

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

S.A.No. 117(ET)/2017-18

(From the order of the Id.Addl.CST (Appeal), South Zone,
Berhampur, in Appeal No. AA(ET)10/2011-12, dtd.17.06.2017,
confirming the assessment order of the Assessing Authority)

**Present: Sri S. Mohanty
2nd Judicial Member**

M/s. Arora Packwell,
Kadambariguda,
Dist. Rayagada.

... Appellant

-Versus-

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

.... Respondent

For the Appellant : Mr. A. Ananda Rao, A/R
For the Respondent : Mr. M.S. Raman, A.S.C. (CT)

(Assessment period : 04/2005 to 03/2010)

Date of Hearing: 28.08.2018 Date of Order: 28.08.2018

ORDER

This second appeal involves in it the following questions for
determination :

(i) Whether 'craft paper' and 'duplex board' purchased and
used as raw materials for the purpose of manufacturing
'corrugated board' are exigible to entry tax.

(ii) What should be the value on sale of the finished products
like 'corrugated board' for the purpose of determination of entry
tax.

(iii) Whether the dealer is entitled to set off of entry tax if in the case he is found liable to pay entry tax on purchase of raw materials mentioned above and

(iv) Whether in the facts and circumstances of the case, the dealer is liable to pay penalty u/s.9-C(5) of the OET Act as determined by both the fora below ?

2. In a proceeding u/s.9-C of the OET Act covering the period from 04/2005 to 03/2009, the AA held the goods like 'craft paper' and 'duplex paper' purchased by the dealer for the purpose of manufacturing of corrugated board are covered under the goods as per Entry Sl.No.14 of Part-I of the Entry Tax schedule and levied tax on it. At the same time, the AA determined the value of finished products in application of Sec.26(1) of the OET Act read with Sec.2(j) of the OET Act and Sec.2(46) of the OVAT Act and in the result, the sale price including VAT was treated as the value for the purpose of levy of entry tax, whereas the AA allowed set off in accordance to Rule 19(5) read with Sec.3 of the Act but imposed penalty u/s.9C(5) of the OET Act on the balance tax due. In ultimate analysis, the dealer was found liable to pay balance amount of tax of Rs.14,49,308.96 and penalty u/s.9-C(5) for Rs.10,86,740/-.

3. In appeal, the FAA just reiterated the entire findings of the AA and then confirmed the order of assessment. With this backdrop, the dealer has filed this appeal.

4. Admittedly, the dealer is a manufacturer of goods like corrugated board covered under Entry Sl.No.101 Part-I of the Schedule under Entry Tax Act. For the purpose of the manufacturing of corrugated board, the dealer effects purchase of raw materials like craft paper and duplex paper and some other

materials which are not much pertinent to be taken consideration into for the purpose of this appeal. Admittedly, the dealer has not paid any entry tax on purchase of these two goods with the impression and plea that these are not schedule goods exigible to entry tax. The AA treated both these goods as covered under the definition of paper as per Sl.No.14 of Part-I of the Entry Schedule, whereas the FAA has stood by the view of AA.

5. Arguing in support of the plea like craft paper is not a schedule goods under Entry tax Act, learned Counsel for the dealer placed reliance in the matter of **State of Odisha Vrs. Gestetner Duplicators (P) Ltd., (1974) 33 STC Page 333, Commissioner of Sales Tax U.P. Vrs. Macneill & Barry Ltd., (1986) 61 STC Page 77, Deputy Commissioner of Sales Tax Vrs. Indian Duplicator Co. Ltd., (1988) 69 STC, Page 238, Commissioner of Income Tax -Versus - Vegetables Products Ltd. (SC) 82 ITR 192 and M/s. Hindustan Lever Ltd. Vrs. Sales Tax Officer, Cuttack-I East Circle in W.P.(C) No.11400 dated 21.01.2010.** In reply to it, learned Addl. Standing Counsel Mr. Pradhan placed reliance in the matter of an earlier decided second appeal of this Tribunal in **S.A.No. 47(ET)/2008-09 in Lalji Board Industries Vrs. State of U.P., (2004) 135 STC 197.** In the earlier decided S.A.No.47(ET)/2008-09, the Full Bench of this Tribunal to which, I was a member had taken consideration of the ratio laid down by the Hon'ble Supreme Court in **State of Uttar Pradesh and Another Vrs. Corex India Ltd. (1997) 30 STC Page 8 (SC)** and in **State of Orissa Vrs. Gestetner Duplicators (P) Ltd. (supra)** relied by the dealer and then arrived at a conclusion that, the craft paper comes under the Entry Sl.No.14 Part-I of the Schedule. In addition to that, if we take the ratio in the Lalji Board Industries Vrs. State

of U.P. (supra), the irresistible conclusion can be drawn by saying that, craft paper should be treated as a goods under the definition paper as per Entry Sl.No.14. So avoiding unnecessary discussion on this question, it can be summed up by deciding that, craft paper purchased by the dealer is exigible to entry tax.

