

BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 158 (ET) of 2014-15

(Arising out of the order of the learned ACST (Appeal), South Zone, Berhampur, in Appeal Case No. AA(ET).06/2013-14, disposed of on dtd.11.08.2014)

Present: **Mrs. Suchismita Mishra**, Chairman,
Shri Ashok Kumar Panda, 1st Judicial Member,
&
Shri Ranjit Kumar Rout, Accounts Member-II.

M/s. B.V. Enterprises,
At/P.O.- Malasanipeta,
Raghunath Complex, Berhampur,
Dist.- Ganjam.

... Appellant

- V e r s u s -

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

... Respondent

For the Appellant ... Mr. S. Lal, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 09.07.2018

Date of order: 08.08.2018

ORDER

This appeal is directed against the order dated 11.08.2014 passed by the learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (hereinafter referred to as, the learned ACST) in Appeal Case No. AA(ET).06/2013-14, wherein and whereby, he has allowed the first appeal in part by reducing the balance tax demand, penalty and interest to Rs.19,46,194.00 from Rs.26,52,903.59 raised by the learned Joint Commissioner of Sales Tax, Ganjam Range, Berhampur (hereinafter referred to as, the learned JCST) in an assessment u/s.9C of the Orissa Entry Tax Act (hereinafter referred to as, the OET Act) in respect of the appellant-dealer for the assessment period from 01.10.2007 to 31.03.2011.

2. The appellant-dealer bearing TIN-219711900374 is a wholesaler-cum-retailer of spices and salt and in course of business transaction it used to receive goods from outside the State under 'F' form condition and also under 'C' form condition. Similarly, it also effects sale both inside as well as outside the State. Basing upon an Audit Visit Report (in short, the AVR) submitted by the ACST, Ganjam I Circle, Berhampur, the learned JCST initiated a proceeding u/s.9C of the OET Act against the appellant-dealer for its assessment for the period from 01.10.2007 to 31.03.2011 and issued a notice in form E-30 to appear and to produce the books of account and in response to the notice, the proprietor of the appellant-dealer firm appeared and produced the books of account which were duly been examined in the light of the allegation of the AVR. On examination of the books of account and the other relevant documents, the learned JCST determined the purchase value of the consignment goods as per the provision u/s.2(j) of the OET Act and on consideration of all the transactions determined the GTO at Rs.51,57,49,276.82 and after deducting the value of the scheduled goods purchased from the registered dealers inside the State, determined the TTO at Rs.51,39,81,529.55 and levied tax at the appropriate rate of 2% and 1% on different transactions, which came to be Rs.51,93,123.56 in total. On further examination of the relevant materials, the learned JCST found out that, the appellant-dealer has not deposited the admitted tax in due time for certain periods, rather has deposited the same in delay and as such he levied interest upon it u/s.7(5) of the OET Act amounting to Rs.9,75,796.00. Similarly, he also invoked the provision u/s.7(6) of the OET Act and imposed a penalty of Rs.15,04,845.41 for withheld of the admitted tax and the interest payable thereon and finally the order of the learned JCST resulted in a demand of balance tax, interest and penalty amounting to Rs.26,52,904.00, to be paid by the appellant-dealer.

3. After the assessment, being aggrieved with the order of the learned JCST, the appellant-dealer preferred an appeal before the learned ACST bearing Appeal Case No. AA(ET).06/2013-14. On hearing and on consideration of the entire materials available on record, the learned ACST

found out the levy of interest u/s.7(5) of the OET Act upon the appellant-dealer amounting to Rs.9,75,796.00 to be proper and justified and accordingly did not accept the contention of the appellant-dealer raised in this regard. But, so far as the imposition of penalty u/s.7(6) of the OET Act upon the appellant-dealer is concerned, he found out that, out of the due amount of Rs.20,00,000.00, the appellant-dealer has deposited Rs.5,00,000.00 each on three occasions prior to the audit visit and is not liable to pay any penalty and hence basing upon such finding, he reduced the penalty imposed under this sub-section to Rs.7,98,135.37 and the same resulted in reduction of the total demand of balance tax, interest and penalty to Rs.19,46,194.00 from Rs.26,52,904.00 as raised earlier by the learned JCST. But, still being aggrieved with the order of the learned ACST, the appellant-dealer has preferred this second appeal.

