

BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.
S.A.No. 28(ET)/2017-18

(Arising out of order of the Id.JCST (Appeal), Bhubaneswar Range,
Bhubaneswar, in Appeal No.AA-108221622000162,
disposed of on dtd.30.03.2017)

Present: Sri S. Mohanty & Sri R.K. Pattnaik
2nd Judicial Member Accounts Member-III

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

.... Appellant

-Versus-

M/s. Twincity Green Homes & Villas,
Bhubaneswr.

... Respondent

For the Appellant : Mr. S.K. Pradhan, Addl. Standing Counsel (C.T.)

For the Respondent : Mr. L.M. Pany, Advocate

Date of Hearing: 11.06.2018 *** Date of Order: 12.06.2018

ORDER

Revenue being aggrieved with the reversing order of the learned First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (in short, FAA/JCST) has preferred this appeal challenging the sustainability of the order of the FAA deleting thereby the tax due and penalty imposed by the AA.

2. The instant dealer is a real estate promoter and builder engaged in purchase of land, building houses and selling it to the buyers. It has its business house in Bhubaneswar having Registration vide TIN No.21525600735. For the tax period 10.06.2011 to 31.03.2015, a proceeding u/s.9C of the Odisha Entry Tax Act, 1999 (in short, OET Act) Act was initiated on the basis of Audit Visit Report (AVR) submitted by the Sales Tax Officer, Bhubaneswar-IV Circle, Bhubaneswar (in short, STO). The allegation in the AVR, the dealer had not paid Entry tax on purchase of sand, earth etc. i.e. to the tune of Rs.1,27,47,098/- and Rs.25,56,641/-. Before the AO, the dealer

took a stand that, sand and earth are not minerals coming under section 3(e) of the Mines & Minerals (Regulation & Development Act), 1957 and Entry Sl.No.59 of Part-II of the schedule to the OET Act. The other plea of the dealer was, all these purchases were made within the local area, so otherwise it is not also exigible to tax. The AO on interpretation of the provisions under the Mines & Minerals Regulation Act mentioned above and the provision under Entry Sl.No.59 of Part-II of the schedule to the OET Act, arrived at a conclusion that, the sand and earth used by the dealer are purchased from unregistered dealers of outside the local area of the dealer exigible to entry tax @1%. The total tax due was accordingly determined to the tune of Rs.1,59,668/-. Beside the tax, penalty u/s.9C(5) of the OET Act was also imposed to the extent of twice of the tax due, calculated at Rs.3,19,336/-. As a result, the total demand against the dealer was raised to Rs.4,79,004/-.

3. Being aggrieved, the dealer preferred appeal before the FAA, whereby the Id.JCST, Bhubaneswar Range, in consideration of the dealer's argument came to a conclusion that, sand and clay dealt by the dealer are not minerals/minor minerals and accordingly not exigible to entry tax. As a result, the FAA deleted the tax demand with penalty what was raised by the AO.

4. Felt aggrieved, the Revenue has preferred this appeal on the contentions like the FAA has gone wrong in interpreting the provision u/s.3(e) of the Mines & Minerals (Regulation & Development Act), 1957 as well as Entry 54 of the Union List-I and Entry 23 of the State List-II of the 7th Schedule of the Constitution of India. It has further contended that, the FAA has also gone wrong in deleting the penalty as a consequence of deletion of the tax demand. Revenue has prayed for restoration of the demand of tax and penalty passed by the AO.

5. The appeal is heard without cross objection from the side of the dealer.

6. The moot question to be decided in this appeal are, whether the goods like sand and clay purchased and used in construction of building by the

dealer are exigible to entry tax in the case in hand or not ? If yes, whether the dealer is liable to pay tax as well as penalty as imposed by the AO?

7. In the hearing, learned Addl. Standing Counsel, Mr. Pradhan strenuously argued that, the position of law is now well settled keeping view the decision by the Apex Court in **D.K. Trivedi & Sons Vrs. State of Gujarat AIR (1986) SC 1323** that the term “mineral” i.e. u/s.3(e) of the Mines & Minerals (Regulation & Development Act), 1957 includes minor minerals. Sand and clay dealt by the dealer in the case in hand comes under the category of minor minerals and falls under the entry sl.no.54 of the OET Act. As such, the same is exigible to entry no.59 Part-I of the OET Act as such exigible to tax @1%. It is noteworthy to mention here that, keeping view the settled position of law as laid down by the Apex Court and as followed by this Tribunal time to time in similar cases, there is no reason why to discuss this question further. Rather to conclude it with the finding that, sand and clay purchased by the dealer and used in the works contract like construction of building are amenable to entry tax. There is no dispute that, the dealer is a works contractor falls under the category of Sec.2(62) of the OVAT Act. In that event, the entry tax liability fixed by the AO basing on the AVR is in accordance to law, whereas, the findings of the FAA reversing the finding of the AO is erroneous interpretation of law. Hence, we are of the view that, the impugned order is not sustainable in the eye of law.

8. The next point for determination in this appeal is, whether the penalty u/s.9C(5) as imposed in this case is sustainable or not keeping in view the bona-fides shown by the dealer. Learned Counsel for the dealer argued that, under the impression that sand and clay are not amenable to entry tax, the dealer had not paid tax on it. It is also argued that, in normal practice, no dealer pays tax for sand and clay. So, the dealer has no intention to avoid tax but under the wrong notion has not paid tax. Ignorance of law has no excuse. At the same time *mens rea* is not a primary condition for imposition of penalty u/s.9C of the OET Act. However, the fact remains, in the case in hand, the authorities are also not clear in their opinion whether sand and clay are minor

minerals exigible to entry tax. If that is, when the taxing authorities are with conflicting opinions, then it is not expected from a dealer to be sure about the interpretation of goods like sand and clay is minor minerals. Thus, it is found that, the enforcing authorities have contributed much for such wrong understanding of the provision by the dealer and the dealer might have been misled with the impression that the sand and clay are not minor minerals. In the peculiarity of the case in hand, we are of the view that, the dealer's mistake should be leniently viewed to the extent of imposition of penalty only. From the discussion above, it is held that, the dealer is liable to pay entry tax on sand and clay. However, he should not be imposed with penalty as per Sec.9C(5) of the OET Act in the case in hand. Accordingly, it is ordered.

The appeal is allowed on contest. The impugned order is set-aside. The dealer is liable to pay tax on the value of sand and clay as determined by the AO. The demand be raised accordingly.

Dictated and Corrected by me,

(S. Mohanty)
2nd Judicial Member

(S. Mohanty)
2nd Judicial Member

I agree,

(R.K. Pattnaik)
Accounts Member-III