BEFORE THE DIVISION BENCH-I, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 63 (ET) of 2020

(Arising out of order of the learned Addl.CST (Appeal), Central Zone, Odisha, Cuttack in First Appeal No. AA- CUI- 268/13-14, disposed of on dated 30.06.2018)

Present: **Shri A.K. Das, Chairman**
&
Shri M. Harichandan, Accounts Member-I

M/s. Vestige Marketing Pvt. Ltd.,
876, 1st Floor, Nandan Mansion,
Gobind Nagar, Cuttack Road,
Bhubaneswar ... Appellant

-Versus-

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

For the Appellant : Sri Pravakar Mishra, Advocate
For the Respondent : Sri D. Behura, S.C. (CT) &
Sri S.K. Pradhan, Addl.SC (CT)

Date of hearing: 26.05.2022 *** Date of order: 06.06.2022

O R D E R

The dealer-assessee has called in question the legality and propriety of the order dated 30.06.2018 passed by the learned Addl. Commissioner of Sales Tax (Appeal), Central Zone, Odisha, Cuttack (hereinafter called as 'first appellate authority') in Appeal No. AA- CUI- 268/13-14 thereby confirming the order dated 28.02.2013 passed by

the Deputy Commissioner of Sales Tax, Cuttack-I Central Circle, Cuttack (in short, 'assessing authority') raising demand of ₹1,27,87,581.00 for the period 16.07.2008 to 31.03.2012 in the assessment framed u/s. 9C of the Odisha Entry Tax Act, 1999 (in short, 'OET Act').

2. The relevant facts leading to filing of the present second appeal are that the dealer-assessee deals in food supplements, cosmetics, medicines of Vestige make and other items in trade, i.e. agricultural supplements and tea. The dealer carries on business through a hierarchical chain of multi level marketing system, which works through the distributor. One distributor appoints another, who in turn, appoints another. The chain is created with one distributor, who becomes leader and the multi level chain for sale of goods is created. All the distributors in the off line get monetary incentives in case of sale of one distributor. The dealer-assessee receives the stock of items on stock transfer basis from its registered office located at Okhala Industrial Area, Phase-II, New Delhi. The assessment u/s. 9C of the OET Act was initiated on receipt of Audit Visit Report (AVR) submitted by the Sales Tax Officer, Cuttack-I East Circle and notice was issued to the dealer-Company in Form E-30

under the OET Act. Pursuant to such notice, one Pravakar Mishra, Power of Attorney Holder of the dealer-assessee, appeared before the assessing authority and produced the books of account relating to the period from 16.07.2008 to 31.03.2012, which includes stock transfer notes, statement of sales and stock statement supplemented by stock transfer notes and retail invoices and the audited accounts of the firm for the financial years 2008-09, 2009-10, 2020-11 and 2011-12. In the AVR, it was alleged that the dealer-assessee made payment of entry tax in a manner which was inconsistent with the provisions of Section 3 and Section 2(j) of the OET Act. Since it (dealer-assessee) was receiving the stock from outside the State of Odisha on stock transfer basis, was liable to pay tax on the market price of such goods as per proviso to Section 2(j) of the OET Act. It was further alleged in the report that the dealer-Company was selling scheduled goods on the MRP, which was 80% higher than the price indicated on the stock transfer notes, which was treated as the purchase value by the dealer. The turnover of receipt during the period of audit as per the books of account was ₹18,64,08,465.00, but the appellant

made payment of entry tax of ₹20,80,980.00 @ 1% on the stock receipt value.

2(a). The assessing authority on verification of the books of account produced by the dealer-assessee and other materials on record observed that the total receipt of goods for the period from 16.07.2008 to 31.03.2012 as per the return was ₹21,53,11,878.00 and as per the books of account was ₹21,59,94,231.02. Learned assessing authority determined the GTO at ₹63,34,11,473.50, which was also treated as TTO and levied tax @ 1% on ₹63,24,72,235.00 and @ 2% on ₹9,39,238.50.The total tax payable by dealer assessee was computed at ₹63,43,507.12 and after deduction of payment of admitted tax of ₹20,80,980.00, the balance tax payable was determined at ₹42,62,527.12 on which penalty of ₹85,25,054.24 was imposed. The assessing authority raised total demand of ₹1,27,87,581.00 which included the penalty of ₹85,25,054.24.

2(b). The dealer-appellant challenging the aforementioned demand raised by the assessing authority, preferred appeal before the first appellate authority, who also concurred with the findings of the assessing authority and dismissed the appal by order dated 30.06.2018

confirming the order of the assessing authority. The dealer-assessee being further aggrieved with the demand raised by the assessing authority has preferred the present second appeal.