4. The respondent-Revenue has filed its cross objection supporting the order of the learned ACST.

5. Heard both the sides. Though the appellant-dealer has raised the contention challenging the levy of interest u/s.7(5) and imposition of penalty u/s.7(6) of the OET Act upon it in the grounds of appeal, the learned Counsel appearing on its behalf, confined his argument relating to the imposition of penalty and submitted that both the learned forums below have not considered the fact and law in its proper perspective and have passed the order erroneously by not affording a due opportunity of hearing to the appellant-dealer and hence the order passed in this regard being illegal and not being based upon the materials available on record, the same is liable to be set aside and the imposed penalty is liable to be deleted. On the other hand, the learned Addl. Standing Counsel appearing for the respondent-Revenue supported the order of the learned ACST and urged for dismissal of the appeal.

6. Perused the orders of both the learned forums below and the other materials on record. From the materials on record, it is seen that, the appellant-dealer has not deposited the admitted tax for certain periods in due time and has deposited the same at a subsequent stage with some delay.

This fact has not been disputed by the appellant-dealer at any stage of the proceeding. Therefore, on consideration of the materials available in this regard, the learned JCST has levied interest upon the appellant-dealer u/s.7(5) of the OET Act amounting to Rs.9,75,796.00 and the same has further been confirmed by the learned ACST at the first appeal stage. As interest has been levied upon the appellant-dealer by operation of law due to its failure to pay the admitted tax shown in the returns in due time, the contention raised by the appellant-dealer in the grounds of appeal bears no merit.

7. But, so far as the imposition of penalty u/s.7(6) of the OET Act is concerned, in view of the rival submission from both the parties, it is beneficial to refer to the relevant sub-section itself, which speaks as follows:-

“If any dealer, without sufficient cause, fails to pay the amount of tax due and interest payable thereon along with return under sub-section (1) or revised return under sub-section (2), the Commissioner may, after giving the dealer a reasonable opportunity of being heard, direct him to pay in addition to the tax and the interest payable by him, a penalty at the rate of two per centum per month on the tax and interest so payable, from the date it had become due to the date of its payment or the order of assessment, whichever is earlier.”

On a bare reading of this sub-section, it is seen that, the imposition of penalty upon a dealer for his failure to pay the amount of tax due and interest payable thereon along with the return is totally a discretionary one and prior to imposition of the same, the dealer is entitled to get a reasonable opportunity of hearing. Further, on a conjoint reading of this sub-section along with the other provisions of the Act, it appears that, a separate proceeding, other than the assessment proceeding, is required to be initiated by the learned assessing authorities to impose penalty upon a dealer under this provision. But, in the present case, neither any separate proceeding has been initiated nor the appellant-dealer has been afforded with a reasonable opportunity of hearing and hence invoking of the provision u/s.7(6) of the OET Act by the learned JCST in the present proceeding and further been confirmed by the learned ACST can clearly be considered to be an illegal one.

Therefore, the imposition of penalty amounting to Rs.7,98,135.37 upon the appellant-dealer u/s.7(6) of the OET Act being improper and unjustified is also not sustainable in the eye of law.

8. In view of the above discussion, the appeal is allowed in part. The imposition of penalty amounting to Rs.7,98,135.37 upon the appellant-dealer u/s.7(6) of the OET Act is hereby deleted and consequently the total demand is reduced to Rs.11,48,058.63, to be paid by the appellant-dealer. The demand notice be issued accordingly. However, this forum is making it clear that, the learned assessing authority is at liberty to initiate a proceeding for compliance of the provision u/s.7(6) of the OET Act, if he desires so, but that should be strictly within the four corners of the statute. The cross objection is disposed of accordingly.

Dictated & corrected by me,

Sd/-
(Ashok Kumar Panda)
1st Judicial Member

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I agree,

Sd/-
(Suchismita Mishra)
Chairman

I agree,

Sd/-
(Ranjit Kumar Rout)
Accounts Member-II