

**BEFORE THE FULL BENCH, ODISHA SALES TAX
TRIBUNAL: CUTTACK**

S.A. No. 114 (ET) of 2016-17

(Arising out of order of the learned Joint Commissioner of
Sales Tax, Angul Range, Angul, in First Appeal Case No.
108211621000014, disposed of on dated 29.08.2016)

Present: **Shri A.K. Das, Chairman**
Smt. Sweta Mishra, 2nd Judicial Member
&
Shri S.M. Dash, Accounts Member-III

M/s. D.D. Builders Ltd.,
Plot No.-16F, Flat No.101,
Saudamini Enclaves, BJB Nagar,
Bhubaneswar-751014. ... Appellant

-Versus-

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

For the Appellant : Sri C.R. Das, Advocate
For the Respondent : Sri D. Behura, S.C. (CT) &
Sri M.S. Raman, Addl.SC (CT)

Date of hearing:28.09.2021 *** Date of order:26.10.2021

ORDER

The dealer-appellant has preferred this appeal assailing the order dtd.29.08.2016 passed by the learned Joint Commissioner of Sales Tax, Angul Range, Angul (hereinafter called as 'first appellate authority') in First Appeal Case No. 108211621000014 thereby confirming the order of learned Deputy Commissioner of Sales Tax,

Dhenkanal Circle, Dhenkanal (in short, 'assessing authority') raising tax demand of Rs.1,01,44,971.00 including penalty of Rs.67,63,314.00 for the assessment period 01.04.2006 to 31.03.2011.

2. The facts relevant for adjudication of the second appeal are that, the dealer-appellant is a works contractor who executes works with different principals like E.E. (R&B) Division, E.E. R.W, and Irrigation Divn. of different districts of Odisha. The Sales Tax Officer of the Circle who conducted tax audit of the dealer-appellant for the period from 01.04.2006 to 31.03.2011 observed in the Audit Visit Report (in short, the AVR) submitted under the Orissa Entry Tax Act, 1999 (in short, the OET Act) that the dealer-appellant effected purchase of machineries and equipments in course of interstate trade worth of Rs.6,10,57,691.00 which includes transportation charges and paid Entry Tax of Rs.12,21,222.00 as against due amount of Rs.12,21,154.00 and accordingly suggested not to initiate assessment proceeding against the dealer-appellant which was accepted by the assessing authority i.e. Deputy Commissioner of Sales Tax, Dhenkanal Circle, Dhenkanal. The assessment under the OVAT Act for the above period was completed on 25.03.2013 basing on the suggestion given in the AVR submitted under the OVAT Act.

2(b). While scrutinising the audit assessment records, the A.G. pointed out that due Entry Tax has not

been levied on the value of scheduled goods like stone products, sand, chips, metal etc. which are minerals as per Entry No.59 of Part-I of the schedule of the OET Act worth Rs.33,81,72,472.00 which the dealer-appellant had purchased from unregistered dealers and utilised in execution of works contract. The objection raised by A.G. Audit was accepted and the case was reopened u/s.10 of the OET Act.

2(c). In response to the statutory notice issued to the dealer-appellant, it appeared through Sri Motilal Sharma, Senior Manager (Accounts) of the dealer-company on 14.11.2014 and requested therein to intimate the reasons for reopening of the case. The reason for reopening of the case was communicated to the dealer-appellant vide office letter No.3412 dtd.15.11.2014, where after the dealer-appellant participated in the assessment proceeding and challenged the legality of imposing entry tax on goods like stone products, sand, chips, metal etc. The assessing officer on going through the AVR observed that, the dealer purchased goods like stone products, sand, chips, metal etc. worth of Rs.33,81,72,472.00 from unregistered dealers and utilised the same in execution of the works contract and caused the entry of goods into the local area where the works were executed. It also observed that these goods are minor minerals as per Entry No.59 of Part-I of the schedule of the OET Act and is therefore exigible to tax. The assessing officer so observing

determined the GTO and TTO at Rs.39,92,30,163.00 and accordingly levied OET @ 1% on TTO of Rs.33,81,72,472.00 and @ 2% on Rs.6,10,57,699.00 which on calculation came to Rs.46,02,879.00. After deduction of Rs.12,25,222.00 which the dealer-company had already paid towards entry tax the balance amount payable was determined at Rs.33,81,657.00 on which penalty of Rs.67,63,214.00 was imposed u/s.10(2) of the OET Act.

3. The dealer-appellant being further aggrieved with the order of the assessing officer preferred first appeal before the first appellate authority who also dismissed the appeal and confirmed the order of the assessing officer raising tax demand of Rs.1,01,44,971.00 including penalty of Rs.67,63,314.00. The dealer-appellant being further aggrieved with the order of the first appellate-authority has preferred the present second appeal.

