BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.
S.A. No. 148(ET)/16-17

(Arising out of the order of the learned JCST, Balasore Range, Balasore in first appeal Case No. AA-28/BA-2014-15(ET) disposed of on 29.09.2016)

Present :- Shri A.K. Das, Chairman & Shri Srichandan Mishra, Accounts Member-II.

M/s Gampas Plastech Pvt. Ltd.
Ganeswarpur Industrial Estate,
Januganj, Balasore. ..... Appellant.

-Vrs.-

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

For the Appellant: : Mr. M.P. Jena, Advocate.
For the Respondent: : Mr. D. Behura, S. C.(C.T.)
: Mr. S.K. Pradhan, Addl. S.C.(C.T.)

Date of Hearing : 25.05.2022 * Date of Order : 23.06.2022**

O R D E R

This second appeal has been filed by the dealer-assessee against the order passed by the learned Joint Commissioner of Sales Tax, Balasore Range, Balasore (in short, ld.FAA) in first appeal Case No. AA-28/BA-2014-15(ET) disposed of on 29.09.2016 allowing the appeal in part thereby reducing the demand to Rs.8,09,790.00 from Rs.10,71,450.00 raised by the learned Sales Tax Officer, Balasore Circle, Balasore under Section 9(C) of Odisha Entry Tax Act, 1999(in short, OET Act) for the tax periods from 01.11.2008 from 31.01.2013.

2. Being aggrieved by the impugned order of the ld. FAA, the dealer-appellant has preferred second appeal before this Tribunal assailing the order as bereft of consideration of material facts with the provisions of law for which the impugned order is illegal, arbitrary and bad in law.

3. The brief fact of the case is that the appellant is a manufacturer of HDPE/PP bags. The appellant purchases raw-materials like PP granules and master batch and consumables like printing ink, reducer, paraffin oil, BOPP sticker and sells its finished products both inside and outside the State. On receipt of a Audit Visit Report (in short, AVR), the LAO issued notice in Form-E-30 and in response to such notice, the assessee appeared and produced his books of account and other relevant documents. On examination of the documents produced vis-à-vis allegations made in the AVR, the LAO observed that the assessee has claimed set off of entry tax of Rs.24,74,971.00, however, he is eligible for such set off for Rs.20,56,469.54 as per section 26 of the OVAT Act read with Rule 19 of the OET Rules. He further observed that the dealer has made VAT purchase of Rs.14,23,31,773.00 that constitutes 29% of his total purchase of Rs.48,95,19,024.00. Moreover, the assessee has made CST purchase of Rs.34,71,87,251.00 that constitute 71% of his total purchase. Similarly, the assessee has sold goods worth of Rs.4,79,34,222.00 in interstate sale that constitutes 8.68% of his total sale of Rs.55,22,76,103.00 and has made VAT sale of Rs.50,43,41,881.00

that constitutes 91.32% of his total sale. Applying the provisions of Rule 19(5) of the OET Rules, he allowed set off of ET of Rs.20,56,469.54 against claim of Rs.24,74,971.00 that ultimately resulted in an extra demand of Rs.10,71,450.00 U/s.9C of OET Act including penalty in his assessment order. The aforesaid order was challenged by the assessee in first appeal before the ld. FAA who observed that the appellant is entitled to avail concessional rate of tax @0.5% on purchases of printing ink and reducer valued Rs.1,12,68,858.00 as these are raw-materials in production of HDPE/PP woven sacks as per settled judgment of Division Bench of this Tribunal dtd.16.11.2009 in S.A. No. 1334 of 2007-08. The ld. FAA further observed that the term "raw-material" has been construed in the widest possible manner by the Hon'ble Apex Court to cover ingredients which retain their dominant individual identity in the end product; ingredients which undergo changes and find themselves in altered form in the end product; ingredients while influencing and accelerating chemical reaction may remain uninfluenced and unaltered and remain independent of and outside the end products and ingredients which might be burnt up or consumed in chemical reactions. In Commissioner of Central Excise Vrs. Balarpur Industries Ltd. reported in 1989(4) SCC 566, it is held that "the ingredient goes into the making of the end product in the sense that without its absence, the presence of the end product, as such, is rendered impossible. This quality should coalesce with the requirement that its utilization is in the