3. In course of hearing of the appeal, learned Counsel for the dealer-assessee mainly raised two contentions. His first ground of attack was that the determination of purchase value of the goods received by the dealer-assessee resorting to proviso to Section 2(j) of the OET Act was illegal and contrary to the law laid down by this Tribunal in earlier cases relating to the other dealer-assessee and the second ground on which the impugned order was challenged was that the assessing authority in contravention of the statutory provisions imposed penalty exercising power u/s. 9C(5) of the OET Act, which has confirmed by the first appellate authority without applying his mind to the factual background of the case and the circumstances under which less payment of tax was made. It was vehemently urged by the learned Counsel for the dealer-assessee that the assessing authority did not assign any reason for ignoring the stock transfer notes which clearly revealed the purchase value of the goods received by

it (dealer-assessee) on stock transfer basis. The purchase value determined by the assessing authority resorting to proviso to Section 2(j) of the OET Act was illegal, arbitrary and against the sanction of law. The first appellate authority also concurred with the findings of the assessing authority without taking note of the orders rendered by this Tribunal for the earlier periods on the same issue. The impugned orders of the forums below being contrary to the statutory provisions and the legal principle settled by this forum, the same are unsustainable in the eyes of law and are liable to be quashed. He submitted to allow the appeal, set aside the impugned orders of the forums below and remit the matter back to the assessing authority to recompute the tax liability of the dealer-assessee.

4. Per contra, learned Standing Counsel (CT) for the revenue supporting the impugned orders of the forums below in terms of cross-objection filed by it, vehemently urged that the tax liability of the dealer-assessee has been determined strictly in accordance with law giving due opportunity of hearing to it (dealer-assessee). The AVR clearly indicates how the dealer-assessee paid less tax than the tax it was liable to pay compelling the assessing

authority to initiate the assessment proceeding u/s. 9C of the OET Act and to redetermine the tax liability of the dealer-assessee as per the materials available on record. The assessing authority rightly determined the purchase value of the stock received by the dealer-assessee resorting to proviso to Section 2(j) of the OET Act and there is no illegality in such action of the assessing authority warranting interference of this forum. He further submitted that the first appellate authority has passed a reasoned order and has returned independent findings on the contention raised by the dealer-assessee and thereafter upheld the observations of the assessing authority. There is no illegality or impropriety of any kind in the impugned orders of the forums below warranting interference of this Tribunal. He submitted to dismiss the second appeal filed by the dealer-assessee and confirm the impugned orders.

5. We have given our anxious consideration to the rival submissions of the parties, gone through the impugned orders of the forums below, grounds raised in the memorandum of appeal vis-a-vis the materials on record. The dispute as emerges from the contention raised by the dealer-assessee is two folds. The first dispute is with regard

to the determination of purchase value of the stock received by the dealer-assessee on stock transfer basis by the assessing authority, which was concurred by the first appellate authority and the second issue is with regard to imposition of penalty. Before addressing on these two issues, we feel it expedient to narrate some undisputed facts herein below as available in the records of the forums below. There is no dispute that the dealer-assessee carries on business in sale of food supplements, cosmetics, medicines of Vestige make, etc. through a chain of multi level marketing system in which one distributor appoints another, who in turn, also appoints other. The present dealer-assessee during the relevant period received stock of ₹21,59,94,231.02 and it paid entry tax on entry of such scheduled goods into the local area as per the purchase value mentioned in stock transfer notes. The Audit Team disputed the payment of ₹20,80,980.00 by the dealer-assessee, which was calculated @ 1% on the purchase value mentioned in the stock transfer notes. The Audit Team was of the view that the dealer-assessee was liable to pay entry tax as per the market value of the goods, not as per the value mentioned in the stock transfer notes. The assessing

authority as well as the first appellate authority accepted the allegations made in the AVR and redetermined the tax liability of the dealer-assessee at ₹63,43,507.12. Now, the question arises whether the forums below were correct in their approach in calculating the entry tax on the market value of the stock so received by the dealer-assessee or it should have been calculated on the purchase value mentioned in the stock transfer notes of the dealer-assessee. The issue can be better answered by referring to some of the provisions of the statute. Section 3 of the OET Act, which is the charging provision, provides thus :-

> "3. Levy of tax –
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> (1) There shall be levied and collected a tax on entry of the scheduled goods into a local area for consumption, use or sale therein at such rate not exceeding twelve percentum of the purchase value of such goods from such date as may be specified by the State Government and different dates and different rates may be specified for different goods and local areas subject to such conditions as may be prescribed.
>
> Provided that the State Government may direct that in such circumstances and under such conditions and for such period as may be prescribed, a dealer shall pay in lieu of tax payable under this Act a sum fixed in the prescribed manner, and in such a case the tax shall be deemed to have been compounded.

