BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A.No. 108(ET)/2017-18

(From the order of the ld.Addl.CST (Appeal), South Zone, Berhampur, in Appeal No. AA(ET)37/2015-16, dtd.30.06.2017, remanding the order of the Assessing Officer)

Present: Sri S. Mohanty
2nd Judicial Member

M/s. The India Cements Ltd.,
At- Goods Shed Road, Berhampur,
Dist. Ganjam. .... Appellant

-Versus-

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

For the Appellant : Mr. G. Mohanty, Advocate
For the Respondent : Mr. S.K. Pradhan, A.S.C. (C.T.).

(Assessment period : 01.04.2012 to 31.03.2014)

Date of Hearing: 04.12.2018 *** Date of Order: 04.12.2018

ORDER

This second appeal is directed against the order of the learned First Appellate Authority/Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (in short, FAA/Addl.CST) in First Appeal No.AA(ET)37/2015-16 dtd.30.06.2017 in remanding the order of assessment passed by the learned Joint Commissioner of Sales Tax/Assessing Authority, Ganjam Range, Berhampur (in short, JCST/AA) for the assessment period from 01.04.2012 to 31.03.2014 u/s.9C of the Odisha Entry Tax Act, 1999 (in short, OET Act).

2. In the appeal in hand as state above, originally there were two number of allegations brought by the audit team in Audit Visit Report (AVR) first one is, less payment of entry tax adopting wrong method of calculation of entry tax and the second one is, purchase suppression. The fact of purchase suppression was established by the order of the learned AA whereas the same is deleted by the learned FAA. Such deletion is not questioned by the Revenue, even though the Revenue has raised a cross objection. It is not out of place to mention here that, the cross objection by the Revenue is stereotype, confusing not in the context of the present case. Hence, it makes hardly any sense to taken care of. However, from the discussion above, it is held that, once the findings of the FAA in the impugned order regarding the purchase suppression, is deleted and since this being not challenged, the same is remained un-interfered with this appeal. Hence, confirmed.

3. Coming to the method of calculation of entry tax on sale value, the audit team has suggested for inclusion of VAT in the sale value to determine the TTO for the purpose of calculation of entry tax, whereas, the AA has taken a different view on interpretation of the provisions under statute and arrived at a conclusion that, the local tax collected should be excluded from the sale value so as to determine the TTO for the calculation of entry tax. In appeal, the FAA re-imposed the view of the audit team i.e. the VAT should be included in sale value for the purpose of entry tax. It is pertinent to mention here that, on earlier occasions in the capacity of the Single Bench of this Tribunal, this disputed issue was decided by me with the view that, the purchase value shall be determined on the basis of sale value excluding VAT. It is in the light of the interpretation of the provision u/s.2(j) of the OET

Act and Sec.2(46) of the OVAT Act, and the Circular issued by the CCT in the particular context. For better appreciation, relevant portion of the Clarification and the provisions mentioned above are produced below :

COMMISSIONERATE OF CT AND GST, ODISHA (AT CUTTACK)
(Finance Department, Government of Odisha)

No. Pol-53/3/2017-Policy-CCT-(Part-1) 6322/CT, Dated 21/4/2018"

Provision u/s.2(j) of the OET Act is reads as follows :

> "(j) "PURCHASE VALUE" means the value of scheduled goods as ascertained from original invoice or bill and includes insurance charges, excise duties, countervailing charges, sales tax, [value added tax or, as the case may be, turnover tax] transport charges, freight charges and all other charges incidental to the purchase of such goods:
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> ***Provided that*** where purchase value of any scheduled goods is not ascertainable on account of non-availability or non-production of the original invoice or bill or when the invoice or bill produced is proved to be false or if the scheduled goods are [required] or obtained otherwise than by way of purchase, then the purchase value shall be the value or the price at which the schedule goods of like kind or quality is sold or is capable of being sold in open market:"

Provision u/s.2(46) defines sale price as under :

