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

S.A. No. 110 (ET) of 2011-12

(Arising out of order of the learned DCST, Bhubaneswar Range, Bhubaneswar, in First Appeal Case No. AA (ET)- 108111011000128/ BHIII/2010-11, disposed of on dt. 30.03.2011)

Present : **Smt. Suchismita Misra**, **Chairman**
Shri Ashok Kumar Panda, 1st Judicial Member
&
Shri Rabindra Ku. Pattnaik, Accounts Member-III

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

- V e r s u s –

M/s. Syndicate Scrap Processing, Plot No. 133, Sector-A, Zone-A, Mancheswar Industrial Estate, Bhubaneswar. . . . Respondent

For the Appellant … Mr. M.S. Raman, Addl. S.C.(CT)
For the Respondent … Mr. P.K. Harichandan, Advocate

Date of hearing: 29.11.2018 **** Date of order: 21.12.2018

O R D E R

This appeal is directed against the order dated 30.03.2011 passed by the Deputy Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar (in short, "first appellate authority") in First Appeal Case No. AA (ET)- 108111011000128/BHIII/2010-11 reducing the assessment passed by the Sales Tax Officer, Bhubaneswar-III Circle, Bhubaneswar (in short, "assessing officer") u/S.9C of the

Odisha Entry Tax Act, 1999 (in short, "OET Act") for the tax period from 01.04.2005 to 31.03.2007.

2. Facts as revealed from the case record are as follows:-

The dealer-assessee carries on business in scheduled goods i.e. iron and plastic scraps from the place situated at Mancheswar Industrial Estate, Bhubaneswar. Basing upon the Audit Visit Report (AVR) in respect of the aforesaid business of the dealer a statutory notice in Form E-30 along with a copy of the AVR was served on the dealer to explain the discrepancies noticed by the Audit Team which consequently revealed non-payment of leviable entry tax on the scheduled goods purchased by him for the tax periods commencing from 01.04.2005 to 31.03.2007. As the dealer could not explain the less payment of entry tax in respect of purchases of scheduled goods within the State of Odisha and out of Odisha during the period from 01.04.2005 to 31.03.2006 and 01.04.2006 to 31.03.2007 before the assessing officer the latter on verification of his books of account determined his tax liability including penalty and interest amounting to `7,36,511.00 for the aforesaid period and sent a demand notice accordingly. Being aggrieved with the aforesaid order of assessing officer, the dealer-assessee preferred an appeal before the first appellate authority challenging the legality and maintainability. The main contention of the dealer-assessee before the first appellate authority was the scraps of iron and plastic being not covered as items subject for levy of entry tax in the Schedule-I and II, he is not liable to pay entry tax on those goods. The assessing officer passed the order

arbitrarily relying on the AVR. It was also asserted on behalf of the dealer-assessee that as per the decision of Hon'ble Apex Court in the case of Tata Engineering and Locomotive Company Ltd. Vs. Municipal Corporation, reported in [1992] 86 STC 363 (SC), sale of goods in course of inter-State trade and commerce and consignment sale are not liable to tax under the OET Act. Learned first appellate authority after scrutinizing the order of assessment and papers available in the audit file found that the dealer had no purchase transaction in course of inter-State trade and commerce. He had transaction of purchases of iron and plastic scraps which are scheduled goods made from registered dealers within the local area and other places outside the local area but within the State. Thus, taking into consideration the statement of the dealer recorded on 18.06.2007 wherein the dealer admitted about his purchase of iron and plastic scraps and the fact that iron and steel includes iron scraps in view of the definitions of 'goods' as envisaged in clause (iv) of Sec. 14 of the CST Act and also the Entry at Sl.No.23 of Part-I of the Schedule of OET Act, learned first appellate authority concluded that both the iron and plastic scraps are taxable items. Then taking into account the purchases of iron and plastic scraps made by the dealer within the local area and outside the local area but within the State in the years 2005-06 and 2006-07 respectively and sale of those goods in course of inter-State trade and commerce as well as for consignment sale he (the first appellate authority) determined the tax liability of the dealer-assessee. While determining the tax liability of the dealer-assessee learned first appellate authority also took note of ratio

of judgment rendered in the case of Tata Engineering and Locomotive Company Ltd. (supra) and the provision contained in Rule 17(3) of the OET Rules which provides :

Quote : "The purchase value of scheduled goods brought inside a local area but sent outside Orissa otherwise than by way of sale shall be deducted while determining the purchase value liable to tax under these rules."