4. Learned Counsel for the dealer-appellant challenging the order of the forums below vehemently urged that both the forums below under misconception of law held that stone products, sand, chips, metal etc. are minor minerals as per Entry No.59 of Part-I of the schedule of the OET Act and accordingly exigible to tax. The forums below while returning such finding has neither taken note of the statute nor the law settled by the Hon'ble Court in different judicial pronouncements. The

orders of the forums below are illegal, arbitrary and against the sanction of law. When the AVR was accepted by the assessing officer, reopening of the case only due to objection by the A.G. Audit amounts to change of opinion and review of earlier decision without any basis which is illegal and unsustainable in the eye of law. The forums below acted in a very arbitrary manner in reopening the case without any justifiable reason. The first appellate authority also has confirmed the order of the assessing officer without applying its mind to the facts and circumstances of the case and without taking note of the relevant statute and settled law on the point. When the statute defines a particular word, adding or subtracting anything while interpreting the statute is not permissible. Entry at Sl. No.59 of Part-I of the schedule of the OET Act does not refer to the Mines and Minerals (Development and Regulation) Act, 1957. Therefore the forums below are not correct in their approach in following the definition minor minerals from the said Act. The Entry at Sl. No.59 only speaks about minerals which does not include coal and coke. When the relevant entry does not include stone products, sand, chips, metal etc. in the definition of minerals the forums below should not have held that purchase of such goods worth of Rs.33,81,72,472.00 is exigible to tax. He strenuously argued that both the forums below also illegally imposed penalty when the dealer-appellant did not intentionally suppress any

transaction in order to evade tax whether stone products, sand, chips, metal etc. are minerals within the meaning of Entry No.59 of Part-I of the schedule of the OET Act is interpretation of the statute and for such interpretation even if wrong no penalty can be imposed. When the ingredients of Sec.9C(1) of the OET Act are not fulfilled imposition of penalty u/s.9C(5) of the OET Act is unwarranted. The violation being purely technical in nature which requires proper interpretation of the statute, the imposition of penalty on the dealer-appellant should be struck down. On the above plea he submits to set aside the orders of both the forums below and allow this second appeal.

5. The learned Standing Counsel (CT) refuting the contention raised by the dealer-appellant in terms of the cross objection filed by it vehemently urged that this Tribunal in Advance Ruling Application No.05(ET)/2013-14 has already held that boulder, stone chips are minor minerals and are exigible to Entry Tax. The issue having already been settled by this Tribunal. The contention raised by the learned Counsel for the dealer-appellant that stone products, sand, chips, metal etc. are not minor minerals within the meaning of Entry No.59 of Part-I of the schedule of the OET Act is legally unsustainable. The forums below rightly accepted the audit objection and reopened the case against the present dealer-appellant as there is suppression of purchase turnover of

Rs.33,81,72,472.00 by the dealer-appellant which was exigible to tax. The reopening of the case is based on the materials on record not whimsical as alleged. The forums below rightly also imposed penalty u/s.9C(5) of the OET Act as there is suppression of purchase transactions in respect of goods like stone products, sand, chips, metal etc. worth Rs.33,81,72,472.00. There is no illegality or impropriety in the orders of the forums below in imposing penalty on the dealer-appellant for intentional suppression of purchase transaction. He submits to dismiss the appeal and confirmed the orders of forums below.

6. We have heard the rival submissions of the parties, gone through the grounds of appeal, impugned orders of both the forums below vis-a-vis the materials on record. The learned Counsel for the dealer-appellant mainly challenged the orders of both the forums below on two grounds that the stone products, sand, chips, metal etc. are not minor minerals as per Entry No.59 of Part-I of the schedule of the OET Act and accordingly is not exigible to tax. Secondly, there being no intentional suppression of the purchase transactions and ingredients of Sec.9C(5) of the OET Act is not fulfilled imposition of penalty u/s.9C(5) is illegal and unwarranted. The first and foremost issue involved in the present second appeal is, whether the goods like stone products, sand, chips, metal etc. are minor minerals within the meaning of Entry

No.59 of Part-I of the schedule of the OET Act is exigible to tax. There is no dispute in the present case that the dealer-appellant purchased goods like stone products, sand, chips, metal etc. worth Rs.33,81,72,472.00 from unregistered dealers and utilised in execution of the works contract. The Sales Tax Officer of the Circle who conducted tax audit of the dealer-appellant for the period 01.04.2006 to 31.03.2011 observed in the AVR that the dealer-appellant effected purchase of machinery, equipments in course of interstate trade worth Rs.6,10,57,691.00 and paid OET of Rs.12,21,154.00. It was also suggested in the AVR not to initiate any assessment proceeding against the dealer-appellant which was also accepted by the assessing authority and the said suggestion of the Sales Tax Officer was accepted by the Deputy Commissioner of Sales Tax, Dhenkanal Circle, Dhenkanal. The assessment proceeding was reopened u/s.10 of the OET Act due to audit objection by the A.G. Audit who pointed out that goods like stone products, sand, chips, metal etc. worth Rs.31,81,72,472.00 are minerals as per Entry No.59 of Part-I of the schedule of the OET Act which the dealer-appellant purchased from unregistered dealers and utilised the same in execution of the works contract but no OET was levied on the value of the said goods. Now the question arises whether the goods like stone products, sand, chips, metal etc. are minerals as per Entry No.59 of Part-I of the schedule of the OET Act

