforementioned order passed by the first appellate authority.

4. The dealer is a Private Limited Company dealing in gold ornaments by manufacturing the same and also carries on business in gold ornaments, diamond studded jewellery, watches and its spares. On the basis of Audit Visit Report (AVR) submitted for the tax period from 01.04.2005 to 31.07.2006 based on inspection of the dealer's premises on 28.07.2006, a proceeding u/s. 9C of the OET Act was initiated. The allegations contained in the AVR were confronted to the dealer in course of such proceeding and he

was asked to explain the same. The explanations offered by the dealer in respect of allegations were rejected. As such, the allegations in respect of the following were held to be established :-

- (a) ET not paid on purchase of new gold ornament and gold bar from outside the State including old gold ornaments and gold based diamond purchased;
- (b) Discrepancy in stock; and
- (c) Discrepancy in books of account and documents seized.

Having held the purchase suppression of ornaments, watch and spares to be established and finding the incidental charges incurred towards purchases effected from outside the State being not included, learned assessing authority found the dealer to have not disclosed in the monthly return ET amounting to `70,92,855.52. Since the dealer deposited an amount of `34,98,178.00 after the visit of the Inspecting Authority, penalty of `1,41,85,711.04 u/s.9C(5) of the OET Act was imposed. Accordingly, the ET liability was determined and demand as aforesaid was raised.

Being aggrieved, the dealer carried the matter in appeal. Learned first appellate authority considered the contentions raised by the dealer on the findings of the assessing authority in respect of the allegations contained in the AVR and accordingly, held that as per notification vide SRO No. 336/2006, dt. 16.06.2006, the purchase turnover of bullion worth `3,06,42,351.00 during the period from 16.06.2006 to 31.07.2006 was not exigible to ET and that in view of the judgment dt. 18.02.2008 of our Hon'ble

High Court of Orissa in the case of ***M/s. Reliance Industries Ltd. and others (OJC No. 6515 of 2006)***, the dealer-company was exempted from payment of ET on a turnover of watches for `44,18,054.00 as the same were not manufactured/ produced in the State of Odisha. That apart, learned first appellate authority accepted some contentions offered by the dealer on account of alleged suppressions and the rest were rejected in the impugned order. On such basis, he computed the ET payable at `35,05,512.38 being satisfied with such explanation. Taking into consideration the ET deposited after the Audit Visit and the subsequent payments made by the dealer, he determined the ET liability including the penalty imposed thereby, resulting in reduction of demand as aforesaid.

Being further aggrieved, both the dealer and the Revenue have approached this Tribunal.

5. Sri N.K. Dash, learned Counsel appearing for the dealer assails the impugned order on the ground that the findings of the authorities below on each of the allegations contained in the AVR are factually untenable and hence, the impugned order warrants interference. Sri Das further contends that the imposition of penalty u/s.9C(5) of the OET Act is illegal and arbitrary since the authorities below have taken into account the amount already deposited by the dealer before the assessment is completed.

6. Per contra, Mr. M.S. Raman, learned Addl. Standing Counsel (CT) appearing for the Revenue vehemently challenges the impugned order on the ground that learned first appellate authority has utterly failed to examine the case considering the AVR as well as the finding of learned assessing authority and as such, he submits that the reduction in tax/penalty by first appellate authority is not sustainable in law. Further, Sri Raman submits that in view of Constitution Bench decision of Hon'ble Supreme Court in the case of ***Jindal Stainless Steel Ltd. and another Vs. State of Haryana and others (Civil Appeal No. 3453/2002*** and others, decided on 11.11.2016), exempting the purchase turnover of `44,18,054.00 from payment of ET by the first appellate authority is unlawful.

7. It is argued by Sri Dash that the finding of the assessing authority regarding suppression, which was confirmed by the first appellate authority is factually incorrect as the same is based upon improper verification. We do not accept the above contention because the findings referred to by Sri Dash are essentially factual ones and it has not been proved that they are perverse or otherwise erroneous. A reading of the impugned order reveals that the dealer had purchased new gold ornaments and gold bar from outside the State as also old ornaments, but ET on the same was not paid. Similarly, the visiting officials had found discrepancy in stock, which could not be properly explained at the relevant time by the dealer. In such view of the matter, we are not inclined to enter into this

factual aspect at this belated stage and hence, the dealer's contention in this regard is rejected.

8. On the question of imposition of penalty, Sri Dash forcefully argues that the dealer had not paid ET on purchase of bullion on bonafide belief that it was not liable to do so, but having come to know of its mistake, the dealer immediately paid ET, which was before submission of AVR as well as passing of order of assessment. The above clearly proves that the dealer did not have any intention to evade tax, but had acted upon a mistaken notion at the relevant time. Having considered the above submissions, we are also of the view that the dealer's action in paying the ET immediately on being brought to its notice during the Audit itself proves its bonafides. Learned authorities below appear to have been influenced by principles laid down in the proviso to Sec. 33(5) of the OVAT Act, which debars voluntary disclosure of liability after initiation of audit proceeding. There is no such provision in the OET Act and hence, there is legal bar to accept the payment of ET after initiation of audit proceeding. We are, therefore, of the considered view that imposition of penalty to such extent is unsustainable in law and hence, the impugned order deserves to be modified accordingly.

9. As regards the next ground urged by the State, we are of the view that the position of law having been settled by the highest Court of law, there remains nothing more to be argued in this regard. As such, the

impugned order in so far as it relates to exemption of tax on purchase turnover of watches to the tune of `44,18,054.00 cannot be sustained in the eye of law. The ground urged by the State is, therefore, allowed.

10. In the result, both the appeals are allowed in part. The impugned order is modified to the extent indicated above. The matter is remanded to the first appellate authority to do the needful in the light of observations made in this regard within a period of four months from the date of receipt of this order.

Dictated & Corrected by me,

**Sd/-**  
**(Sashikanta Mishra)**  
**Chairman**

I agree,

**Sd/-**  
**(Sashikanta Mishra)**  
**Chairman**

I agree,

**Sd/-**  
**(Subrat Mohanty)**  
**2<sup>nd</sup> Judicial Member**

**Sd/-**  
**(Rabindra Ku. Pattnaik)**  
**Accounts Member-III**