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

Present: Sri S. Mohanty
2nd Judicial Member

S.A.No. 144(ET)/2017-18

(From the order of the ld.JCST (Appeal), Bhubaneswar Range, Bhubaneswar, in Appeal No. AA-108221622000261(OET), dtd.26.09.2017, setting-aside the assessment order of the Assessing Officer)

M/s. Bajaj Electricals Limited,
Unit-III, Janpath,
Bhubaneswar. ... Appellant

-Versus-

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

S.A.No. 148(ET)/2017-18

(From the order of the ld.JCST (Appeal), Bhubaneswar Range, Bhubaneswar, in Appeal No. AA-108221622000261(OET), dtd.26.09.2017, setting-aside the assessment order of the Assessing Officer)

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

-Versus-

M/s. Bajaj Electricals Limited,
Unit-III, Janpath,
Bhubaneswar. ... Respondent

For the dealer : Mr.T.K. Satapathy, Advocate
Mr. A. Kedia, Advocate
For the State : Mr. M.S. Raman, ASC (CT)

(Assessment period : 01.04.2013 to 31.03.2015)

Date of Hearing: 04.08.2018 Date of Order: 04.08.2018

ORDER

Both these appeals above and the cross objection by the State in one are taken up together in this common order for sake of convenience, to avoid conflicting judicial opinion and since the questions involved in both the appeals are based on same set of fact and law. Second Appeal No.144(ET)/2017-18 is preferred by the dealer and it was heard with cross objection from the side of the State, whereas S.A.NO.148(ET)/2017-18 preferred by the State is heard without cross objection.

2. The impugned order under challenge in both these appeals were passed by First Appellate Authority (Appeal), Bhubaneswar Range, Bhubaneswar preferred by the dealer against an assessment u/s.9C of the Odisha Entry Tax Act, 1999 (in short, OET Act) on the basis of Audit visit.

3. M/s. Bajaj Electricals Limited its principal office at Mumbai and registered branch office in different States including the State of Odisha at Unit-III, Janpath, Bhubaneswar, the instant dealer was subjected to assessment u/s.9-C(3) of the OET Act for the period 01.04.2013 to 31.03.2015. Three observations made by the Audit team which formed the basis of the assessment are : (i) The dealer had sent goods through stock transfer to outside the State but failed to produce 'F' forms. (ii) The dealer had purchased/received goods out of State but has not added the freight and other incidental charges properly to discharge the entry tax liability and (iii) The dealer effected inter-state purchase of electrical goods and supplied the same to M/s. OPTCL amounting to Rs.2,38,59,600/- without proof of payment of entry tax.

The AA dropped the charge no.1 on due verification of the declaration form 'F' whereas the AA in application of the provision u/s.2(j) read with Sec.3(1) of the OET Act determined the purchase value and entry tax liability against the inter-state purchase and on the supply of goods to M/s. OPTCL amounting of Rs.2,38,59,600/-. The total tax liability with penalty u/s.9-C(5) of the OET Act was calculated at Rs.58,11,760/-.

4. The matter was carried in appeal before the FAA, who in turn, re-determined the purchase value by reducing the percentage of freight amount as added by the AO vis-à-vis withholding the entry tax liability supply of goods to M/s. OPTCL. In the result, the matter was remanded to the AO for re-calculation of the liability with entry tax and penalty.

5. When the matters stood thus, being aggrieved with such order of remand and confirmation of the tax liability even though in the percentage of freight was reduced for 5% to 3%, the dealer has preferred Second Appeal No.144(ET)/2017-18. It is contended that, the goods supplied to M/s. OPTCL of Rs.2,38,59,600/- was a sale u/s.6(2) of the OST Act. So, there was no question of entry tax liability. It is further contended that, application of Sec.2(j) of the OET Act and addition of freight @5% by the AA or @3% by the FAA, both are whimsical, arbitrary and having no reasonable nexus with the actual freight and the value of goods. However, at the same time it is claimed that, the freight as shown by the dealer in his return i.e. to the amount of Rs.3,59,19,728/- should have been treated as actual amount of freight.

In cross objection to the dealer's appeal, State has supported the addition of 5% towards freight as charged by AA.

6. On the other hand, in Appeal No.148/2017-18, State has contended that, the purchase value should have determined in application of the proviso appended to Sec.2(j) of the OET Act, which is not done by the appellate authority. The purchase price must be determined on the basis of selling price. So, the order of the AA should be restored by setting aside the impugned order.

The dealer has not preferred to file any cross objection to the appeal of the State keeping in view his appeal and pleas therein.

7. The substantial question of law and fact raised to be decided in this appeal are as follows :

(i) Whether the freight determined by the fora below are reasonable or appropriate or the authority should have accepted the freight as disclosed by the dealer to be added to the stock transfer price to ascertain the purchase value ?

(ii) Whether the purchase value determined by the FAA or in alternative the AA is to be accepted or fresh determination required to be made in accordance to Sec.2(j) of the OET Act.

(iii) Whether the appeal preferred by the State is maintainable keeping in view the fact that, State has raised cross objection in the dealer's appeal.

Findings :

8. Adverting to the question of maintainability of the State appeal, learned Counsel for the dealer argued that, in the appeal preferred by the dealer, State has raised cross objection. Once the State has raised cross objection, which is to be treated as cross appeal in the eye of law as per the OVAT Act, then separate appeal or appeal is not maintainable.