manufacturing process as distinct from the manufacturing apparatus." Accordingly, the ld. FAA, with his above observation reduced the demand to Rs.8,09,790.00 in his appeal order relating to the material period which is now challenged by the assessee before this forum in shape of second appeal mainly on following grounds:-

i. "For that, the ld. STO while disallowing the claim of set off has disallowed proportionately both under OVAT and CST Act, on raw materials of Rs.1,23,21,779.38 & interstate purchase of Rs.3,01,67,115.00 which is wrong. Categorically speaking, out of the total sales, 8.68% is CST Sales & rest 91.32% is VAT Sales against VAT Purchase at 29% & CST Purchase at 71%. My Point of submission is, the appellant purchased 71% of raw-material under CST Act & sold 91.32% under OVAT Act. My other submission is, the appellant sold more quantity of finished products under OVAT Act, including the CST purchases. In other words, total CST Purchase is sold under OVAT Act. The CST Purchase has suffered ET while purchasing in the hands of the assessee. Therefore, ET paid on CST purchase has to be set off against VAT sales. In the present case, CST purchase is 71% & VAT sales is 91.32%. Therefore, no point to disallow set off of Rs.1,50,835.75, as is made by the ld. STO and also by the ld. JCST.

ii. For that, the ld. JCST totally ignored the submission of the appellant with regard to grant of relief of set off claimed at Rs.1,50,835.75. It is submitted to allow necessary relief as claimed by the appellant.

iii. For that, there should not have been any penalty leviable. In the present case, the appellant never concealed or suppressed facts or figures with regard to the claim of set off. Penalty is leviable in case where the dealer willfully, deliberately or intentionally avoided or concealed facts and figures resulting less payment of tax. In the present case, the appellant has paid the tax and disclosed all figures of purchase and sales under the Act. Therefore, the penalty imposed should be deleted."

4. During the course of hearing, Mr. M.P. Jena, ld. Counsel for the appellant argued that the ld. Authorities below were wrong of adopting wrong method and ratio allowing set off of ET paid against purchase of raw material against ET payable on sale of finished products. Accordingly, he prayed for re-calculation of set off of ET by remanding the matter back to the forum below. He further argued that there should not have been any penalty leviable as the assessee has never concealed or suppressed facts and figures with regard to claim of set off.

5. Per contra, the ld. Standing Counsel (C.T.), Mr. D. Behura, appearing for the Revenue supported the order of fora below and submitted that there is no infirmity in the impugned

order and the order passed is justified and in accordance with the law and as such, doesn't warrant any interference by this Tribunal. Hence, he submitted to dismiss the appeal and confirm the order of the forum below.

6. In view of the rival contentions of the parties, the following issues emerged for adjudication by this Tribunal:

I) Whether the calculation of set off made by learned FAA proportionately is justified and correct as per provisions of the statute?

II) Whether penalty is imposable U/s.9C(5) of the OET Act when the assessee claims to have reflected all his transactions in his books of account and has claimed set off accordingly?

Issue No.I

In order to address the issue correctly and in a rational manner, it will be profitable to refer to relevant provisions of the statute.

Rule-3 (4)

Goods specified in Part I and Part II of the Schedule to the Act shall be exigible to tax at a concessional rate of fifty per centum of the rate to which such goods are exigible under sub-rule (3) and sub-Rule (2) respectively of this Rule.....

Section-26 Manufacturers to collect and pay tax:

(1) Notwithstanding anything contained in this Act, every manufacturer of scheduled goods who is registered under the VAT Act shall in respect of sale of its finished products effected

by it to a buying dealer or person, either directly or through any intermediary, shall collect by way of tax an amount equal to the tax payable on the value of such finished products under section 3 of this Act by the buying dealer or person in prescribed manner and shall pay the tax so collected into the Government Treasury.

Provided that xxx xxx

Provided further that where a buying dealer, under the rules providing for the rates of tax required to be specified with reference to Section 3, is entitled to pay tax at a concessional rate or not to pay any tax, as the case may be, in respect of such finished products, the manufacturer shall, on a declaration furnished by the buying dealer in the prescribed form, collect the tax at such concessional rate or shall not collect any tax, as the case may be.

Rule 19 Set off of entry tax-

(1) xxx xxx

(2) The tax so collected from the buying dealer or person, as the case may be shall be credited to the Government Treasury and the proof of payment thereof shall be submitted along with the statement and return, as the case may be, required to be filed under the Act.

