BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 7 (ET) of 2021

(Arising out of order of the learned Addl.CST (Appeal), South Zone, Berhampur in Appeal No. AA- (ET) 03/2018-19, disposed of on dated 27.11.2020)

Present: **Shri A.K. Das, Chairman**

M/s. Swastik Traders,
Raikia Main Road, Raikia,
Kandhamal ... 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 D. Behura, S.C. (CT) &
Sri S.K. Pradhan, Addl.SC (CT)

Date of hearing: 31.05.2022 *** Date of order: 03.06.2022

O R D E R

The dealer-assessee has preferred this second appeal assailing the order dated 27.11.2020 passed by the learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (hereinafter called as 'first appellate authority') in Appeal No. AA- (ET) 03/2018-19 thereby confirming the order dated 30.12.2017 passed by the Asst. Commissioner of Sales Tax, Phulbani Circle, Phulbani, (in short, 'assessing authority') raising demand of

₹33,81,411.00 including penalty of ₹22,54,274.20 for the tax period 01.04.2012 to 31.03.2014 in the assessment framed u/s. 9C of the Odisha Entry Tax Act, 1999 (in short, 'OET Act').

2. The facts relevant for effective adjudication of this appeal are that the dealer-assessee carries on business in seasonal goods like turmeric, dead turmeric, niger seed, anacadium, mango kernel, mahua seed and cake toor and sal seed on wholesale-cum-retail basis, which are scheduled goods under the OET Act. The books of account of the dealer were audited by the Audit Team of Ganjam Range, Berhampur who on verification of the books of account and other documents found that the dealer-assessee has not paid entry tax on purchase value of turmeric procured from the unregistered dealer/persons outside the locality during the period in question. Thus, the Audit Visit Officer suggested for audit assessment and reported accordingly. Basing upon this report, the assessing authority initiated proceeding u/s. 9C of the OET Act and issued notice in Form E-30 to the dealer-assessee. Pursuant to such notice, the proprietor of the firm appeared before the assessing authority on 08.11.2017 and produced the books of account. In the assessment, the Audit Visit Report (AVR)

was confronted to the dealer-assessee wherein it was alleged that the dealer purchased turmeric from unregistered dealer and caused entry into the Gram Panchayat of Raikia without paying entry tax claiming the same as unscheduled goods. The assessing authority relying upon the order of this Tribunal as well as the judgment of the Hon'ble Court held the turmeric as scheduled goods under entry No. 21 of Part-I of the Schedule and levied entry tax @ 1% on the purchase turnover. The assessing authority raised total demand of ₹33,81,411.00 which includes penalty of ₹22,54,274.20.

2(a). The dealer-appellant challenging such demand raised by the assessing authority preferred appeal before the first appellate authority, who also concurred with the finding of the assessing authority that turmeric was spice falling under entry No. 21 of Part-I of the Schedule and confirmed the order of assessment. The dealer-assessee being dissatisfied with the orders of the forums below raising demand of ₹33,81,411.00 holding turmeric as spice falling under entry No. 21 of Part-I of the Schedule, preferred this second appeal.

3. The dealer in the memorandum of appeal has raised several grounds challenging the impugned orders of the forums below. But, in course of argument, learned

Counsel for the dealer-assessee confined his argument to the question that it having sold the scheduled goods out of the local area after receiving the same in course of inter-State sale, it was not liable to pay entry tax. He forcefully contended that the scheduled goods brought into the local area only can be subjected to entry tax when it is proved by the revenue that it was brought into the local area for the purpose of consumption, use or sale therein. The forums below while levying tax on entry of scheduled goods did not return any finding as to whether such goods were brought for the purpose of consumption, use or sale in the local area or not. The dealer took specific ground before the first appellate authority that the assessing authority was wrong in its approach in levying entry tax on purchase value of scheduled goods brought into the local area notwithstanding the fact such goods were sold out of the local area in course of inter-State sale, it did not deal with such ground and disposed of the appeal in whimsical manner. There being no evidence on record to show that the goods brought into the local area were actually consumed, used or sold therein (in the local area), imposition of entry tax was impermissible in the eyes of law. Learned first appellate authority simply concurred with the finding of the

assessing authority without returning any independent finding as to whether the assessing authority was correct in its approach in levying tax @ 1% on turmeric without recording any finding that the same was brought for the purpose of consumption, use or sale therein. The first appellate authority being extended forum of assessment, should have meticulously scanned the materials on record before jumping to any conclusion. The assessing authority as well as the first appellate authority committed serious error of law in levying entry tax on turmeric without satisfying the requirement of Section 3 of the OET Act. Therefore, the impugned orders of both the forums below are unsustainable in the eyes of law and are liable to be set aside.

