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

S.A.No. 217(ET)/2016-17

(From the order of the ld.JCST (Appeal), Cuttack-I Range, Cuttack, in Appeal No. 108121612000018, dtd.29.12.2016, confirming the assessment order of the Assessing Officer)

Present: Sri S. Mohanty
2nd Judicial Member

M/s. Jagannath & Jagannath,
Jobra Road, College Square,
Dist. Cuttack. ... Appellant

-Versus-

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

For the Appellant : Mr. R. Chhapolia, 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: 05.01.2019 *** Date of Order: 05.01.2019

ORDER

Assessee-dealer as appellant has preferred this second appeal challenging the sustainability of a confirming order by the First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Cuttack-I Range, Cuttack (in short, FAA/JCST) upholding thereby the tax due and penalty from the assessee as calculated by the Assessing Authority/Sales Tax Officer, Cuttack-I East Circle, Cuttack (in short, AA/STO) in a proceeding u/s.9C of the Odisha Entry Tax Act, 1999 (in short, OET Act).

2. It was the Audit Visit Report (AVR) formed the basis for assessment u/s.9C(3) of the OET Act covering the tax period from

01.04.2012 to 31.03.2014 relating to the dealer's business concern. The Audit team has made observation/allegations for audit assessment on three points such as, the dealer has classified certain goods worth of Rs.13,92,083/- as taxable @1% treating the same as goods covered under Part-I of the schedule wrongly, the dealer had not paid any tax on sale of the goods manufactured and there are goods claimed to be purchased from local dealer which are tax suffered are not supported with sufficient evidence. On due confrontation of the Audit Visit Report to the dealer, the AA examined the books of account and relevant documents on production and found that, the dealer has under-assessed himself so far as the goods to the tune of Rs.13,92,083/- as it was taxed @1% instead of the correct rate i.e. @2% since the goods in question covered under Part-II of the Schedule of the OET Act. Similarly the AA has also found that, the dealer has no documentary evidence in support of the claim of tax suffered goods purchased from local dealer whereas the third allegation i.e. non-payment of tax on sale of manufactured goods, the AA has found that, the dealer was not engaged in any manufacturing process and the goods sold are not covered under the definition of "manufactured". Hence, the aforesaid allegation was dropped with a finding that, the Audit team has misinterpreted the term "manufacture" taking consideration of the R.C. whereby the dealer was granted permission for manufacturing and trading. In ultimate analysis the AA re-determined the GTO, calculated the tax due and then raised demand at 1/3rd of the tax due keeping view the direction of the Hon'ble Court in W.P.(C) No.4775/2010 Order dtd.02.04.2010. Thereafter, penalty as per Sec. 9C(5) of the OET Act for non-payment of tax was imposed in addition to the tax due, thereby, the total demand raised to Rs.81,806/-.

3. In appeal before the FAA preferred by the dealer, the findings and demand raised by the AA remained undisturbed as the FAA confirmed the order of AA.

4. Felt aggrieved, the dealer has preferred this second appeal with the contentions such as, the FAA as well as the AA both have gone wrong in imposing tax on tax suffered goods and the authority below has also gone wrong in imposing penalty particularly when the dealer has deposited the tax as calculated very soon after the audit visit.

5. The appeal is heard with cross objection from the side of the Revenue whereby the Revenue has supported the concurrent findings of the fora below as sustainable and correct.

In this appeal, the dealer has raised two questions, whether the FAA has gone wrong in confirming the order of AA by imposing tax on tax suffered goods and if the penalty as imposed is not sustainable? The plea of the dealer is, he had produced Xerox copies of the documents against the purchases from local dealer, but the FAA or the AA had not considered those documents. As a result, the tax as raised on these goods amounts to double taxation.

Gone through the findings of the fora below. The impugned order nowhere reflects that, any documents were produced indicating the purchases from local dealers and the goods were tax suffered goods. On the other hand, the dealer has not produced any documents before this forum also. In absence of any cogent evidence, the findings of the fora below on the question of facts cannot be upset. There is no reason to believe that, the subjective satisfaction of the AA and FAA on due scrutiny of the documents produced before them is wrong particularly when the dealer has failed to adduce any documentary evidence before this forum. Mere submission of the

dealer through his counsel cannot negativise the findings of the fora below on question of facts. Thus, it is held that, the concurrent findings of both the fora below on this point calls for no interference.

6. The next point raised by the dealer is, the penalty as imposed in this case is not tenable in law. It is found that, the dealer has calculated tax liability @1% on certain goods treating the goods as covered under Part-I of the schedule. However, both the fora below on due consideration of the goods which are schedule goods covered under Part-II treated the same as taxable @2%. The rate of tax as imposed by both the fora below is almost gone unchallenged. It is also found that, the goods need to be covered under Part-II of the schedule i.e. taxable @2%.

Learned Counsel for the dealer vehemently argued that, this is a bona-fide mistake on the part of the dealer. The dealer had no intention to avoid or evade tax. Though it is an underassessment by the dealer but it is with no intention. On the other hand, it is found that, the dealer has paid the tax as calculated and suggested by the audit team very soon after the audit visit i.e. before the initiation of the assessment proceeding. In this circumstance, it is believed that, it is a bona-fide mistake by the dealer and the dealer was prompt enough to clear the tax due. At the same time, the law as it contemplates the audit team has the duty to explain the dealer the manner of calculation, filing of return etc. and in compliance to that, when the audit team has pointed out the defects or less collection of tax, the dealer was quick and vigilant enough to deposit the tax at the appropriate rate. In many of the decision of this forum, the view has been consistently taken that, in such a situation the dealer needs to be dealt with leniently so far as the question of penalty is concerned. In respectful agreement with the view taken earlier, I am of the

considered view, when the dealer was prompt enough to deposit the tax very soon after the audit visit that too before initiation of the assessment proceeding, in that case, the dealer is entitled to grace of bona-fide. It is not out of place to mention here that, no disclosure can be made after audit visit, but there is no restriction in law to pay tax after AVR. With the observation above, it is held that, the penalty as imposed by the AA which is confirmed by the FAA in the case in hand need to be set-aside. So far as the finding of both the fora below, the goods sold by the dealer were not covered under the category of manufactured goods is remained as it is, since it has not been questioned by the Revenue in this appeal.

With the observation above, it is hereby ordered.

The appeal by the dealer is allowed in part on contest. The dealer is liable to pay the tax as determined by fora below. However, the penalty as imposed is set-aside.

Dictated and Corrected by me,

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

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