(3) xxx xxx

(4) xxx xxx

(5) The entry tax paid by the manufacturer of the scheduled goods on the purchase of raw materials which directly go into the composition of finished products by the manufacturer of the scheduled goods shall be set off against the entry tax payable under sub-rule (2) above by the selling dealer:

Explanation-

Where no entry tax is payable under sub-rule (2) of this Rule on a part of the sales effected, the set off admissible under this sub-rule shall be reduced proportionately.

Accordingly, we observe that as per explanation appended to Rule 19(5) of the OET Rules, the assessee is eligible to claim set off proportionately on its sale transaction of finished goods under the OVAT Act & CST Act. It is further observed that both the forums have erred in making calculation of set off proportionately. The actual calculation of set off is as under:

E.T. Set Off = Total ET paid on raw-material/ Total sale x ET levied sale.

E.T. Paid on raw-material (inter-state Purchase) = 16,66,406.00

E.T. paid on raw material (intra-state purchase) = 6,58,832.00

Total E.T. Paid on raw material = 23,25,238.00

Total Sale =57,09,19,311.00

E.T. Levied sale =52,20,26,405.00

Thus, E.T. set off allowable

= 23,25,238/57,09,19,311X52,20,26,405= 21,26,107/-.

Accordingly, based on above formula, actual tax payable is calculated as below in a tabular form:

PARTICULAR	AMOUNT
Intra-State Purchase	14,23,31,773
Inter-State Purchase	34,71,87,251
Total Purchase	48,95,19,024
(Less) Intra State Regd. Purchase	14,23,31,773
Net E.T. Leviable Purchase	34,71,87,251
Raw Material Purchase	32,20,17,403
E.T. @0.5%	16,10,087
Raw-Material Purchase (Printing Ink)	1,12,63,858
E.T. @0.5% thereon	56,319
Capital Goods (including Spare Parts) Purchase	1,39,05,990
E.T. @2% thereon	2,78,120
Total E.T. on Purchase	19,44,526
SALE TRANSACTION	
Inter-State Sale (**@102% the net sale value)** that includes 2% CST.	4,88,92,906
Intra-State Sale (**including tax collected**)	52,20,26,405
Total Gross SALE	57,09,19,311
(Less) Inter-State Sale	4,88,92,906
Balance E.T. Leviable Sale	52,20,26,405
E.T.@1%	52,20,264

(Less) Entry Tax Set Off allowed	21,26,107
E.T. Payable on SALE	**30,94,157**
E.T. Payable on SALE and Purchase (30,94,157+19,44,526)	**50,38,683**
(Less) E.T. Paid	47,71,453
Balance E.T. Payable	**2,67,230**
Penalty	5,34,459
Total Tax & Penalty	**8,01,689**

Issue No-II

On imposition of penalty, Section 9C (5) speaks, inter-alia 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-section." Sub-section (3) of Section 9C speaks that where the dealer to whom a notice is issued under sub-section (1) produces the books of account and other documents, the assessing authority may, after examining all the materials as available with him in the record and those produced by the dealer and after causing such other enquiry as he deems necessary, assess the tax due from that dealer accordingly.

Sub-section(1) of the said Section speaks that where the tax audit conducted under Section9B results in the detection of suppression of purchases or sales, or both, **erroneous claims of deductions**....

affecting the tax liability of the dealer, the assessing authority..... serve on such dealer a notice ..... requiring him to appear in person or through his authorized representative on a date and place specified therein.....

On a coherent reading of the above sub-sections of Section 9C, we observe that imposition of penalty under section 9C (5) of the OET Act is mandatory on the part of the LAO if the assessee violates the conditions specified in section 9C (1). In the instant case, the assessee has knowingly and deliberately claimed deductions erroneously that is not as per provisions of the statute. As such, penalty is imposable.

Accordingly, it is ordered.

7. The appeal filed by the assessee is allowed in part and the demand raised by the ld. FAA for the material period is reduced to Rs.8,01,689.00 including penalty as per calculation made above. The cross objection filed by the State is disposed of accordingly.

Dictated & corrected by me,

Sd/-
(Srichandan Mishra)
Accounts Member-II

Sd/-
(Srichandan Mishra)
Accounts Member-II

I agree,

Sd/-
(A.K. Das)
Chairman