Learned first appellate authority while discussing in detail about the tax liability of the dealer-assessee in the impugned order held that the dealer is required to pay a sum of `52,008.00 only towards his tax liability for the relevant period.

3. The State, however, being not satisfied with this order of first appellate authority came up with this second appeal on the grounds that the order passed by the DCST is unjust, illegal, arbitrary and bad in law because the DCST committed error in allowing inter-State sale of scraps towards deductions from the gross turnover of the dealer which is unjust since in the instant case the dealer had made inter-State sale by purchasing the goods from unregistered dealers. The State-appellant thus urged to remit the matter to assessing officer for fresh assessment in terms of Sec. 3 and 7(5) of the OET Act.

The respondent-dealer filed his cross-objection in this appeal. It is contended by the dealer-assessee that the appeal preferred by the State is neither based on facts and circumstances of the case nor on points of law. It is also contended that learned DCST after verifying the facts on record has allowed deductions towards purchase value of goods

sent outside the State on sale as well as for sale on commission basis which as such do not require any interference by this forum.

4. Learned Addl. Standing Counsel (CT) appearing on behalf of the revenue strenuously argued that the reasons assigned by the first appellate authority for coming to the conclusion as contained in the impugned order are not legally sound and tenable. He further submitted that the decision rendered by the Hon'ble Supreme Court of India which has been cited in this case is under different context with respect to the provisions which are not pari materia with that of the provisions in OET Act and Rules framed thereunder. Identical provisions as found in the judgment in Tata Engineering and Locomotive Company Ltd. Vs. Municipal Corporation, reported in [1992] 86 STC 363 (SC) are absent in the OET Act. Under such circumstances, the order of first appellate authority may not be sustained.

In reply, learned Counsel on behalf of the dealer-assessee pointed out that the appellant has taken the ground that Rule 17(3) of the OET Rules allows deduction only in the case of "branch transfer", and for that deductions relating to inter-State are not to be allowed as the same is not prescribed under the Rules is not correct principle of law. He further submitted that the State Government while making OET Rules, incorporated the Rule 17(3) to clarify that levy of tax on "branch transfer" will also not be permissible u/S. 3 of the OET Act. In other words, as u/S. 3 of the OET Act the words "sale therein" are available, as such there may be confusion in respect of claim relating to

"branch transfer" for which the State Government clarified the same u/R. 17(3) of the OET Rules.

5. The next point of argument as advanced by the learned Counsel for the dealer-assessee is that the contentions of the appellant are found to be contradictory since it has been alleged that at the time of procurement of goods the dealer has to pre-identify the goods which are to be taken outside the State and only then the dealer can avail the deduction on inter-State sale but the deduction allowed in the case of branch transfer the dealer-assessee has not raised any such objection. On the contrary, learned Addl. Standing Counsel (CT) draws the attention of this forum that there is no contention and/or averment or iota of evidence available on record to the effect that goods at the time of their entry into local area were pre-identified/destined to be taken outside State of Odisha. Sec. 3(2) makes the present dealer liable to pay entry tax, who "brings or causes to be brought into a local area" scheduled goods "whether on his own account or on account of his principal or customer or takes delivery or is entitled to take delivery of such goods on such entry". After taking delivery of the goods within the local area which attracted levy and liability to pay entry tax by virtue of operation of Sec. 3(1) and Sec. 3(2) read with Sec. 2(d) of the OET Act.