> "***SALE PRICE*"** means the amount of valuable consideration received or receivable by a dealer as consideration for the sale of any goods less any sum allowed as cash discount or trade discount at the time of delivery or before delivery of such goods but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof and the expression **"PURCHASE PRICE"** shall be construed accordingly;
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> xxx xxx xxx "

4. Drawing attention of Sec.2(46) of the OVAT Act and explanation appended to it under clause (d), learned Counsel argued that, the amount of VAT should be excluded from the sale value to determine the purchase price as well as the purchase value. As per the notification mentioned above, the Commissioner of CT and GST in interpretation of the provision under the OET Act and OVAT Act has issued the circular with direction that :

"In view of the above, it is hereby clarified that, in relation to the proviso of Sec.2(j) of the OET Act, the purchase value shall be determined on the basis of the sale value excluding VAT".

Basing the circular, learned Counsel prayed for exclusion of VAT from the sale value to determine the purchase value. The definition of "purchase value" as per Sec.2(j) if reads carefully, the first part speaks of, inclusion of tax and that is the tax paid by the selling dealer, which should have been included in the purchase value by the purchasing dealer while paying the entry tax but when we come to the proviso appended to the provision it say, the purchase value should be the value or the price on which the schedule goods of like, kind or quality is sold or is capable of being sold in open market. So, the word "value" if interpreted does not specifically include the tax amount. Moreover, when the circular is issued by the taxing authority to be followed by the subordinate AA all over the State, then in application of the theory of consistency, which is applicable to the taxing matter scrupulously in the case in hand. Thus, it can safely be said that, it has got application to determine the purchase value in the instant case also.

From the discussion above, it is held that, the sale value as determined by the AA is correct and it should be restored.

5. Another important aspect of the appeal in hand is, even though there are two allegations brought through AVR and decided by the AA but the FAA has ventured to go further to take consideration of the stock in position on the date of assessment with the dealer, so as to ascertain the GTO and TTO for the purpose of calculation of Entry Tax. As per the view of the FAA, it is the entry point is relevant for the purpose of entry tax and when the goods are already entered into the local area or brought into the local area by the instant dealer, the tax liability under the entry tax has begun. Further, as because there is no purchase value as per the first part of the definition of term "purchase value" u/s.2(j) of the OET Act, then on application of the proviso, the purchase value is determined and while determining so, the aforesaid method of calculation as decided above need to be applied. But in no case it can be stated that, the goods which are sold by the dealer only are exigible to entry tax and which are available in the stock are not exigible to entry tax. The argument of the dealer is, the goods which are available in the stock are also sold in course of time and on the point of sale, the dealer pays the entry tax. As such, the view of the FAA is disputed by the dealer. It is also claimed by the dealer that, this practice has been accepted by the Revenue time to time and in accordance to that, the dealer has been paying entry tax.

6. At the outset, it is said that, the view of the FAA is in accordance to the correct appreciation of the provision under the Act. Here in the case in hand it is to be seen, what is the mode of return paid by the dealer time to time and how those are accepted by the Revenue time to time. The method as claimed by the dealer if is the regular practice, then application of the method decided by

the FAA in this case will upset the returns of the previous years as well as coming years. Morefully, it is not the allegation in the AVR and it was not the consideration before the FAA. Well settled principle is Court or Tribunal cannot make out a third case for the parties. The FAA which is an extended forum of assessment can take up a new issue of fact but it must be subject to the notice to the dealer. Here the addition by the FAA is without giving proper opportunity of being heard to the dealer. In consequence thereof, it is held that, here in this case, the dealer is found not guilty of purchase suppression and the calculation of entry tax/purchase value will be the sale value excluding the VAT paid by the dealer. The matter be remanded accordingly to the AA for calculation afresh and to raise demand accordingly. It is hereby ordered.

The appeal is allowed in part on contest. The matter is remitted back to the AA for calculation of entry tax payable by the dealer afresh as per the method decided above and to raise demand if any payable by the dealer.

Dictated and Corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

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