4. On the other hand, learned Standing Counsel (CT) and Addl. Standing Counsel (CT) appearing for the revenue supported the impugned orders of the forums below and in terms of cross-objection filed by it, contended that the dealer-assessee has stuck to the technicalities only in order to evade the payment of tax. Neither before the assessing authority nor before the first appellate authority, the dealer raised the contention that the goods brought into the local area were not used, consumed or sold therein.

Therefore, at this belated stage, the dealer-assessee is debarred from taking such ground. He further argued that the forums below have rightly imposed tax and penalty on the dealer-assessee for not paying the entry tax on turmeric brought by it into the local area. He submitted to dismiss the appeal and confirm the orders of both the forums below.

5. I have heard the rival contentions of the parties, gone through the grounds raised in memorandum of appeal vis-a-vis the impugned orders of the forums below and the materials on record. On going through the impugned orders of the forums below, I find that the dispute centres round the question whether turmeric was spice or not falling under entry No. 21 of Part-I of the Schedule. The assessing authority answering this question held that turmeric is spice falling under entry No.21 of Part-I of the Schedule, which was also confirmed by the first appellate authority inspite of serious objection by the dealer-assessee. In course of hearing of the second appeal, learned Counsel for the dealer-assessee fairly conceded that turmeric is spice falling under entry No. 21 of Part-I of the Schedule and is a scheduled goods. In view of such concession of the learned Counsel for the dealer-assessee, this Tribunal does not feel it expedient to examine that question again. Learned

assessing authority rightly relying on the order of this Tribunal in case of **M/s. Priya Traders, Malgodown, Cuttack Vs. State of Orissa (S.A. No. 144 (ET) of 2005-06, decided on 29.03.2012) and the decision of the Hon'ble High Court of Orissa in the case of Ramachandra Ramniwas Vs. State of Orissa, reported in [1970] 26 STC 41 (Ori.),** has rightly held that turmeric being 'spices' is falling under entry No. 21 of Part-I of the OET rate schedule and is exigible to tax @ 1%. I do not find any illegality or impropriety in such finding of the forums below.

6. Now, the crux of dispute before me is whether the goods brought into the local area, which was subsequently sold or taken out of the local area are exigible to entry tax under the OET Act. Before addressing on this issue, it is profitable to refer to the relevant provisions of the OET Act under which entry tax is levied.

Section 3(1) of the OET Act provides that there shall be levied and collected a tax on entry of scheduled goods into the local area for the purpose of consumption, use or sale therein at such rate not exceeding 12% of the purchase value of such goods from such date as may be specified by the State Government and different dates and different rates may be specified for different goods

and local areas subject to such conditions as may be prescribed. Proviso to Section 3(1) of the said Act provides that the State Government may direct that in such circumstances and under such conditions and for such period, as may be prescribed, a dealer shall pay in lieu of tax payable under this Act a sum fixed in the prescribed manner, and in such a case the tax shall be deemed to have been compounded. It is crystal clear from the provisions contained in Section 3(1) of the OET Act that the entry tax shall be levied and collected on entry of the scheduled goods into the local area for the purpose of consumption, use or sale therein. The Hon'ble Apex Court in case of **Entry Tax Officer, Bangalore and others Vs. Chandamal Champalal & Co. and others, reported in [1994] 95 STC 5 (SC),** while interpreting Section 3 of the Karnataka Tax of Entry of Goods into local areas for consumption, use or sale therein Act, 1979, which is pari-materia provision with that of Section 3 of the OET Act, in para-6 of the judgment observed as under –

