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

S.A. No. 97 (ET) of 2017-18

(From the order of the ld. JCST (Appeal), Cuttack I Range, Cuttack,
in First Appeal Case No. 108121612000022,
disposed of on dtd.30.06.2017)

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

- V e r s u s -

M/s. Sheth Bhagawan Das Vithaldas & Sons,
H. No.110, Ward-10, Nayasarak,
Cuttack. ... Respondent

S.A. No. 119 (ET) of 2017-18

M/s. Sheth Bhagawan Das Vithaldas & Sons,
H. No.110, Ward-10, Nayasarak,
Cuttack. ... Appellant

- V e r s u s -

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

For the Revenue : Mr. S.K. Pradhan, ASC
For the Dealer : Mr. A. Kedia, Advocate

Date of hearing: 02.02.2019 **** Date of order: 02.02.2019

O R D E R

The appeal and cross appeal both are heard together and decided in this common order for sake of convenience and to avoid repetition as well as conflicting opinion, if any.

2. State is the appellant in S.A. No.97(ET) of 2017-18 challenging the deletion of penalty by the first appellate authority in the impugned order, whereas dealer is the appellant in S.A. No.119(ET) of 2017-18 challenging the levy of entry tax by both the fora below on the plea that the dealer is not liable to exigible to entry tax, more to say penalty, if any for non-payment of entry tax.

3. The period of assessment in question is 01.04.2012 to 31.03.2014 relating to the assessee-dealer which is a proprietorship concern in trading of gold ornaments as per the Registration Certificate granted to him. The report of the audit team which is basis of initiation of assessment proceeding u/s.9C of the OET Act for the tax period above brought in allegations like the dealer has sold 22 karat gold ornaments after manufacturing inside as well as outside the Cuttack Municipal area and as such the dealer is liable to entry tax. Since the dealer was found to have not paid entry tax and it was duly admitted by the dealer himself by his statement, the audit team suggested for assessment, whereas during the assessment the assessing authority found the dealer has not suppressed anything relating to his transaction and as a result he accepted the books of account of the dealer. Dividing the sale made inside the local area and outside the local area, the assessing authority imposed entry tax and in consideration of manufacturing of the goods like ornaments, the assessing authority imposed entry tax which was calculated to Rs.6,63,421. The dealer having not paid any amount of entry tax, the entire amount determined above was raised against him along with penalty u/s.9C(5) i.e. at twice of the tax due. Accordingly, the total demand against the dealer was calculated at Rs.19,90,263.00. However, before completion of assessment the dealer was found to have paid entry tax of Rs.663032.00 and interest of Rs.1,43,226.00. In course of audit the dealer was asked to pay the balance amount of Rs.13,27,231.00.

4. Being aggrieved with the assessment and levy of entry tax, the dealer carried the matter before the first appellate authority. In first appeal, the learned the first appellate authority in the impugned order confirmed the order of the assessing authority so far as the entry tax liability and the

determination of TTO and calculation of tax. But, while raising demand of tax the first appellate authority adjusted the tax already paid by the dealer during the audit on the tax liability and then, the balance amount which is due from the dealer was raised along with the interest u/s.9C(5). As a result, the demand reduced to only Rs.1,167.00.

On this backdrop, the State in one hand has preferred this second appeal challenging the deletion of penalty by the first appellate authority, whereas, on the other hand, the dealer in his appeal has challenged the impugned order on the ground that the dealer is not exigible to entry tax at all. The tax paid by the dealer in the audit was under wrong notion of law and as such the entire assessment by the assessing authority and thereafter by the first appellate authority both are not sustainable in law.

5. The questions arose out of the appeal and cross appeal are as follows: (i) whether the first appellate authority has committed wrong in adopting the method of calculation of tax due i.e. adjustment of the tax and interest paid during audit before imposition of penalty; (ii) whether the first appellate authority is wrong in confirming the order of the assessing authority by imposing entry tax on the dealer; (iii) whether the dealer is not liable to entry tax as neither he was engaged in manufacturing nor he was selling the goods outside the local area?

6. **Findings**:

Question No.1

Claim of the State in keeping view the restrictions laid in provision u/s.33(5) and 34 of the OVAT Act once the tax audit is conducted deposit of tax, if any, thereafter cannot absolve the dealer from paying penalty on entire tax due as per audit observation. To appreciate the

position of law, the provision is reproduced as follows. Sec. 33(5) of the OVAT Act -

> "(5) If any dealer, after furnishing a return under sub-section (1) or sub-section (2), discovers that a higher amount of tax was due than the amount of tax admitted by him in the original return for any reason, he may voluntarily disclose the same by filing a revised return for the purpose and pay the higher amount of tax as due at any time, in the manner provided under Section 50:
> ***Provided that*** no such voluntary disclosure shall be accepted where the disclosure is made or intended to be made after receipt of the notice for tax audit under this Act."