So far as the goods like Duplex Board purchased by the dealer and its liability under Entry Tax Act was decided by the AA in consonance to the suggestion given by the reporting officer that, it should be treated as paper coming under Entry Sl.No.14 mentioned above. The FAA also reiterated the view of AA. In fact the impugned order is nothing but a replica of the assessment order and as it revealed the FAA has not applied his mind independently into the question involved.

Learned Counsel for the dealer vehemently argued that, duplex board is not exigible to entry tax as it has been decided by this Tribunal on earlier occasions as well as by different authorities. In that regard he has placed much reliance in the matter of **Cheema Paper Ltd. Vrs. Commissioner Trade Tax, U.P., Lucknow (2012) 55 VST 473 (All)**, whereby the Hon'ble Court has held that, though duplex board made out of paper is ordinarily a packing material and would not be paper covered under the entry of paper of all kinds. Said view is also reaffirmed in a latter period by the same High Court in **M/s. M. Graphics Pvt. Ltd. Vrs. State of U.P. & Others** in Writ Tax No.1980/2009 decided on dt.12.11.2013.

In cross objection, State has taken a plea that, the Entry Sl.No.106, Part-I to the schedule of the OET Act should cover duplex board. Entry Sl.No.106, Part-I of the schedule reads as follows :

“Card board, art board, paste board, mil board and straw board”.

It is apt to mention here that, even though this is an alternative plea of the Revenue before this forum but it is not taken as a specific plea in the cross objection to treat the same as a cross appeal. The cross objection as filed does not contain any prayer by payment of necessary court fees by the State. As such the separate plea taken by the State, if any, without any prayer preceded by the payment of Court fee as required for filing of appeal cannot be entertained.

The decision in **Raman Boards Ltd. Vrs. State of Karnataka (2015) 80 VST 502 (Kar)** relied by the Revenue reads as follows :

“For the purposes of classification, the relevant factors, inter alia, are, statutory fiscal entry, the basic character, function and use of the goods. When a commodity falls within a tariff entry by virtue of the purpose for which it is put to, the end use to which the product is put to, cannot determine the classification of that product.

The normal function of the word “including” in an entry, is to indicate that the items following the word “including” are those of the types of the main item in the entry. There could be some doubt as to whether the main entry covered them or not and therefore, the Legislature specifically mentioned those items in the entry to remove scope for any doubt. The item about which there is no scope for doubt of there is comparatively less scope for doubt would accordingly stand automatically covered by the main items in the entry.

Electrical insulated press board is commonly known as high density board. In the Indian Standard Glossary Terms used in the paper trade and industry, electrical insulated press board is described as “having certain properties, namely, high electrical strength, durability, absence of conductive metallic particles and uniformity in thickness and formation. Such material is being used by the electrical industry for insulation”. The

goods are excessively used in the electrical industry and not used in common parlance for the purpose of writing, printing, packing, drawing, decorating or covering walls”.

6. Learned Addl. Standing Counsel for the State filed chart of the manufacturing process of writing and printing paper and that of duplex board separately. The process and stages for production of these two categories of goods are almost same. Learned counsel for the State argued that, since the process of manufacturing for both the goods are same, both should be treated as same for the purpose of levy of entry tax. This submission contradicts the plea in cross objection like duplex board comes under Entry Sl.No.106 because paper comes under Entry Sl.No.14 and if the process of manufacturing of paper and duplex board are same and are to be treated under same category then how duplex board should be covered under Sl.No. 106?

Keeping view the decisions of this authority on earlier occasion and the decisions in M/s. M. Graphics Pvt. Ltd. (supra), this Tribunal is constrained to held that, the duplex board purchased by the assessee-dealer is not covered under Sl. No.14 of Part-I of the schedule attracting EntryTax.