> "6. While we cannot deny the force and substance in the submissions urged by Sri Narasimha Murthy, we do not find it possible to give effect to it in the light of the decisions referred to by Sri Salve. It is true that Burmah Shell, Hiralal Thakorlal and Parekh

Automobiles were concerned with State enactments which empowered the Municipalities to levy the impost, all the same a close reading of the said decisions does indicate that they have read the words 'sale therein' occurring in Entry 52 of List-II as meaning 'a sale of goods within a local area for consumption or use therein' – though as a matter of fact, in a given case, the goods may be taken out and consumed there. The decisions clearly say that where the goods are sold within a local area for the purpose of being taken out of that local area and are actually taken out, no levy is permissible under Entry 52. It is not possible to distinguish the said decisions on the grounds suggested by Sri Murthy. There is yet another reason. Octroi or any impost in the nature of that impost has always been looked upon with certain amount of disfavour. Acceptance of the State's contention in this case would ultimately result in driving up the price of these goods to the consumer. It would become another sales tax in effect. In the circumstances, we are inclined to – indeed we have no option but to – affirm the decision of the Karnataka High Court on the meaning of the words 'sale therein' in Section 3 of the Karnataka Act. At the same time, we find it not possible to agree with the Karnataka High Court insofar as it directed refund of the amount, which may be found to have been paid in excess of the legal liability, to the respondents. Any such direction would amount to unjust enrichment of the respondents who are merely dealers and have passed on the burden to

> the purchasers/consumers. The dealers themselves have not suffered any loss. They merely passed on the liability. In such cases, this Court has been refusing to refund the tax."

6(a). The Hon'ble Apex Court in the aforesaid case took note of the judgments in case of Burmah Shell Oil Storage & Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality, reported in AIR 1963 SC 906, and Hiralal Thakorlal Dalai Vs. Broach Municipality and others, reported in AIR 1963 SC 1446. The Hon'ble **Karnataka High Court in case of Entry Tax Officer (supra)** had come to a categorical conclusion that levy created by Section 3 of the Karnataka Act on the sales effected within a local area is confined only to those sales of goods which are meant for consumption or use within such local area. Where the goods sold are not intended for use or consumption within the local area but are meant to be and are taken out of the area for use or consumption elsewhere, no levy is permissible under the said Act. In case of **Burmah Shell Oil Storage & Distributing Co. India Ltd. (supra)** Hon'ble Apex Court while dealing with an issue to prohibit the municipality from charging octroi from the company on its product brought into the octroi limit for sale, in para-26 of the judgment held

that the company was liable to pay octroi tax on goods brought into the local area to be consumed by itself or sold by it to consumers direct and for sale to dealers who in their turn sold the goods to consumers within the municipal area irrespective of whether such consumers brought them for use in the area or outside it. The company, was, however, not liable to pay octroi in respect of the goods which it brought into the local area and which were re-exported. Similarly, in case of **Rungta Sons Private Ltd. Vs. State of Orissa and others, reported in 1996 (I) OLR 376,** the Hon'ble High Court of Orissa held that levy of octroi on the goods sold by M/s. Rungta Sons Private Ltd. within municipal area of Barbil Municipality for ultimate consumption and use outside octroi limits of the said Municipality is illegal and unjustified. Similarly, in case of **Sidhhagiri Vs. Entry Tax Officer, II Circle, Commercial Tax Department, Belgaum, reported in [1993] 89 STC 221 (Kar.),** their Lordships of Karnataka High Court while dealing with Section 3 of Karnataka Tax on Entry of Goods into Local Areas for consumption, use or sale therein Act, 1979, set aside the impugned order insofar as they relate to levy of tax u/s. 3 of the Act in respect of such quantity of goods brought and sold within the local area which intended

to be re-exported or transported outside the local area. This Tribunal also in **S.A. No. 124 (ET) of 2018 in case of M/s. Indian Oil Corporation Ltd. Vs. State of Odisha** vide order dated 28.02.2020 held that levy of tax on entry of scheduled goods into a local area for consumption, use or sale therein does not include in its purview scheduled goods brought from outside the State and sold in course of inter-State trade or commerce.

