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

S.A.No. 109(ET)/2017-18

(From the order of the ld.JCST (Appeal), Cuttack-II Range, Cuttack, in Appeal No. AA/12/OET/CUII/2016-17, dtd.10.05.2017, confirming the assessment order of the Assessing Officer)

Present: Sri S. Mohanty
2nd Judicial Member

M/s. Odiray Drinks,
Imamnagar, Jagatpur,
Dist. Cuttack. ... Appellant

-Versus-

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

For the Appellant : Mr. A.K. Meher, Advocate
For the Respondent : Mr. S.K. Pradhan, ASC (CT)

(Assessment period : 01.04.2013 to 31.03.2015)

Date of Hearing: 25.08.2018 Date of Order: 25.08.2018

ORDER

The factual matrix involved in this second appeal in a narrow compass is, Whether the goods dealt by the instant dealer/appellant such as soft drinks and mango drinks should be taxed as per Entry Sl.No.53 of Part-I or as per Entry Sl.No.4 of Part-II of the Odisha Entry Tax Act, 1999 (in short, OET Act).

2. Admittedly, the dealer is a manufacturer of soft drinks and mango drinks. In a proceeding u/s.9(C) of the OET Act for the tax period from 01.04.2013 to 31.03.2015 initiated on the basis of Audit Visit Report (AVR), the AO rejected the claim of the dealer like the goods exigible to entry tax @1%. He imposed tax @2% and in consequence thereof, the tax due payable by the dealer was calculated

at Rs.4,32,930/-. Besides the tax due, penalty u/s.9C(5) of the OET Act was also calculated at Rs.8,65,860/-. Hence, the total demand became Rs.12,98,790/-.

3. The dealer had assailed the order of the FAA with the contentions like, the goods dealt by the dealer were coming under Entry Sl.No.53 of Part-I of the chart and part of sale was local sale not amenable to entry tax. Both these pleas of the dealer were rejected by the FAA whereby the assessment by the AA became confirmed, which led to the dealer to prefer this second appeal. In this second appeal, the dealer has also taken the self-same contention, which was taken before the FAA. It is contended that, the dealer had not sold all the manufactured goods outside the local area. It has effected sale of manufacturing goods amounting to Rs.1,08,26,347/- inside the local area which are not exigible to entry tax. It is further contended that, imposition of penalty is uncalled for in the case in hand, whereas the goods are to be taxed @1% in accordance to Entry Sl.No.53 of Part-I of the rate chart.

4. The Revenue has raised cross objection in support of the order of FAA.

5. The facts and circumstances involved in this appeal gives rise to following questions for decision such as : (i) What should be the rate of tax against the goods manufactured and sold by the dealer ? (ii) Whether the dealer has effected sale of Rs.1,08,26,347/- in the local area which was not exigible to tax ? (iii) Whether the dealer is not liable to pay penalty u/s.9C(5) of the OET Act ?

6. Coming to the question no.1, learned Counsel for the dealer drew the attention of the Court to the Entry Sl.No.53 Part-I of the rate chart which is as follows :

> "53. [Diary products including butter, ghee, cheese excluding the products sold in sealed containers and milk chocolate products].

Per contra, learned Addl. Standing Counsel Mr. Pradhan argued vehemently that, it is not Entry Sl.No.53 of Part-I but Entry Sl.No.4 of Part-II of the rate chart is applicable.

Entry Sl.No.4 of Part-II of the rate chart reads as follows :

> "4. Aerated or Mineral Water sold in bottles or in sealed containers"

7. In the appeal in hand, the fact remains undisputed that, the dealer manufactures and sale soft drinks and mango drinks. Mango drinks is nothing but a fruit juice comes under the Entry Sl.No.4, whereas the soft drink itself is a direct entry under the same serial. In that event, avoiding unnecessary discussion on this question it can safely be said that, the goods dealt by the dealer falls under Entry Sl.No.4 of Part-II of the rate chart and are required to be taxed @2%.

8. Adverting to the question no.2 such as the dealer had effected sale in the local area to the tune of Rs.1,08,26,347/- and in that case such sale is not exigible to entry tax, the impugned order has taken care of this plea of the dealer but it is silent what is the answer to this plea of the dealer. As it revealed, the FAA has not passed any order on this question. In that case, it is held that, the authorities have not taken consideration of this plea on verification of the necessary evidence supported by any speaking or reasoned order.

9. The next question is the penalty as imposed by the fora below invoking provision u/s.9C(5) of the OET Act. The provision reads as follows :

Section 9C(5) clearly speaks 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".

The term 'shall' as incorporated in the provision, indicates the penalty is a mandatory consequence when the dealer is assessed u/s.9C(3) or (4) of the OET Act and found liable to pay tax. Here in this case, the facts remained the dealer has misinterpreted the provision and has paid tax in accordance to a particular entry, which cannot be interpreted in favour of the dealer as it is not relatable to the goods dealt by the dealer. When the rate chart is unambiguous and the dealer is seller of fruit drinks and soft drinks as per the specific entry as per the Entry Sl.No.4 of Part-II, in that case it is believed that, he has made an unsuccessful attempt to evade the payment of actual rate of tax. It is the dealer had taken a specific plea before the FAA that, he is a manufacturer of soft drinks in the name of Spice up and also a trader of Mango drinks in the brand name of 'Mango tree', then by necessary implication it is believed that, the dealer has tried to evade the appropriate rate of tax. If the fact of the dealer is not found to be bona-fide, there cannot be a question of any liberal interpretation of the provision to give the dealer relaxation from payment of penalty. The very intention of the dealer was not to give tax at appropriate rate and once the dealer is liable to pay the differential rate of tax assessed u/s.9C(3), then penalty u/s.9C(5) is a necessary consequence thereof. As such it is held that, the dealer is also liable to pay penalty.

In view of the discussion and findings above, it is held that, even though the rate of tax as determined by the fora below is confirmed

and although the penalty invoking provision u/s.9C(5) by the fora below is confirmed, still the matter needs to be remitted back to the AA to scrutinize the fact of local sale as claimed by the dealer. Accordingly, it is ordered.

The appeal is allowed in part. The matter is remitted back to the AA for a limited purpose such as the AA will verify if any local sale was effected by the dealer and in the event it is found true supported by evidence, then he is to re-determine the tax liability and penalty to be paid by the dealer as per the observation above.

Dictated and Corrected by me,

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

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(S. Mohanty)
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