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

S.A.No.115(ET) of 2017-18

(From the order of the learned JCCT, Ganjam Range, Berhampur, in Appeal case No.AA.E 03/15-16 dated 31.07.2017)

P r e s e n t: **Shri Subrat Mohanty, Judicial Member.**

M/s.Maa Tara Tarini Traders,
Ganesh Market, Berhampur. ... Appellant

- V e r s u s -

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

For the Appellant ...Mr.B.B.Panda, Advocate.
For the Respondent ...Mr.S.K.Pradhan, Addl. S.C.(CT).

Period of Assessment: 01.04.2007 to 31.03.2011

Date of hearing: 23.09.2019 * * * Date of Order:26.09.2019

O R D E R

This tax appeal is at the instance of the dealer against the confirming order of the first appellate authority questioning the maintainability of the re-assessment and levy of entry tax on dry chilli covered under the generic term 'spices'.

2. The appellant-dealer M/s.Maa Tara Tarini Traders was originally assessed under Section-9C of the OET Act for the tax period 01.04.2007 to

31.03.2011 but in a latter period on the basis of A.G.Audit report the assessment was re-opened as per Section-10 of the OET Act for re-assessment with the allegation that dry chilli purchase by the dealer was left out from the tax liability in the regular assessment. The allegation of the audit team was dry chilli is a scheduled goods as per Entry Serial No.21 of the Part-1 of the schedule exigible to entry tax @1%. Further, the chilli has been enlisted in serial No.3 of List-52 nos spices notified by Spices Board of India, a statutory body for promoting export. So, the dry chilli purchased by the dealer should be levied with entry tax. Learned assessing authority accepted the suggestion of audit team in the re-assessment proceeding and finally, discarding the plea of the dealer levied entry tax on purchase of dry chilli to the extent of Rs.1,89,768.00 payable by the dealer. Besides, penalty under Section 12(2) also imposed for Rs.3,79,536.00, thereby totalling the demand raised against the dealer at Rs.5,69,304.00.

3. In appeal before first appellate authority at the instance of the dealer, the demand remained unaffected as the first appellate authority vide impugned order confirmed the levy of tax on purchase of chilli by the dealer.

4. On the above backdrop, the dealer knocked the door of this tribunal with following contentions:

The very initiation of the re-assessment proceeding is not maintainable as it is mechanical acceptance of the A.G. Audit report and nothing but mere a change of opinion by the assessing authority. Further, in identical matter this Tribunal has held the chilli is not a taxable goods at the same time it is also contended that the penalty as imposed by is absolutely not warranted in the case in hand.

5. The appeal is heard with cross objection by the revenue in support of the impugned order stating it to be just and proper. The question arise for consideration before are-

(i) Whether, the re-assessment as per Section-10 of OST Act in the fact and circumstances of the case is not maintainable?

(ii) Whether, the 'dry chilli' would come within the term of spices exigible to entry tax as levied by both the fora below?

(iii) Whether, the penalty as imposed is justified in law, keeping view the fact and circumstances of the case?

Findings:

6. Regarding maintainability of the proceeding, the learned counsel for the dealer argued that the dealer was originally assessed under Section 9C of the OST Act. In the said assessment. Chilli was not treated as scheduled goods but in a latter period on the basis of A.G. Audit report the assessment was mechanical re-opened which is not recognized by the Hon'ble Courts as it controverts statutory requirements under Section-10 of the OET Act. Without disputing the enforceability of the authorities as argued by the learned counsel for the dealer, looking at the case in

hand, it is found that the assessing authority had treated dry chillies not a scheduled goods. Now the question is if it is a mistake in law by not treating the goods as scheduled goods then on detection of such mistake whether assessment can be re-opened? But answer is yes. Yes, because in the original assessment, the assessing authority had swayed by his own opinion mechanically without delving into question in particular, if chilli is a scheduled goods or not? In that event, in a later period when the mistake is defeated the authority can re-conisder its earlier finding that too when specifies provision is there for re-opening of assessment. The term 'any reason' as included in Section-10 of OET Act encompass the situation like one in hand. Hence, it is held that the re-opening is not erroneous.

7. Coming to the nest question i.e. whether chilli is a scheduled goods or not here it only can be said that guiding by ratio laiddown in Ramchandra Ramniwas Vrs. State of Orissa (1970) 26 STC 412 Orissa where it is held that chilli is covered

under the expression spices. If that be spices being a scheduled goods as per Entry Serial No.21 of Part-I of the schedule. The instant dealer is liable to pay tax on it. To repeat it is said that the findings of fora below treating chilli as scheduled goods is correct.

8. The next point raised for decision is whether in the penalty in the case in hand is lawful. According to the dealer the regular assessment the dealer was not found guilty of not paying tax. The dealer has no intention to avoid payment of tax so in absence of bonafiedness in the part of the dealer penalty cannot be attracted.

9. Per contra, leaned Addl. Standing Counsel argued that penalty is a consequence of tax liability under Section 10 of the OET Act. The provision under Section 10(2) speaks for penalty only in an appropriate case i.e. when the escapement is without reasonable cause. Further, the penalty is not mandatory but discretionary as it gathered from the word 'may' contemplated in the provision.

10. In the case in hand, the dealer was originally assessed and the taxing authority found the goods dealt by the dealer is not taxable. In a latter period in the re-assessment proceeding view is changed so when taxing authority is confused what should about the correct interpretation of the entries of the goods in schedule it can definitely be presumed that the dealer has no evil design from paying appropriate tax. There is a bonafied dispute which is finally decided against the dealer. So it can safely be said that the dealer has not paid the tax without reasonable cause if that be I am of the considered view that in the case in hand the penalty is not attracted and to that extent the impugned order need to be modified.

11. In the argument, the learned Counsel for the dealer has submitted that the dealer has already deposited tax . This is a matter subject to scrutiny by the assessing officer.

In the result, it is ordered.

12. The appeal is allowed in part. The dealer is liable to pay tax on dry chilli but nut the penalty. The

impugned order is modified to that extent. Demand be raised accordingly, asking the dealer to pay the balance tax, if any, after adjustment of the tax already deposited.

Dictated and Corrected by me,

(Sri Subrat Mohanty)
Judicial Member.

(Sri Subrat Mohanty)
Judicial Member.