6(b). In view of evolution of aforesaid legal position, I am of the considered view that levy of entry tax is restricted only to the scheduled goods brought into the local area for the purpose of consumption, use or sale therein. The power conferred on the State under Entry 52 of List-II of the Schedule does not extend to the goods brought within the local area, sold and taken out of the local area. On perusal of the impugned orders of both the forums below, I find that both the forums below have not discussed the law laid down in case of Entry Tax Officer, Bangalore (supra) and have adopted casual approach in ignoring the law laid down in the said decision. The law is no more *res integra* that the entry tax can be levied on entry of the scheduled goods into the local area from outside the local area which includes from outside the State as well as outside the

country. But so far as the turnover of the goods brought to the local area by way of import and its subsequent inter-State sale from the local area of the State of Odisha, the same is not exigible to entry tax. The impugned orders of both the forums below holding that the goods brought into the local area are exigible to tax without making any enquiry to find out whether such goods have subsequently sold for the purpose being taken out of the local area and are actually being taken out of the local area or not is not legally sustainable in view of the fact that under Entry 52 of List-II of the 7th Schedule of Constitution of India, no levy is permissible where the goods are sold within the local area for the purpose of being taken out of the local area and are being actually taken out from that local area.

7. In the instant case, both the forums below have not dealt in such question even though specifically raised by the dealer-assessee in ground no. 3 of the memorandum of appeal. In course of hearing of the second appeal also, the dealer-assesee relied upon the AVR which shows inter-State sales of the scheduled goods by the dealer. It reveals from the materials on record that the dealer during the period 01.04.2012 to 31.03.2013 effected total purchase of Q. 10,134.42 of turmeric and during the period

01.04.2013 to 31.03.2014 Q. 10,751.15 of turmeric purchased both from inside as well as the outside the State of Odisha. The total purchase of turmeric effected during the aforesaid period was Q. 20,885.56. The assessing authority calculated the total quantity of turmeric at ₹10,44,27,800.00. The dealer also purchased Q. 1,455.12 of dead turmeric for the period from 01.04.2012 to 31.03.2013 and Q. 866.65 of dead turmeric during the period 01.04.2013 to 31.03.2014, the total value of Q. 2,321.77 of dead turmeric was calculated at ₹69,65,310.00. The dealer-assessee has also purchased mohua cake to the tune of Q. 1,100.50, which average price was calculated at ₹13,20,600.00 by the assessing authority. The total purchase value of scheduled goods was calculated at ₹11,27,13,710.00 on which entry tax was levied @ 1%. There being no dispute in the present case with regard to the value of the scheduled goods determined by the assessing authority as above, it (assessing authority) is only now required to examine whether such scheduled goods brought into the local area have been sold and taken out of the local area or not. If it is found by the assessing authority from the materials to be produced by the dealer-assessee that the goods brought into the local area were subsequently sold

within the local area for the purpose of being taken out from that local area and were actually taken out from that local area, it would not levy entry tax on the same. But if the dealer fails to establish that the scheduled goods brought into the local area were subsequently taken out of the local area, it would levy entry tax on the purchase value of the scheduled goods as per law. Section 3 of the OET Act, which is a charging section, says only about levy of entry tax on scheduled goods which are brought into the local area for the purpose of consumption, use or sale therein. Under these circumstances, I am of the considered opinion that the forums below were not correct their approach in levying entry tax on scheduled goods without returning any finding as to whether the goods in question were brought into the local area for the purpose of consumption, use or sale therein or not.

8. In view of the discussions made above, I feel it expedient to remit the matter back to the assessing authority to examine the claim of the dealer-assessee that the scheduled goods brought into the local area were sold in course of inter-State sale and were actually taken out of the local area keeping in view the observations made herein above with reference to the relevant documents to be

produced by the dealer-assessee. Accordingly, the appeal is allowed, the impugned orders of the forums below are hereby set aside and the matter is remitted back to the assessing authority to recompute the tax liability of the dealer-assessee in the light of the observations made above within a period of three months from the date of receipt of this order. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman