

**BEFORE THE DIVISION BENCH-II: ODISHA SALES TAX TRIBUNAL:
CUTTACK.**

S.A. No. 34 (ET) of 2017-18

(Arising out of the order of the learned Addl. CST (Appeal), South Zone,
Berhampur, in Appeal Case No. AA (ET) 06/2015-16,
disposed of on dtd.26.04.2017)

P r e s e n t : Shri A.K. Panda, & Shri R.K. Pattnaik,
1st Judicial Member Accounts Member-III

M/s. Lalchand Jewellers Pvt. Ltd.,
Lalchand Complex, Station Square,
Bhubaneswar. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. K.R. Mohapatra, Advocate
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 27.06.2018 **** Date of order: 15.11.2018

ORDER

This appeal is directed against the order dtd.26.04.2017 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) 06/2015-16, wherein and whereby he has dismissed the first appeal by confirming the order of the learned Deputy Commissioner of Sales Tax, Bhubaneswar II Circle, Bhubaneswar (hereinafter referred to as, the learned DCST) passed in an assessment u/s.9C of the Orissa Entry Tax Act, 1999 (hereinafter referred to as, the OET Act) in respect of the appellant-dealer for the assessment period from 01.06.2009 to 31.03.2012 raising a balance tax demand, interest and penalty amounting to Rs.6,71,227.00.

2. The appellant-dealer is a trader of gold and silver ornaments, jewellery, pen, watches, leather goods, packing materials, old gold, gold

bullion, diamond set, gem stones, platinum jewellery and mobile phones etc. Basing upon an Audit Visit Report (in short, the AVR) submitted by the Asst. Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar, the learned DCST initiated a proceeding u/s.9C of the OET Act against the appellant-dealer and issued a notice to appear and to produce the books of account and in response to the notice, the appellant-dealer appeared through an Advocate and produced the books of account, which were duly been examined. As per the allegation of the AVR, in the assessment period in question, though the appellant-dealer has effected purchase of pen worth Rs.6,26,207.00 it has not disclosed the same. Similarly, the appellant-dealer has also not paid entry tax upon outside purchase of diamond jewellery, marble and T.V. amounting to Rs.14,21,819.89 on the ground that, the State has no jurisdiction to levy tax on such goods imported from outside and not manufactured within the State of Odisha in view of the decision rendered by the Hon'ble High Court of Orissa in the case of **Reliance Industries Ltd. v. State of Orissa, (2008) 16 VST 85 (Ori.)**. During assessment, on examination of the books of account and the other relevant documents, the learned DCST did not accept any of the contentions advanced by the appellant-dealer on confrontation of the AVR, rather accepted the allegations mentioned therein as true and genuine and on consideration of all the transactions, determined the GTO and TTO and levied tax at the appropriate rates of 1% and 2% on different transactions which resulted in a balance tax demand of Rs.2,22,603.37. Similarly, the learned DCST also levied interest of Rs.3,417.00 u/s.7(5) and a penalty of Rs.4,45,206.74, equal to twice of the balance tax demand u/s.9C(5) of the OET Act and as such the balance tax demand, interest and penalty came to be Rs.6,71,227.00 in total, to be paid by the appellant-dealer.

3. After the assessment, being aggrieved with the order of the learned DCST, the appellant-dealer preferred an appeal before the learned ACST bearing Appeal Case No. AA (ET) 06/2015-16. On hearing and on consideration of the materials available on record, the learned ACST did not accept any of the contentions of the appellant-dealer and accordingly dismissed the appeal by confirming the order of the learned DCST. Thus,

again being aggrieved with the order of the learned ACST, the appellant-dealer has preferred this second appeal.

4. Cross objection has been filed by the respondent-Revenue supporting the orders of the learned forums below.

5. Heard both the sides. The learned Counsel appearing for the appellant-dealer submitted that, though the appellant-dealer has also challenged the levy of tax upon the goods in question in the present appeal, the same bears no merit in view of the judgment of the Hon'ble Apex Court dated 11.11.2016 passed in **Jindal Stainless Ltd. and another v. State of Haryana and others**, wherein the levy of Entry Tax on goods imported from outside the territory has been upheld and being conscious of the said judgment, the appellant-dealer has already paid the Entry Tax levied upon it by the learned DCST and further being confirmed by the learned ACST. But, challenging the imposition of penalty upon the appellant-dealer, he submitted that, the appellant-dealer had no intention of evasion of tax at any point of time and as it has not paid the tax upon the goods in question imported from outside with a bonafide belief of no liability in view of various judgments of the Hon'ble High Courts of different states, the imposition of penalty at the rate of equal to twice of the tax demand is quite improper and unjustified in the facts and circumstances of the present case and the same needs to be deleted by this forum. On the other hand, the learned Standing Counsel appearing for the respondent-Revenue submitted that, no illegality has been committed by the learned forums below in imposing the penalty upon the appellant-dealer u/s.9C(5) of the OET Act for non-payment of due tax and hence, the appeal being devoid of merit is liable to be dismissed.

