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

S.A. No. 104(ET) of 2017-18

(Arising out of the order of the ld. JCST (Appeal), Sambalpur Range, Sambalpur, in First Appeal Case No. AA 33/JSG/ET/2015-16, disposed of on dtd.21.06.2017)

P r e s e n t: **Shri S. Mohanty,**
1st Judicial Member

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

- V e r s u s -

M/s. Surendra Mohanty, Kuchinda, Sambalpur. ... Respondent

For the assessment period: 01.04.2009 to 31.03.2014

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

Date of hearing: 06.08.2019 ******** Date of order: 06.08.2019

O R D E R

When the order of assessment u/s.9C of the Orissa Entry Tax Act, 1999 (hereinafter referred to as, the OET Act) by the learned assessing authority modified before the first appellate authority and thereby resulted in reduction of the demand towards tax and penalty. The Revenue being aggrieved has preferred this appeal.

2. It is the assessee-dealer M/s. Surendra Mohanty, Kuchinda, Sambalpur faced audit assessment u/s.9C of the OET Act for the tax period from 01.04.2009 to 31.03.2014 on the basis of Audit Visit Report (in short, the AVR). During the period, the dealer had effected intrastate and interstate purchases of taxable goods like

machinery, bitumen and sanitary fittings for use in the works contract. The AVR allegations were the dealer had not excluded the freight in the purchase price. In the assessment, the learned assessing authority found the dealer had paid Entry Tax @ 1% on bitumen though the rate of tax of Bitumen is @ 2% as per entry in Sl. No.11 of Part-II of the schedule of the OET Rate Chart. Accordingly, the assessing authority added freight charge @ 5% of the purchase value and whereas levied Entry Tax @ 2% on purchase of bitumen. Thus, on re-determination of tax liability the dealer was found liable to pay a balance tax of Rs.1,41,617 including penalty of Rs.94,411.20 i.e. twice of the tax due imposed u/s.9C(5) of the OET Act.

In appeal at the instance of the dealer, the first appellate authority modified the findings of the assessing authority to the extent that, the enhancement of rate of tax on goods like Bitumen from 1@ to 2% is erroneous, whereas addition of freight as suggested in the AVR confirming the findings of the assessing authority to be correct. In the result, the tax due was recalculated and determined at Rs.16,318.00, whereas penalty was determined at Rs.62,636.00.

3. When the matter stood thus, Revenue has preferred this appeal.

The contention of the Revenue is, the finding of the first appellate authority with regard to rate of tax on Bitumen is erroneous and to that effect, the finding of the assessing authority is to be restored.

4. The questions struck for decision in this appeal are,

(i) whether the first appellate authority is wrong in reversing the findings of the assessing authority in determining the rate of tax against Bitumen?

(ii) what order ?

5. As mentioned above here in this case, the assessing authority had imposed tax @ 2% on purchase of Bitumen by the dealer. The AVR was submitted with different allegations such as non-

inclusion of freight in the purchase price. The assessing authority has held that, Bitumen is a specific entry under Sl. No.11 but covered under entry at Sl. No.97 of Part-I called 'Road Tar'. In analysis of literature of Road Tar and the common parlance theory, the first appellate authority has held that, the goods are nothing but Road Tar as per entry Sl. No.97 of Part-I of the Schedule, hence it is taxable @ 1%.

6. When Bitumen is a specific entry under the entry chart, then interpretation of the entry by application of the common parlance theory is not only erroneous but also the act of exceeding the jurisdiction vested in law. So, the finding of the first appellate authority to treat the goods as 'Road Tar' is not based on fact and law.

7. The other findings of the first appellate authority which is challenged by the dealer in its written submission that, this question being beyond AVR cannot be taken up in the audit assessment. The audit team has suggested for inclusion of freight into purchase price, where the audit team had accepted the tax rate @ 1% against the purchase of Bitumen by the dealer. So when the audit team has not disputed the rate of tax but accepted as disclosed by the dealer and when, the AVR does not contain such allegation while suggesting for audit assessment, this fact being beyond AVR, the assessing authority has acted in disobedience to the principle settled by the Hon'ble Court in the case of **Bhusan Power & Steel Ltd. Vrs. State of Orissa and Others (2012) 47 VST 466 (Ori.)**.

8. The contention in the appeal memo is, the ratio laid down by the Hon'ble Court in Bhusan Power & Steel case (supra) is different from the facts and circumstances of the case. In the hearing, the learned Standing Counsel argued that, when Bitumen has specific entry under Entry Tax Act, the assessing authority has rightly taken up this question in the assessment proceeding which he could notice on scrutiny of the return of the dealer. In the AVR, the audit team has accepted the return relating to the tax rate on goods like Bitumen.

The AVR is silent on this question. In the regular audit assessment the assessing authority detected this defect of less payment of tax. Now the question is, whether the assessing authority can take up this question in the same audit assessment or can suggest for reassessment as per Sec.10 of the OET Act. The Legislature in its wisdom has fixed time limit for completion of audit assessment within a period of six months which can be extended up to one years with the permission of the authority, whereas it has given a time duration of seven years for reassessment u/s.10 of the OET Act. It is when the assessing authority detected some new incriminating materials against the dealer, it could have suggested for reassessment u/s.10 of the OET Act on the new incriminating materials detected but it cannot take up a separate question basing the new materials in the self audit assessment which is beyond AVR. The argument of the learned Standing Counsel like the facts and circumstances of the present case is different from the facts and circumstances of the case before the Hon'ble Court in Bhusan Power & Steel (supra) is not conceivable. It is apt to mention here that, in a recent decision, the Hon'ble Court in **Tata Sponge Iron Ltd. v. Commissioner of Sales Tax in W.P.(C) No.3661/2019 dtd.17.04.2019** has held that,

> "The law laid down by High Court must be followed by all authorities and subordinate Tribunals when it has been declared by the highest proceedings or deciding on the rights involved in such a proceeding"
>
> ********** "Section 41 & Section 42 of the Odisha Value Added Tax Act, 2005- Whether the first appellate authority was justified in ignoring the ratio of the Judgment in *Bhushan Power & Steel Ltd. Vrs. State of Odisha, 2012 (I) ILR-CUT 421 = (2012) 47 VST 466 (Ori.)* wherein it was held that the assessing authority cannot travel beyond the materials available in the audit report and utilization of any other materials from any other sources in audit assessment is completely foreign to audit assessment under Section 42 of the OVAT Act? – ignoring said law laid

down by the High Court by the appellate authority amounts to contempt."

In view of the authoritative pronouncement above, it is held that, the first appellate authority has not committed any illegality or irregularity while applying the ratio of the Bhusan Power & Steel Ltd. to the case in hand. Be that as it may, it is held that, the order suffers from no illegality.

Accordingly, it is ordered.

The appeal is dismissed as of no merit.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

Sd/-
(S. Mohanty)
1st Judicial Member