Per contra, learned Addl. Standing Counsel, Mr. Raman argued that, since the dealer's appeal and cross objection has not been decided and the cross appeal by the State is pending and since the grounds in cross objection and cross appeal are not in conflict to each other, the same can be taken up whereas no prejudice will be caused to the dealer as well as, there is no express restriction under law to file the cross appeal even though it has raised cross objection. In the case in hand the fact remains, in the cross objection to the dealer's appeal, the State has categorically stated above the cross appeal and has prayed for analogous hearing of both these appeals. It is also contended that, the contentions taken in the cross appeal should be equally applicable in the case of cross objection. When both the appeals are taken up together and when there is no decision rendered on any of the question raised by any of the sides and when the cross objection is explicit about the cross appeal with a prayer for analogous hearing, it can safely be said that, in the facts and circumstances of the case in hand in particular, the cross objection in dealer's appeal and cross appeal are not separate from each other but one is in continuity of another. Hence, cross appeal is held to be maintainable in the eye of law.

9. The crux of the dispute between the parties revolve around the question what should be the 'purchase value' for the purpose of levy of entry tax in the case in hand. The provision u/s.3(1) of the OET Act speaks of entry tax on 'purchase value' and the term "purchase value" has been defined u/s.2(j) of the OET Act. It 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:"

The dealer's contention is, while determining the purchase value, the AA has illegally rejected the freight amount disclosed by the dealer and has arbitrarily imposed freight @5% on application of best judgment principle. Similarly the FAA has also applied the best judgment principle and reduced the percentage of freight from 5% to 3%. Learned Counsel argued that, both the authorities below are whimsical in determining the freight amount and the percentage determined by them has no basis, rather it is capricious and vindictive. Learned Counsel has pressed for acceptance of the freight what was disclosed in the periodical return. ***Per contra,*** learned Addl. Standing Counsel Mr. Raman strenuously argued for re-determination of the purchase value. It is submitted by him that, both the fora below have not determined the purchase value in accordance to the statute and further submitted that, when statute requires certain things to be done in certain way no other method can be adopted and the things must be done in accordance to the statute. The provision u/s.2(j) as contemplated, in the event the purchase value of any schedule goods is not measurable on account of no availability or no production of original invoice or bill or when the original bill produced is proved to be false or if the schedule goods are obtained otherwise by way of purchase then 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 the open market.

10. Learned Counsel for the dealer vehemently argued that, first part of the provision speaks of original invoice or bill. It does not stick to purchase bill or purchase invoice only, stock transfer invoice is also the invoice to be considered in the purchase value. Proviso appended to a section has overriding effect and if we go by the proviso as it contemplates, when the goods are obtained otherwise without by way of purchase in that case purchase value shall be the value or the price at which, schedule goods of like, kind or quality is sold or is capable of being sold in open market. Once it is held that, the goods brought into the local area by the dealer was not purchased but otherwise than by way of purchase, in that event, price mentioned in the stock transfer invoice report or statement are of no use and the price on the stock transfer invoice cannot be termed as value or market price as required by the provision above. With this principle in mind, when we look into the case in hand, here it is found that, both the authorities below have not appreciated the provision in its true sense to determine the purchase value. But the peculiarity of the case in hand is, it is the State itself has pleaded for restoration of the order of the AA. The Revenue has not disputed the price mentioned in the stock transfer receipt with freight as a basis to determine the purchase value. It is not the case of the Revenue that, the consideration of price on the stock transfer to determine the purchase value as done by both the fora below is wrong. So without disputing the contentions raised by the learned Addl. Standing Counsel Mr. Raman, it is said that third case cannot be made out for the parties in the argument where they were not at issue, particularly when it relates to a question of fact.

11. It is apt to mention here that, on being asked, both the sides failed to apprise the Tribunal that, when the dealer was filing return on monthly basis, then what made the AA not to ascertain the sale price from the returns accepted under the VAT. The sale price under the VAT should have been taken into consideration for the purpose of determination of entry tax. So far as the addition of freight it is found that, the determination same either @5% or 3% both have no base. It is unreasonable and whimsical.

In ultimate analysis, keeping in view the facts and circumstances above, it is held that, the determination of freight by both the fora below is arbitrary and whimsical, hence not tenable. The freight charges can definitely be ascertained from the books of account, the IT return and other connected documents of the dealer. Similarly it is also held that, even though the argument of the learned Addl. Standing Counsel, Mr. Raman has got considerable force regarding determination of purchase value but here in this case when price on stock transfer invoice was accepted by both the fora below and particularly when the Revenue supported the same as a basis to calculate purchase value as per the plea in the cross objection as well as in the appeal, there is no escape from the conclusion that, the purchase value is to be calculated in accordance to price mentioned in the stock transfer invoice with freight for the purpose of entry tax in the case in hand. In consequence thereof, it is found that, this is a fit case where the matter should be remitted back to the AA for determination of the tax liability in the light of observation above. Accordingly, it is ordered.

The appeal by the dealer is allowed on contest. Cross objection and cross appeal by the State is accordingly disposed of. The matter is remitted back to the AA with a direction to complete the assessment in the light of observation above within a period of 4 months hence.

Dictated and Corrected by me,

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

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