6. Perused the orders of both the learned forums below and the other materials on record. There is no dispute with regard to the levy of tax upon the goods in question brought to the local area by the appellant-dealer from outside the territory. The appellant-dealer has not challenged the finding and order arrived at by the learned forums below in this regard. Thus, the only dispute relates to the imposition of penalty upon the appellant-dealer u/s.9C(5) of the OET Act by the learned DCST which has further been confirmed by the learned ACST at the first appeal stage.

7. Before examining the justification of the order passed by the learned forums below, it is beneficial to refer to Sec.9C(5) of the OET Act which is as follows:-

“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”.

8. On a bare reading of the above provision, it is seen that, though the imposition of penalty under this sub-section is a mandatory one, the same is subject to certain conditions as provided under the provisions of law. Here, in the present case, though the appellant-dealer has brought certain goods like pen, diamond jewellery, marble and T.V. to the local area from outside the State, it has not paid any Entry Tax thereon by taking a plea that, the same is not payable on such goods. On being confronted of the allegation leveled in the fraud case report during the assessment, the appellant-dealer has taken the contention that, on a bonafide belief of non-levy of Entry Tax upon the goods brought from outside and not manufactured in the State of Odisha, it has not paid the same and to show its bonafideness it has relied upon in the **Hon’ble High Court of Orissa in the case of Reliance Industries Ltd. v. State of Orissa, (2008) 16 VST 85 (Ori.)**.

9. In the case of **Reliance Industries Ltd. v. State of Orissa, (2008) 16 VST 85 (Ori.)**, the Hon’ble High Court of Orissa has held that the State has no jurisdiction to impose tax on such goods imported from outside and are not manufactured within the State of Orissa. Similar view was also taken by some of the Hon’ble High Courts of different states by that time.

10. It is to be noted that, Sec.2(d) and Sec.3(1) of the OET Act defines the “entry of goods” and deals with the provision of levy of tax under this Act respectively. On a conjoint reading of both this provision, it is very much clear that, Entry Tax shall be levied and collected on entry of scheduled goods into a local area from any place outside that local area or any place outside the State for consumption, use or sale therein. In the case of **Jindal Stainless Ltd. and another v. State of Haryana and others**, vide

Civil Appeal No.3453/2002, on consideration of these provisions, the Hon'ble Apex Court delivered its judgment on 11.11.2016 holding that Entry Tax is leviable on goods brought to the local area from outside by reversing the judgment of the Hon'ble High Court of Orissa. But, in the entire factual background, the plea of bonafide belief of non-levy of entry tax upon the imported goods as taken by the appellant-dealer can be considered to be a valid one. Further, the appellant-dealer had also preferred a writ petition vide W.P.(C) No.11865/2007 before the Hon'ble High Court of Orissa challenging his own assessment involving this particular question and the same shows some sort of bonafideness on its part. Therefore, on consideration of the entire facts and circumstances, a conclusion can clearly be arrived that, the contention taken by the appellant-dealer is a valid one having certain reasonableness.

11. In the case of **Hindustan Steel Ltd. v. State of Orissa (1970) 25 STC 211 (SC)** the Hon'ble Apex Court has held that -

“..... An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute

12. On consideration of the entire facts and circumstances and on consideration of the settled position of law, it can clearly be said that, both the learned forums below have not considered the matter in its proper perspective while imposing penalty upon the appellant-dealer u/s.9C(5) of the OET Act by exercising the power vested upon them and as such, the order passed by them in this regard being improper and unjustified needs interference of this forum.

13. In the result, the appeal is allowed in part. The order of imposition of penalty u/s.9C(5) of the OET Act upon the appellant-dealer is hereby set aside. However, the rest of the order is confirmed. The cross objection is disposed of accordingly.

Dictated & corrected by me,

Sd/-
1st Judicial Member,
Odisha Sales Tax Tribunal

Sd/-
1st Judicial Member,
Odisha Sales Tax Tribunal

I agree,

Sd/-
Accounts Member-III,
Odisha Sales Tax Tribunal