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

S.A.No. 152(ET)/2017-18

(From the order of the ld.JCST (Appeal), Sambalpur Range, Sambalpur, in Appeal No. AA.267/SAI/ET/2010-11, dtd.21.10.2017, confirming the assessment order of the Assessing Officer)

Present: Sri S. Mohanty
2nd Judicial Member

M/s. Castrol India Ltd.,
At/P.O. Malipali, Bhalupali,
Dist. Sambalpur. ... Appellant

-Versus-

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

For the Appellant : Mr. R.C. Poddar, Advocate
For the Respondent : Mr. S.K. Pradhan, ASC (CT)

(Assessment period : 01.04.2005 to 28.02.2007)

Date of Hearing: 01.08.2018 Date of Order: 01.08.2018

ORDER

Felt aggrieved by the order of learned First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur (in short, FAA/JCST) in First Appeal Case No.AA.267/SAI/ET/2010-11, dtd.21.10.2017, the dealer-appellant has preferred this appeal challenging the sustainability of the calculation of entry tax by both the fora below relating to its business transaction for the tax period 01.04.2005 to 28.02.2007.

2. The factual backdrop leading to this appeal are : On the basis of AG Audit with the allegation of underassessment the AA

initiated re-assessment proceeding u/s.10 of the OET Act comprising tax period 01.04.2005 to 28.02.2007 relating to the appellant-dealer. The appellant-dealer is a manufacturer of lubricant and grease having it's head office out of State but branch office located at Malipali, Bhalupali, Sambalpur. Said branch office receives stock on transfer against Form 'F' from the main office and effects sale as well as transfer to other branch office located outside the State by way of stock transfer. The AG Audit had reported that, the purchase value of the goods had not determined in accordance to Sec.2(j) of the OET Act thereby there was shortage of levy of tax to the tune of Rs.8,61,224/- during the tax period in question. The AA on confrontation of the allegations brought by the AG Audit team to the dealer and then on verification of books of account, has determined the purchase value of goods received by the dealer during the tax period at Rs.93,34,152.51. Having paid ET for Rs.85,05,954/-, the dealer was asked to pay the balance entry tax of Rs.8,28,199/-.

3. In appeal before the FAA challenging the aforesaid tax liability, the FAA also turned down the claim of the dealer and upheld the determination of purchase value by the AA.

4. Being aggrieved by such confirming order, the dealer preferred this second appeal. It is contended by the dealer that, the dealer company has unique (Equalized Landed Price) ELP of each grade of products, which is same all over the country and the stock transfer invoice is issued on the basis of that ELP. The instant dealer had paid entry tax in appropriate rate of 1% on this ELP, which was duly accepted by the taxing authority in course of regular assessment u/s.9 of the OET Act. But it is only on the basis of Audit report, the re-assessment proceeding is initiated, which is nothing but a change of

opinion by the taxing authority and as such does not maintainable in the eye of law. It is further contended that, the calculation of purchase value and imposition of tax on it is erroneous keeping in view the definition of sale price as per the VAT. So, the dealer-appellant has prayed for reversal of the impugned order.

5. The Revenue-respondent contested the appeal by filing cross objection, whereby it has contended that, in application of Sec.2(j) of the OET Act, the purchase value should be determined and the authority below, in due interpretation of the provision has determined the TTO and imposed tax. Besides State has contended that, the dealer is liable to pay interest for want of original invoice or bill showing purchase value of the goods.

6. The substantial question of law and facts raised for decision in this appeal are as follows :

(i) If the FAA was wrong in determining the purchase value in the case in hand ?

(ii) If the value disclosed in the stock transfer memo i.e. in accordance to the ELP should be treated as purchase value and

(iii) If the re-opening of the assessment in the case is illegal ?