and are exigible to tax. It is pertinent to mention here that similar issue came for consideration before this Tribunal in Advance Ruling Application No.05(ET)/2013-14 in case of M/s. Banadurga Stone Crusher Vrs. State of Odisha in which the Tribunal by order dtd.26.02.2016 clarifying that the minerals appearing in Sl. No.59 is a broad one covering within its ambit minor minerals held that Boulder and chips cannot remain outside the ambit of the Entry Tax. In view of this observation of the tribunal, now the dealer-appellant is debarred to agitate again that the stone products, sand, chips, metal etc. are not minor minerals within the meaning of Entry No.59 of Part-I of the schedule of the OET Act and are not exigible to tax. The Advance Ruling made by this Tribunal in A.R.A. No.05(ET)/2013-14 is binding on us and we cannot take a different view in the absence of any contrary decision on the point either of the Hon'ble High Court or Hon'ble Apex Court. The learned Counsel for the dealer-appellant in course of argument could not cite any decision of our own High Court or of the Hon'ble Apex Court contrary to the decision of this Tribunal in Advance Ruling Application No.05(ET)/2013-14. Therefore, we are of the considered opinion that goods like stone products, sand, chips, metal etc. worth of Rs.33,81,72,472.00 purchased by the dealer-appellant having not been subjected to OET is exigible to tax. On perusal of the impugned orders of both the forums below, we found that both the forums have

rightly interpreted the terms minerals used in Entry No.59 of Part-I of the schedule of the OET Act while coming to the conclusion that goods like stone products, sand, chips, metal etc. are minor minerals and are exigible to tax. There is no illegality or impropriety in such finding of the forums below. The reopening of the assessment proceeding u/s.10 of the OET Act is legally permissible as the A.G. Audit raised valid objection for inclusion of goods like stone products, sand, chips, metal etc. worth Rs.33,81,72,472.00 while calculating the tax liability. The reopening of assessment proceeding is not a change of opinion of the assessing authority but based on the valid grounds imposing tax liability on the dealer-appellant.

7. So far as second issue is concerned with regard to penalty, we are of the considered opinion that both the forums below have not discussed anything while imposing penalty u/s.9C(5) of the OET Act. Section 9C(5) of the OET Act provides where the tax audit conducted under Section 9B results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions, evasion of tax or contravention of any provisions of this Act affecting the tax liability of the dealer, the assessing authority notwithstanding the fact that the dealer may have been assessed under Section 9 or 9A, serve on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report, requiring him to appear in person or through his authorised representative on a date

and place specified therein and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report. Section 9C(5) provides for imposition of penalty of an amount equal to twice the amount of tax assessed under sub-section (3) or (4). In the present case the AVR did not detect any suppression of purchase or sale or erroneous claims of deduction or evasion of tax rather the AVR suggested not to initiate any assessment proceeding against the dealer-appellant which was accepted by the Deputy Commissioner of Sales Tax, Dhenkanal Circle, Dhenkal. The assessment was reopened only after the objection by the A.G. Audit due to non-inclusion of good like stone products, sand, chips, metal etc. worth Rs.33,81,72,472.00. The forums below on interpretation of Entry No.59 of Part-I of the schedule of the OET Act held that the goods like stone products, sand, chips, metal etc. are minor minerals as per Entry No.59 of Part-I of the schedule of the OET Act and accordingly exigible to tax. This interpretation is purely technical in nature for which the forums below should not have imposed penalty in the absence of any intentional suppression of purchase or sale transaction to evade tax.

8. For the foregoing reasons, we are of the considered view that the forums below were correct in

their approach in holding that the goods like stone products, sand, chips, metal etc. are minor minerals as per Entry No.59 of Part-I of the schedule of the OET Act and are exigible to tax. There is no illegality or impropriety in such finding of the learned forums below. But so far as penalty is concerned, there being no suppression of purchase or sale or erroneous claims of deduction with malafide intention of evading tax imposition of penalty by both the forums below is unwarranted or unsustainable in the eye of law and accordingly that part of the order is set aside.

9. With this observation the appeal filed by the dealer is partly allowed by modifying the order of assessment and reducing the tax demand to Rs.33,81,657.00. Cross-objection filed by State respondent is accordingly disposed of.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(Sweta Mishra)
2nd Judicial Member

I agree,

Sd/-
(S.M. Dash)
Accounts Member-III