(2) The tax leviable under this Act shall be paid by every dealer in scheduled goods or any other person who brings or causes to be brought into a local area such scheduled goods whether on his own account or on account of his principal or customer or takes delivery or is entitled to take delivery of such goods on such entry :"

Section 2(j) of the OET Act provides as follows :-

"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 :

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 scheduled goods of like kind or quality is sold or is capable of being sold in open market;"

6. If we look at both these provisions, it becomes abundantly clear that the purchase value of any scheduled goods can be ascertained from the original invoice

or bill and 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 obtained otherwise than by way of purchase, then the purchase value shall be the value or the price at which the scheduled goods of like kind or quality is sold or is capable of being sold in open market. In the case at hand, the dealer-assessee undisputedly having received the scheduled goods on stock transfer basis, in view of the proviso to Section 2(j) of the OET Act, the purchase value of such scheduled goods shall be determined as per the value or the price at which such goods is capable of being sold in the open market. The price mentioned in the stock transfer notes cannot be the basis for determining the purchase value being contrary to proviso to Section 2(j) of the OET Act. The contention raised by the learned Counsel for the dealer-assessee referring to the order of this Tribunal in S.A. Nos. 144 (ET) & 148(ET) of 2017-18 disposed of on 04.08.2018 relating to the other dealer is unsustainable in the eyes of law in view of the fact that learned Single Bench of this Tribunal in para-10 of the order has categorically

observed resorting to proviso to Section 2(j) of the OET Act that the price on the stock transfer invoice cannot be termed as value or market price. In the cited order, the Single Bench basing on the fact that the revenue did not dispute the price mentioned in the stock transfer receipt with freight, observed to ascertain purchase value as per the price mentioned in the stock transfer invoice. The dispute between the parties cannot be resolved or adjudicated on the basis of the contention raised by them in course of hearing of the case. It would be decided according to the statutory provisions and the law settled by the Hon'ble High Court and the Hon'ble Apex Court. Even if the State did not dispute, the price mentioned in the stock transfer notes, it cannot be the basis for determination of purchase value for the purpose of computation of entry tax. It is only the market value in which the goods are capable of being sold in the open market will be the purchase value for the purpose of computation of entry tax. On going through the impugned orders of the forums below, we find that the assessing authority has vividly discussed the statutory provisions and the legal principle while computing the entry tax on the market price of the stock so received by the dealer-assessee,

which was subsequently confirmed by the first appellate authority. The first appellate authority has also returned independent finding on thorough analysis of materials on record and the statutory provisions. Both the forums below did not commit any illegality in returning the finding that the dealer-appellant should be assessed on the market value as determined from its own sales turnover inside the State of Odisha. Our above view also finds support from the order of this Tribunal passed in **S.A. No. 118 (ET) of 2014-15 in case of M/s. Havells India Limited Vs. State of Odisha disposed of on 15.11.2021** wherein it has been held that when the original purchase invoices or bills are available, the purchase value of the scheduled goods can be only be determined on the basis of the amount mentioned in the original purchase invoices or bills, but not from any other document, such as stock transfer notes or excise invoices. Thus, there is no illegality or impropriety in such finding of the forums below warranting the interference of this Tribunal. Accordingly, the first issue is answered in favour of the revenue and against the dealer-assessee.

7. The second issue is with regard to the imposition of penalty by the assessing authority resorting to

provisions of Section 9C(5) of the OET Act. Learned counsel for the dealer-assessee challenged the imposition of penalty on the ground that the forums below did not apply their mind to the facts and circumstances of the case under which less payment of tax was made and imposed penalty in a very arbitrary and whimsical manner ignoring the statutory provisions and the law settled by the Hon'ble Courts in different judicial pronouncements. Learned Standing Counsel (CT) for the revenue supported the impugned orders of the forums below imposing penalty as per Section 9C(5) of the OET Act. On careful reading of the impugned orders of the forums below, we find that the assessing authority has resorted to Section 9C(5) of the OET Act for imposing penalty, which was confirmed by the first appellate authority. Now it is to be seen whether in the facts and circumstances of the case, imposition of penalty resorting to Section 9C(5) of the OET Act is just and proper and according to law. Section 9C(5) of the OET Act provides that –

> "Without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under sub-section (3) or (4) shall be imposed by way of

penalty in respect of any assessment completed under the said sub-sections."

7(a). The Full Bench of this Tribunal in case of **M/s. Havells India Limited (supra)** interpreting the provisions of Section 9C(5) of the OET Act in similar facts and circumstances deleted the penalty holding that the violation is purely technical in nature which requires proper interpretation of the statute by the parties. In the present case also, the dealer has also paid entry tax as per the prescribed rate on the purchase value mentioned in the stock transfer notes erroneously interpreting the provisions of Section 2(j) of the OET At. The default in payment of appropriate tax is not deliberate, malafide or intentional, but due to erroneous interpretation of the statute. Therefore, imposition of penalty by both the forums below is not justified. Accordingly, penalty of ₹85,25,054.24 imposed on the dealer-appellant is deleted. However, the dealer having not paid appropriate tax at the appropriate time, it is liable to pay interest in view of the provisions contained in Section 7(5) of the OET Act. Therefore, we feel it just and proper to remit the matter back to the assessing authority to recompute the tax liability of the dealer-assessee and the interest payable on the same in accordance with law.

8. For the foregoing reasons, the appeal is allowed in part and the impugned orders of the forums below are set aside to the extent indicated above. The matter is remitted back to the assessing authority for recomputation of tax liability of the dealer-assessee keeping in mind the observations made herein above and in accordance with law within a period of three months from the date of receipt of this order. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(M. Harichandan)
Accounts Member-I