BEFORE THE JUDICIAL MEMBER: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 230 (E) of 2008-09

(From the order of the ld. ACST (Appeal), Sambalpur Range, Sambalpur, in First Appeal Case No. AA 14 (SAI-ET) of 08-09, disposed of on dtd.25.08.2008)

Present: Sri S. Mohanty,
2nd Judicial Member

M/s. Mahesh Bidi Works,
Tawalapada, Sambalpur. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. M. Agarwal, Advocate
For the Respondent ... Mr. S.K. Pradhan, A.S.C.

Date of hearing: 19.01.2019 ******** Date of order: 19.01.2019

O R D E R

The dealer being unsuccessful before the assessing authority, Sambalpur I Circle, Sambalpur, Ward (E) (hereinafter referred to as, the AA) and thereafter in appeal before the first appellate authority, Sambalpur Range, Sambalpur (hereinafter referred to as, the FAA) to establish that the claim like Bidi dealt by him is not exigible to Entry Tax and the proceeding itself suffers from patent defect has preferred this second appeal, whereby and wherein he has challenged the confirming order of the first appellate authority as not sustainable.

2. For the assessment period 2004-05 the dealer was assessed as per Sec.7(3) of the Orissa Entry Tax Act, 1999 (hereinafter referred to as, the OET Act) (the assessment order as revealed). The dealer is a manufacturer of Bidi and for the purpose he has purchased tobacco from the dealer's inside State and outside State. Treating Bidi as non-scheduled goods the dealer had not paid any entry tax to the sale ------. The assessing authority held the dealer as a manufacturer of Bidi from raw materials like tobacco and then levied tax @ 1% on the entire GTO/TTO of the dealer which was calculated at Rs.11,978.00. Besides tax, penalty at the rate of one and half times for Rs.17,968.00 was also imposed resulting thereby the total demand against the dealer was raised at Rs.29,946.00.

3. The matter was carried above by the dealer. The learned ACST (Appeal), Sambalpur Range, Sambalpur as first appellate authority vide impugned order confirmed the order of the assessing authority as a result the demand remained undisturbed. On this backdrop, the dealer has preferred this second appeal.

4. The dealer's contention is, the entire assessment proceeding is illegal since it was passed as per Sec.7(3) of the OET Act. The first appellate authority has not considered the grounds of maintainability of the assessment and the impugned order and the dealer is not liable to pay any Entry Tax as assessed.

5. The appeal is heard without cross objection. However, the Revenue has stood by the orders of both the fora below to be lawful and correct.

6. The impugned order as it revealed, the dealer had claimed for set off in the event of levy of Entry Tax and the dealer has challenged the entire proceeding to be not sustainable and the imposition of penalty without mens rea is illegal. Thus, from the above it is found that the dealer has not questioned the levy of Entry Tax on the goods sold by the dealer rather, he has asked for set off. Similarly, in this second appeal also the dealer has not claimed that the goods sold by him is not liable for Entry Tax

but has challenged the entire proceeding to be void as it was passed as per Sec.7(3) of the OET Act.

7. To appreciate the grounds challenging the impugned order, it is to be seen if the assessment u/s.7(3) of the OET Act in the case is violative of principle of natural justice without proper notice. This ground was raised before the first appellate authority but it is not dealt in the impugned order. Grievance of the dealer is while making assessment under the OST Act the dealer was also assessed under the OET Act and for the purpose of assessment under the provision of OET Act no notice is required under law was served on the dealer which is a patent effect goes to the root of the assessment and as such the assessment should be vitiated. Provision u/s.7(3) of the OET Act as it was by then reads as follows:-

> "(3) If the assessing authority is satisfied that any return submitted under sub-section 91) is correct and complete, he shall assess the dealer on the basis thereof."

