

**BEFORE THE JUDICIAL MEMBER-I: ODISHA SALES TAX TRIBUNAL:  
CUTTACK.**

**S.A. No. 87 (ET) (A) of 2017-18**

(Arising out of the order of the learned JCST (Appeal), Bhubaneswar Range, Bhubaneswar, in First Appeal Case No.AA-108221622000157/OET/BH-I, disposed of on dtd.28.04.2017)

**P r e s e n t :**

Shri A.K. Panda,  
1<sup>st</sup> Judicial Member

M/s. Pramod Kumar Sahoo,  
3025, Lingaraj Nagar, Old Town,  
Bhubaneswar-751002,

**Present address**

Flat No.1/3,  
Annarpurna Residency,  
Mahatab Road, Old Town,  
Bhubaneswar-751002.

... Appellant

**- V e r s u s -**

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

... Respondent

For the Appellant ... Mr. C.R. Das, Advocate  
For the Respondent ... Mr. M.L. Agarwal, S.C.

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Date of hearing: 04.08.2018

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Date of order: 18.12.2018  
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**ORDER**

This appeal is directed against the order dtd.28.04.2017 passed by the learned Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (hereinafter referred to as, the learned JCST) in First Appeal Case No. AA-108221622000157/OET/BH-I, wherein and whereby, he has dismissed the first appeal by confirming the order of the learned Sales Tax Officer, Bhubaneswar I Circle, Bhubaneswar (hereinafter referred to as, the learned STO) passed in an assessment u/s.9C of the Orissa Entry

Tax Act, 1999 (hereinafter referred to as, the OET Act) in respect of the appellant-dealer for the assessment period from 01.04.2009 to 31.03.2014 raising a balance tax demand of Rs.3,77,019.00 and a penalty of Rs.7,54,038.00.

2. The appellant-dealer being a works contractor used to procure bricks, stone chips, metal, sand, morrum from other than registered dealers to use the same in the execution of the works contract. Basing upon an Audit Visit Report (in short, the AVR) submitted by the STO, Tax Audit Unit, Bhubaneswar Range, Bhubaneswar, the learned STO initiated a proceeding u/s.9C of the OET Act against the appellant-dealer for his assessment for the period from 01.04.2009 to 31.03.2014 and issued a notice in form E-30 to appear and to produce the books of account and in response to the notice, the appellant-dealer appeared through an Advocate and produced the books of account which were duly been examined. As per the allegation of the AVR, though the appellant-dealer had purchased goods like stone chips, metal, sand, moorum, bajuri, BM, SDBC, bajuri dust, GSB etc. amounting to Rs.2,18,88,779.00 which are scheduled goods as per entry in Sl. No.59 of Part-I of the schedule of the OET Act, he has not paid any Entry Tax thereon at the appropriate rate of 1%. Similarly, though the appellant-dealer has paid admitted tax in delay on certain occasions, he has not paid due interest of Rs.4,532.00. When the allegations of the AVR was confronted to the learned Advocate appearing for the appellant-dealer, he submitted that, the appellant-dealer has purchased the goods in question from the same local area and as such he is not liable to pay any Entry Tax thereon. As regard the non-payment of interest, he failed to clarify the allegation of the AVR and as such the learned STO accepted the allegation as true and genuine and raised the demand in that regard. Further, though the learned Advocate appearing on behalf of the appellant-dealer raised the contention that, the goods in question are not coming under the purview of minerals as mentioned in Sl. No.59 of Part-I of the schedule of the OET Act, the learned STO arrived at a conclusion that, the goods to be minor minerals coming under the broad heading of minerals as described in the OET Act and are

exgible to Entry Tax @ 1%. On arriving such conclusion, the learned STO accepted the purchase figure of Rs.3,74,94,822.00 as disclosed by the appellant-dealer instead of the figure of Rs.2.18.86.429.00 as revealed from the AVR and on consideration of all the transactions, determined the TTO at Rs.5,53,43,537.00 and levied tax at the appropriate rate of 1% and 2% on different goods which came to be Rs.7,31,993.00. As the appellant-dealer had already paid tax to the tune of Rs.3,54,974.00 earlier, he raised the balance tax demand of Rs.3,77,019.00 and also imposed a penalty of Rs.7,54,038.00 equal to twice of the balance tax demand u/s.9C(5) of the OET Act and as such the balance tax demand, penalty and the interest levied earlier came to be Rs.11,35,589.00 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 JCST bearing First Appeal Case No.AA-108221622000157/OET/BH-I. On hearing and on consideration of the materials available on record, the learned JCST found no merit in the contentions of the appellant-dealer and accordingly dismissed the appeal by confirming the order of the learned STO. Thus, again being aggrieved with the order of the learned JCST, the appellant-dealer has preferred this second appeal.