Findings :

7. For the sake of convenience the question relating to the maintainability of the proceeding u/s.10 as raised by the dealer is taken up ahead of others. Learned representing counsel for the dealer argued that, when in regular assessment the price of the goods in accordance to ELP disclosed by the dealer was accepted without objection, then in a latter period on the basis of AG Audit, the AA when initiated proceeding for determination of purchase value again, it is nothing but a change of opinion, which can't be a basis to proceed

u/s.10 of the OET Act. Sec.10 of the OET Act contemplates, re-assessment in case of escaped assessment of tax or where value of the goods has been under-assessed or any deduction has been allowed wrongly. So, the very term 'where value of all or any of the schedule goods has been under-assessed' as engrafted in the provision enables the AA to sit over the matter which was declared by the dealer or accepted/assessed by the authorities. Self-assessment or audit assessment are the basis on which when there is any allegation covered u/s.10 of the Act is detected, in that event, re-assessment is done. Here in the case in hand, the AG team has questioned the determination of purchase value as declared by the dealer or accepted by the authority in the regular assessment. So, it cannot be said that, initiation of proceeding u/s.10 is a change of opinion but is a duty entrusted under the act on a taxing authority to determine the purchase value in accordance to the provision under law when it is pointed out by another competent authority suggesting for re-assessment. So the question regarding maintainability is not tenable in the case in hand.

8. Adverting to the question of fact i.e. what should be the purchase value in the case in hand, the definition of purchase value as per Sec.2(j) and it's application to the case in hand is almost remained undisturbed. The price quoted in the stock transfer invoice i.e. ELP cannot be treated as the purchase value keeping in view the definition of the term as per the statute. The meaning of the term "purchase value" as per Sec.2(j) of the OET Act reads as follows :

> "(j) "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 schedule goods of like kind or quality is sold or is capable of being sold in open market:"

In the case in hand, it can safely be said that, the value of the schedule goods was not ascertainable in absence of any invoice or bill. What was produced before the authority was stock transfer invoice and the price quoted in it was not in terms of the provision above. Hence, the application of Sec.2(j) is sustainable. Learned Counsel for the dealer vehemently argued that, "sale price" is not defined under the OET Act. So, the meaning of the term "sale price" should be derived from OVAT Act. Sec.2(46) of the OVAT Act, reads as follows :

Provision u/s.2(46) defines sale price as under :

> "***SALE PRICE*"** means the amount of valuable consideration received or receivable by a dealer as consideration for the sale of any goods less any sum allowed as cash discount or trade discount at the time of delivery or before delivery of such goods but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof and the expression **"PURCHASE PRICE"** shall be construed accordingly;
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> xxx xxx xxx "

Drawing attention of Sec.2(46) of the OVAT Act and explanation appended to it under clause (d), learned Counsel argued that, the amount of VAT should be excluded from the sale value to determine the purchase price as well as the purchase value. He also draws the

attention of the Court to the notification by CCT and GST(O) at Cuttack vide PLO/53/3/2017-Policy-CCT (PartpI)-6322 dt.21.04.2018. The Commissioner of CT and GST in interpretation of the provision under the OET Act and OVAT Act has issued the circular with direction that :

"In view of the above, it is hereby clarified that, in relation to the proviso of Sec.2(j) of the OET Act, the purchase value shall be determined on the basis of the sale value excluding VAT".

Basing this circular, learned Counsel prayed for exclusion of VAT from the sale value to determine the purchase value. Per contra, learned Addl. Standing Counsel, Mr. Pradhan strenuously argued that, the circular issued by the Commissioner cannot override the statute. When the statute itself mandates inclusion of tax, the circular has got no enforceable effect under law as it contradicts the statute. The definition of "purchase value" as per Sec.2(j) if reads carefully, the first part speaks of, inclusion of tax and that is the tax paid by the selling dealer, which should have been included in the purchase value by the purchasing dealer while paying the entry tax but when we come to the proviso appended to the provision it say, the purchase value should be the value or the price on which the schedule goods of like, kind or quality is sold or is capable of being sold in open market. So, the word "value" if interpreted does not specifically include the tax amount. Moreover, when the circular is issued by the taxing authority to be followed by the subordinate AA all over the State, then in application of the theory of consistency, which is applicable to the taxing matter scrupulously in the case in hand. Thus, it can safely be said that, it has got application to determine the purchase value in the instant case also. Resultantly, it is held that, this is a fit case where the matter

should be remitted back to the AA for re-determination of the tax liability of the dealer as per the observation above.

The appeal is allowed in part. The matter is remitted back to the AO for assessment afresh in the light of the observation above. The demand be raised accordingly within a period of four months hence.

Dictated and Corrected by me,

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

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