No doubt, for the purpose of the assessment a notice is mandatory. The assessment order is silent on this, but the assessing authority had the occasion to scrutinize the documents of the dealer. On the other hand, although the same question was raised before the first appellate authority which was not taken care of principle is well settled in **Commissioner of Sales Tax and Others –Vrs.- Subash & Co. 130 STC 97 (SC)**, their lordship has held as follows :

> "**20.** The emerging principles are :
> (i) Non-issue of notice or mistake in the issue of notice or defective service of notice does not affect the jurisdiction of the assessing officer, if otherwise reasonable opportunity of being heard has been given.
> (ii) Issue of notice as prescribed in the Rules constitutes a part of reasonable opportunity of being heard :
> (iii) If prejudice has been caused by non-issue or invalid service of notice the proceeding would be vitiated. But irregular service of notice would not render the proceedings invalid; more so, if assessee by his conduct has rendered service impracticable or impossible.

(iv) In a given case when the principles of natural justice are stated to have been violated it is open to the appellate authority in appropriate cases to set aside the order and require the assessing officer to decide the case *de novo*."

The provision u/s.7(3) of the OET Act as it was by then when the assessing authority is satisfied that the return submitted by the dealer is correct and complete in that he shall assess the dealer on the basis thereof. As per the provision above, in the case in hand when the dealer was subjected to assessment as per Sec.7(3), the assessing authority raised demand of tax in acceptance of the books of account but disputing the tax liability. Here the authorities exercised the jurisdiction not vested on him under law as per Sec.7(3). As it appears the authority has invoked Sec.7(4) for the assessment but for that no notice was given. Penalty is also imposed as per Sec.7(5) which is consequence of assessment u/s.7(4) o the OET Act. Hence, it is believed that the principle of natural justice was violated by not giving the dealer an opportunity of explaining his plea and in that event the situations under (iii) & (iv) above as per the authority in Commissioner of Sales Tax (supra) are applicable to the case in hand. Here it is held that prejudice has been caused to the dealer by non-issue of notice. In the case of **Delhi Foot Ware (supra)** it is held that;

> *"Law is well-settled that when the statute requires to do certain thing in certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressio unius est exclusion alterius" meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible".*

Thus, keeping in view the discussions above it is held that the matter need tore-hear again on proper opportunity of being heard to the dealer.

8. It was claimed before the dealer that he is entitled to set off. The dealer had purchased tobacco and sold Bidi. Tobacco and Bidi are commercially different commodities as it has been decided by the Hon'ble Gujarat High Court in **C. Gokaldas and Co. and others v. The State of Gujarat (1965) GLR 601** (relied by the dealer).

The process of manufacturing/preparing Bidi involves different steps; In the first step a mixture containing of tobacco, lime and catechu is repaired. In the second step, the Bidi is rolled with Bidi leaves embedding the mixture in the middle and a small thread is tied at the one end. In the third step, the rolled tobacco are arranged in order in tray. Bidi is prepared from tobacco and both being commercially different article, it can safely be said that it has undergone through the process of manufacturing attracting Sec.26 of the Act. Claim of the taxing authorities is conceivable that Bidi falls under the goods under the term of tobacco and tobacco product which is a scheduled goods as per entry in Sl. No.16 of the part-I and is amenable for tax. If that be, the dealer is liable to pay tax on purchase of tobacco and also eligible to collect tax on sale of tobacco product called Bidi. Inconsequence thereof, the dealer is also entitled to set off as claimed.

From the discussion above, it is held that the dealer is liable to pay Entry Tax. He being found to have not paid the tax, the determination of tax liability by the fora below is correct but at the same time when the dealer is found entitled to set off, then the tax liability needs to be re-determined. It is also made clear that assessment u/s.7(3) of the OST Act is

erroneous. Be that as it may, it is a fit case where the matter should be remitted back to the assessing authority for assessment afresh. However, as the dealer is well aware of the facts, no need of issuing fresh notice for any regular assessment keeping in mind the provision u/s.26 of the OET Act and Rule 19 of the OET Rules as well.

9. The appeal is allowed in part. The impugned order is set aside. The matter is remitted back to the assessing authority for assessment afresh in the light of observation made hereinabove giving proper opportunity of being heard to the dealer.

Dictated & corrected by me,

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

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