

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

S.A.No.56(ET) of 2017-18

(From the order of the learned JCST, Jajpur Range,
Jajpur Road, in Appeal No.AA.520 KJ (ET)16-17
dated 31.03.2017)

P r e s e n t :

**Shri Subrat Mohanty,
Judicial Member.**

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

... Appellant

- V e r s u s -

M/s.Kashvi Power and Steel Pvt. Ltd.,
At/Po:Madhapur, Dist:Keonjhar.

... Respondent

For the Appellant

... Mr.S.K.Pradha, Addl.S.C.(CT).

For the Respondent

... None.

Period of Assessment: 01.04.2011 to 31.03.2012

Date of hearing: 17.09.2019 * * * Date of Order:17.09.2019

ORDER

This second appeal is at the instance of the revenue against the order of First Appellate Authority passed in an assessment under Section-9-C(5) of the OET Act with a prayer to reverse the findings of deletion of penalty in the impugned order.

2. The respondent-dealer is a private limited company engaged in wholesale and retail sale of Manganese Ore, Iron ores and Iron ore fines. For the assessment period 01.04.2011 to 31.03.2012, the dealer was assessed under Section 9-C of the OET Act. It is found that the dealer has collected ET separately besides the purchase price without any provision under law for that. The assessing authority held the dealer liable to pay under declared tax to the

tune of Rs.32,213.00 with penalty under Section 9C(5) of Rs.64426.00, resulting the total demand raised at Rs.96639.00.

3. Being aggrieved, the dealer knocked the door of the first appellate authority. The learned JCST (Appeal) Jajpur Range as first appellate authority confirmed the tax due but deleted the penalty, however, while deleting the penalty it has imposed interest to Rs.9417.00, resulting thereby the total demand payable by the dealer re-calculated at Rs.41,630.00.

4. When the matter stood thus, the revenue being aggrieved questioned the deletion of penalty by the first appellate authority in this second appeal with the contentions like penalty under Section 9C(5) is mandatory in nature and the same should be imposed in accordance to the ratio laid down by the Apex Hon'ble Court.

5. The appeal is heard without cross objection and in absence of the dealer as well, since the dealer remained absent in the hearing.

6. The moot question raised for decision in this appeal is:-

Whether the first appellate authority has committed wrong in deleting the penalty imposed by the assessing authority in under Section 9C(5) of the OET Act?

Finding and reason thereof-

7. To appreciate the case in hand, the admitted fact here is the dealer has collected Entry Tax separately besides the sale price. It is also effected that the dealer has not deposited the aforesaid amount of separately collected ET with the understanding that the same is a set off against the ET paid on purchase. Avoiding un-necessary discussion on this question, it can safely be said that the dealer is at fault in collecting ET. The assessing authority has rightly directed the dealer to deposit the extra ET collected.

Now, the question before us is, imposition of penalty under Section 9C(5) whether compulsory in the aforesaid contingency, if yes, whether it can be deleted by exercising discretionary power of first appellate authority?

Bare reading of provision under Section 9C(1) as it reveals, audit assessment can be taken up when there was purchase suppression and/or sale suppression, erroneous claim of deduction, evasion of tax or contravention of any provision in this act affecting the tax liability of the dealer. Collection of tax un-authorisedly under the wrong notion of law is not covered under any of the situation mentioned above. It is more fully believed that, it does not falls under the situation “contravention of any provision in this Act affected tax liability of the dealer”. It may be a case of contravention of provision but this contravention does not affects the tax liability of the dealer.

Reverting to the case in hand, the allegation against the dealer is it has collected ET and disclosed the same in the return. Collection of ET is not as per law and whereas disclosure of same in the return shows the bonafidness of the dealer. But in no eventuality this act does amounts to any situation falls under Section 9C of the OET Act. Resultantly, it is said that provision under Section 9C(5) is not attracted to the case in hand at all.

The assessment under Section 9C with the allegation of excess calculation of tax is not covered any express provision under the ET Act, however, this can be gathered from the provision under Section 52 of the OVAT Act. Noteworthy to mention here that Rule-34 of the OET Rules empowered the taxing authority to invoke the provision under the OVAT Act more fully the Sections 52 and 53 of the OVAT Act as it is relatable to case in hand. Section 52 OVAT Act speaks of the majors when there was unauthorised and excess

collection of tax. Sub-section 2 of Section 52 of the OVAT Act also speaks of imposition of penalty but the same is not a must and more over the same cannot be imposed without any opportunity of being heard to the dealer. The provision under Section-53 of the OVAT Act contemplates, excess tax collected by the dealer when realised it should be deposited before the 'Orissa Consumer Welfare Fund'. A careful reading of the provision under the OVAT Act and OET Act with Rules mentioned above, here it is held that, the dealer is not liable to be penalised under Section 9C(5) of the OET Act. It is a fact that, both the authorities below have failed to appreciate the provision under law applicable to the case in hand but the ultimate result derived by the first appellate authority into the deletion of penalty being correct, the same findings is confirmed hereby.

It is not out of place to mention here that the levy of interest by the first appellate authority is found illegal having no sanction under law. But the fact remains, the dealer has not filed any cross appeal or even do not choose to contest this appeal. Hence, no order is passed on this aspect as parties are not at disputed on this issue and the interest so collected in the hands of State Exchequer.

From the discussion above, it is ordered as follows;

The appeal is dismissed as of no merit.

Dictated and Corrected by me,

(Sri Subrat Mohanty)
Judicial Member.

(Sri Subrat Mohanty)
Judicial Member.