The provision above mandates, once the dealer received the audit visit notice, he cannot make any volunteer disclosure. It means, if the dealer is involved in any kind of suppression or the dealer has made any underassessment or wrong claim of ITC etc., he cannot make any disclosure after receipt of audit visit by revise return. However, the provision above does not restrict the dealer from paying any tax or interest. Further, in the case in hand in particular, it is the dealer who was under bonafide believe that, he purchases and sells the goods within the same local area and is not liable to pay tax and that is the stand of the dealer throughout including the cross appeal before this forum. So, the moment audit team raised demand, the dealer if wanted to make any payment which was accepted by the Revenue, in that event it cannot be said that the dealer's such payment should not take into consideration at the time of calculation of tax. The dealer is not guilty of any suppression. He has filed return. It is the duty of the authority to rectify the mistake and to guide the dealer how to file return and pay tax i.e. as envisaged under section 38 of the of the OVAT Act read with Rule 46 of the OVAT Rules. It is not the case that the dealer was paying

entry tax on earlier occasion and for the assessment year in question he stopped paying tax. So, it is believed that the dealer has a bonafide dispute raised before the authority that he is not liable to pay tax and at the same time when he has deposited an amount towards tax and interest during audit, the same should have adjusted while making assessment as it was appropriately done by the first appellate authority. Be that as it may, it is believed that, the method of calculation of tax due adopted by the first appellate authority is no way illegal or perverse.

Question No.2

7. The dealer in his appeal has prayed for deletion of imposition of entry tax on the plea that, the dealer has effected purchase and sale within the local area i.e. Cuttack Municipality. The dealer has taken this plea consistently from the assessing authority, first appellate authority and then before this Tribunal.

8. Perused the written argument filed by the dealer and the impugned order, it is apt to mention here that, the same written argument which is filed before this Tribunal was also filed before the first appellate authority and the first appellate authority has reflected the entire written argument from first para to last para in the impugned order. However, unfortunately, the first appellate authority has not tried to answer the question raised by the dealer before him. Both the fora below have accepted the statement of the dealer before the audit team, whereby the dealer had admitted to have manufactured and sold both inside and outside the Cuttack area.

9. Learned Counsel appearing for the dealer vehemently argued that, the statement before the audit team was not the volunteered statement of the dealer. It was recorded and prepared by the audit team and the dealer has only put his signature in it.

Gone through the statement available in the LCR. As per the statement, the dealer has admitted that he is a manufacturer, he has effected sale both inside and outside the Cuttack municipal area. Local area has been defined u/s.2(f) of the OET Act, 1999. The definition of the local area as per Sec.2(f) is any sale/purchase beyond a particular municipal area covers under the Entry Tax net. Similarly, if the dealer is a manufacturer then, he is otherwise liable to be taxed under the OET Act in accordance to Sec.26 of the OET Act. There is no dispute on this proposition of law. The only dispute is, according to the dealer, he is not a manufacturer and he has not made any sale out of local area. He has a shop in Cuttack Municipality area and whoever purchases any gold ornaments, he comes to his shop and purchases from his shop. So, irrespective of the residence or place of business of the purchaser since the sale is affected within the local area, the dealer is not liable for entry tax. In this regard, the authorities relied by the dealer in **Balabhagas Hulaschand v. State of Orissa (1976) 37 STC 207 (SC)**, **Commissioner of Commercial Taxes v. Desai Beedi Company (2015) 82 VST 242 (SC)** and **State of Orissa v. Vijaylaxmi Timber Depot (2002) 126 STC 169 (Ori.)** are very much pertinent.

If we go by the statement of the dealer before the audit team then, there is no reason to interfere with the impugned order but if we disbelieve the statement or if the statement is under suspicion, in that event the facts in issue like the claim of manufacturing and sale out of local area could have verified by the assessing authority from the goods purchased and sold by the dealer. More to say, if the dealer is a manufacturer, it can be ascertained from the verification of the purchases and sales over the period.

Similarly, if the dealer is a seller outside the local area that also can be ascertained from the sales made by the dealer and as well as on verification of the returns of purchasing dealer, if any. The statement became doubtful for the reason that the dealer is granted with R.C. for trading not for manufacturing. Accordingly, it is ordered. Thus, it is held that the effort by the fora below to verify the claim of dealer is not sufficient. In necessary case the authority can examine any seller or purchaser for the foregoing reasons. Thus, it is held that, this is a fit case where the matter should be remitted back to the assessing authority for the limited purpose of verification, scrutiny to ascertain if the dealer is a manufacturer and the dealer has effected sale out of local area. The appeal is allowed on contest. The matter is remitted back to the assessing authority for assessment fresh in the light of the observation hereinabove. All endeavors should be made to dispose of the remand assessment within four months hence.

Dictated & corrected by me,

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

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