7. The next point is, what should be the value of the finished products for the purpose of Entry tax in as much as if it should include VAT or not. It is found that, the AA has taken into consideration of the provision u/s.26(1) of the OET Act, Sec.2(j) of the said Act and Sec.2(46) of the OVAT Act and came to a conclusion that, the sale price received from the purchaser and accordingly it includes VAT for the purpose of calculation of entry tax. Provision u/s.26(1) of the OET Act reads as follows :

26. Manufactures 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 an 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:

When the dealer is a manufacturer, the tax on the finished products will be levied on value of such products contemplated in the provision above. Value of the products should be calculated in accordance to Sec.3 of the same Act and for the purpose the term sale price is to be understood as per Sec.2(46) of the OVAT Act. Revenue and dealer both the sides are agreed on this view but according to the Revenue, the sale price should include VAT. Explanation (d) Sec.2(46) of the OVAT Act reads as follows :

“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;

Explanation (d) : Any amount of duties, charges, taxes levied or leviable under any Act (other than tax levied or leviable under this Act) in respect of such goods shall be included in the sale price”.

The provision above leads to an unambiguous conclusion that, the VAT should not be included while determining the value of the goods. Further, we can make reference to a Circular of the CCT and GST (Orissa) No.Pol-53/3/2017-Policy-CCT0(Part1)

6332/CT, Dated.21.04.2018 for this purpose whereby, it has been categorically directed as follows :

“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”

Thus, from the above it is held that, the value of the goods sold by the dealer is to be determined excluding the VAT amount for the purpose of levy of entry tax. In consequence thereof, the findings of both the fora below on this question needs to be corrected.

8. The next point raised by the dealer is sustainability of the dealer is entitled to set off in the event he is found liable to pay tax on purchase. Learned Counsel for the dealer draws the attention of the Court to the provision u/r.19(5) of the OET Rules, which reads as follows :

“19. Set off of entry tax.-

xxx 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”

On perusal of the assessment order as it revealed, the AA has rightly taken into consideration of the provisions and has held that, the dealer is entitled to set off. The FAA has not given any independent view on this question. It is not understood why the dealer has raised this question before this forum when it is already decided in his favour by both the fora below. Accordingly, in the considered view of this Tribunal, the decision by both the fora below regarding claim of set off in the event of collection of entry tax on purchase calls for no interference, hence confirmed.

9. The next question raised by the dealer is, sustainability of penalty as imposed invoking provision u/s.9C(5) of the OET Act. The plea of the dealer is, when there was no suppression by the dealer then imposition of penalty is unwarranted. The dealer has placed reliance on the earlier decided second appeal by this forum vide S.A.No.41(ET)/2014-15 between **State of Odisha -Versus- M/s. Sai Industries** decided on 17.09.2016. The view of this Tribunal in the said order is not speaking or reasoned one. Adverting to the case in hand, it is found that, the dealer is not guilty of any suppression but craft paper or duplex board which are not specific entries under the rate chart of the Act, the dealer has carried the impression that, the goods are not taxable under the OET Act, whereas the dealer has duly paid tax on sale of finished products. Once the dealer is found to have paid the entry tax on finished goods and when the dealer is entitled to claim set off as per Rule 19(5) against the entry tax paid on sale of finished goods, then there is no reason for the dealer to avoid payment of tax on purchase. It is not the case that, the dealer has attempted for any unjust enrichment. On the other hand, it should be kept in mind that, the authorities are also under different views regarding the interpretation of the goods dealt by the dealer. Once the dealer has disclosed the fact of purchase and paid tax on finished products, he has shown his bona-fides. Needless to repeat here that, non-payment of entry tax on purchase does not tend to unjust enrichment by the dealer, since the dealer has paid tax on the finished products and is entitled to claim set off. So it is held that, in the case in hand in particular, the dealer should not be imposed with penalty and as such the findings of the fora below in confirmation of the AA to

impose penalty needs to be set-aside. The dealer deserves lenient consideration here. Accordingly, it is ordered.

The appeal by the dealer is allowed in part. The impugned order is set-aside. The dealer is liable to pay entry tax on purchase of craft paper. The dealer is not liable to pay tax on purchase of duplex board. The value for the purpose of determination of entry tax on sale of finished goods will not include the VAT and the dealer is not liable to pay penalty. Tax due be calculated and demand be raised accordingly. The cross objection is disposed of accordingly.

The matter is remitted back to the AA for the limited purpose of computation of tax liability afresh and to raise demand.

Dictated and Corrected by me,

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

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