Learned Counsel for the dealer, on the other hand, contended that Entry 92B (List-I of Schedule VII) specifically covers the domain of taxes on consignment of goods (whether the consignment is to the person making it or to any other person) where such consignment

takes place in the course of inter-State trade or commerce. Hence, in view of Entry 92B of the Union List there can be no entry tax imposed on the movement of goods outside State of Odisha as only the Union has the power to levy tax on said inter-State movement/sale under the provisions of Entry 92B. He further contended that the levy created u/S.3 of the OET Act on the sales effected within a local area is confined only to those sales of goods which are meant for consumption or use within such local area. In other words, where the goods sold are not identified for use or consumption within the local area but are meant to be taken out of the area for use or consumption else where, no levy is permissible under the Act. Section 3 of the OET Act as well as the settled principle of law specified not to levy the tax on inter-State sale and for the same no specific rule is required under the OET Rules to allow deduction when the Act provides not to levy tax on inter-State sale. We, therefore, found some force in the submission of learned Counsel appearing for the respondent.

6. Now the question arises relating to levy of interest u/S. 7(5) of the OET Act. The dealer-assessee having effected purchase from outside the local area did not discharge its liability to pay entry tax on the spacious plea that on subsequent sale they have been sent outside the State of Odisha. The assessing officer in order to levy interest had invoked provisions contained in Sec. 7(5) which unequivocally spell out that failure to pay tax as per return would attract levy of interest. On the facts and in the circumstances, the dealer-assessee knew from the very beginning that

it has not complied with the statutory requirement as narrated above. Since the dealer-assessee has not disclosed in its return properly, the assessing officer was justified in levying interest u/S. 7(5) of the OET Act.

Since the dealer had not deposited the tax component in full even though the turnover has been disclosed in its returns, it is liable to compensate the State. "Interest" means the compensation allowed by law or fixed on by the parties for use or forbearance for borrowed money. It is held by the Hon'ble High Court of Orissa in the case of Nailikanta Muduli Vs. Bhubaneswar Development Authority, reported in 2008 (II) OLR 18 (Ori.), that when the legitimate due of the exchequer was enjoyed since long by the dealer, it is liable to pay interest. It has been strictly laid down by the Hon'ble Apex Court in the cases of Hajilal Mohd. Biri Works Vs. State of U.P., reported in [1973] 32 STC 496 (SC); STO Vs. Dwarika Prasad Seo Karan Das, reported in [1977] 39 STC 36 (SC); Commissioner of Trade Tax Vs. Kanhai Ram Thekedav, reported in [2005] 141 STC 1 (SC), that the liability to pay interest is automatic and arises by operation of law. A dealer shall have to deposit the tax admittedly payable within the time prescribed under the statute. If he fails to do so, interest becomes payable. This levy of interest is done by operation of law. It does not require a separate order as such by any authority in view of decision of the Hon'ble Apex Court rendered in the case of Commissioner of Sales Tax Vs. Qureshi Crucible Centre, reported in (1993) 89 STC 467 (SC). In view of the discussions made herein above, we are of the view that the

first appellate authority has committed illegality in deleting the interest as computed by the assessing officer.

7. Therefore, as discussed in the foregoing paragraphs, the grounds advanced by the Revenue relating to determination of purchase value of scheduled goods which sent outside the State against inter-State sale and branch transfer are found to be devoid of merit. However, the ground advanced in respect of levy of interest in terms of Sec. 7(5) of the OET Act is found to be quite sound as per the requirement of law. Therefore, the same is accepted.

8. The appeal is allowed in part and the impugned order is modified accordingly. The matter is remitted back to the assessing authority to compute the tax liability of the dealer keeping in view the observations made herein above. Cross-objection is disposed of accordingly.

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

Sd/-
(Ashok Kumar Panda)
1st Judicial Member

I agree,

Sd/-
(Rabindra Ku. Pattnaik)
Accounts Member-III