4. Cross objection has been filed by the respondent-Revenue supporting the order of the learned forums below.

5. Heard both the sides. The learned Counsel appearing for the appellant-dealer submitted that, the goods in question i.e. stone chips, metal, sand, moorum, bajuri, BM, SDBC, bajuri, dust, GSB etc. are not coming under the purview of the entry in Sl. No.59 of Part-I of the schedule of the OET Act which speaks about the minerals including seven other minerals and not including coal and coke and the same does not refers to any other statute for interpretation or classification of the goods like entry in Sl. No.3 of Part-I of the schedule which refers to section 14 of the Central

Sales Tax Act, 1956 for description of iron and steel. He also submitted that, in absence of reference to any other statute, it is not correct to refer to the Minor Minerals Act for interpretation of the goods as mentioned in Sl. No.59 of Part-II of the schedule to bring the goods in question to its fold. He further submitted that, as per Rule 34 of the OET Rules, for any other matters not specified under the OET Act and Rules and required for the carrying out the purposes of the Act and the Rules, the provision under VAT Act and the Rules made thereunder shall apply *mutatis mutandis* and though several entries in the schedule of the OVAT Act refer to some other Acts, this entry, which speaks of ores and minerals does not refer to any other Act for interpretation and hence, the order passed by both the learned forums below holding the goods in question to be minerals as per Sl. No.59 of Part-II of the schedule of the OET Act is totally erroneous and is liable to be set aside. On the other hand, the learned Standing Counsel appearing for the Revenue supported the orders of the learned forums below and urged for dismissal of the appeal.

6. Perused the orders of both the learned forums below and the other materials on record. In view of the rival contentions, the sole question to be decided in this appeal is to whether the goods in question i.e. stone chips, metal, sand, moorum, bajuri, BM, SDBC, bajuri, dust, GSB etc. are coming under the purview of entry in Sl. No.59 of Part-I of the schedule of the OET Act and are exigible to Entry Tax @ 1%. While deciding the issue, both the learned forums below have taken a consistent view that, the goods in question are coming under the purview of entry in Sl. No.59 of Part-I of the OET Act and are exigible to Entry Tax @ 1%. Actually, the issue is no more *res integra*. While deciding a sales tax dispute, the Hon'ble High Court of Orissa in the case of **State of Orissa and others v. D.K. Constructions and others; [2017] 100 VST 24 (Orissa)** on consideration of similar contentions raised by the appellant-dealer and on consideration of a number of cases decided earlier by the Hon'ble Apex Court and by different High Courts has held that:

“It is, therefore, the opinion of the Tribunal in this regard in all the revisions that they are all minerals cannot be said to be incorrect. Of course, the finding of the Tribunal is based on the definition of mineral in the Act, 1957 or Rules made thereunder. Even if taking the “common parlance test” without going to the reasons by the Tribunal, the result is same to the effect that the ballasts, boulders or chips are nothing but “minerals” under Sales Tax Act exigible to tax at the rate of four per cent, as per entry 117 of the taxable list.”

7. Earlier, different benches of this Tribunal has also taken the same view in S.A. No.220 (ET) of 2015-16 and S.A. No.28(ET)/2017-18.
8. In view of the above principle of law, it is very much clear that, the goods in question are clearly coming under the purview of minerals as mentioned in entry No.59 of Schedule-I of the OET Act and are exigible to be tax @ 1%. Therefore, the order passed by both the learned forums below in this regard suffers from no infirmity and as such the same is deserved to be confirmed.
9. But, so far as the imposition of penalty u/s.9(5) of the OET Act is concerned, it is seen that, the issue involves herein is a complicated one and fully depends upon the strict interpretation of law. The entire facts and circumstances of the present case reveals that, though the appellant-dealer has disclosed its entire turnover voluntarily, he has not paid the due Entry Tax thereon, only on a wrong notion that the goods in question are not exigible to Entry Tax. As the case in hand involves a complicated question of law and as the appellant-dealer has no intention of avoidance of payment of tax, the imposition of penalty at the rate of equal to twice of the balance tax demand upon him u/s.9C(5) of the OET Act is quite improper and unjustified and as such the same is deserved to be set aside. Considering these aspects, different Division Benches of this Tribunal has also deleted the penalty imposed upon the appellant-dealer earlier in S.A. No.220 (ET) of 2015-16 and S.A. No.28(ET)/2017-18.
10. In view of the above discussion, the appeal is allowed in part. The order passed by both the learned forums below in raising the tax

demand against the appellant-dealer is hereby confirmed. However, the order relating to the imposition of penalty u/s.9C(5) of the OET Act is hereby set aside. The cross objection is disposed of accordingly. The demand notice be issued against the appellant-dealer accordingly.

Dictated & corrected by me,

Sd/-  
(A.K. Panda)  
1st Judicial Member

Sd/-  
(A.K. Panda)  
1st Judicial Member