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

S.A.No.156(ET) of 2016-17

(From the order of the learned JCCT, Balasore Range, Balasore in Appeal No.AA.44/BA-2015-16 (ET), dated 31.10.2016)

P r e s e n t: **Shri Subrat Mohanty, 1st. Judicial Member.**

M/s.Bio Tech Ayur Pvt Ltd.,
Mankhani, Khantapada. ... Appellant

- V e r s u s -

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

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

Period of Assessment: 01.04.2012 to 31.03.2014

Date of hearing: 06.09.2019 * * * Date of Order:06.09.2019

O R D E R

The un-successful dealer before both the fora below as appellant has challenged the order of the First Appellate Authority in an assessment under Section 9(C) of the OET Act raising demand of tax and penalty to the tune of Rs.2,47,857.00 for the tax period 01.04.2012 to 31.03.2014.

2. Appellant, a registered dealer engaged in business of manufacturing and sale of herbal extracts from natural resources. On the basis of audit visit report with the allegation of non-inclusion of freight in the purchase value the dealer was assessed under Section 9C of the OET Act. The assessing officer added freight at 5% to the purchase price shown by the dealer to determine the GTO in accordance to the provision under Section 2(j) of the OET Act, as a result, an amount of

Rs.1,28,26,619.00 was added towards freight and then the tax liability was calculated at Rs.83,975.00 besides, penalty under Section 9(C)5 of Rs.1,67,950.00 was also imposed thereby in total Rs.2,51,925.00 was raised as demand.

3. Being aggrieved, the dealer challenged the order before the first appellate authority. Learned JCST, Balasore Range as the first appellate authority vide impugned order confirmed the findings of the assessing authority regarding addition of freight @5% but found there was some calculation mistake. Accordingly, on rectification of the calculation of mistake the tax liability became reduced to Rs.82,619.00. In addition to that the penalty of Rs.1,65,238.00 was imposed thereby, the total demand became re-calculated at Rs.2,47,857.00.

4. When the matter stood thus, the dealer has preferred this second appeal with contentions like imposition of tax @2% against the glass wire is not sustainable in law, the determination of GTO, TTO and freight are whimsical. It is also contended that the levy of penalty in this case is uncalled for.

5. The appeal is heard with cross objection from the revenue, the revenue has supported the finding of the first appellate authority and further prayed for imposition of interest.

The question framed for decision in this appeal are:-

(i) Whether the determination of TTO in addition of freight at 5% is not sustainable?

(ii) Whether the penalty as imposed is uncalled for?

(iii) Whether the rate of tax as levied is erroneous?

(iv) What Order:-

All the issue question above are answer in negative for the reasons here in below:

Law is well settled in view of the provision of Section 2(j) of the OET Act, the purchase value must include the freight charges, the provision reads as follows:

Section 2(J) of the OET Act:

> " **PURCHASE VALUE**" means the value of scheduled goods as ascertained from original invoice or bill and includes insurance charges, excise duties, countervailing charges, sales tax, value added tax or, as the case may be, turnover tax transport charges, freight charges and all other charges incidental to the purchase of such goods:
>
> Provided that where purchase value of any scheduled goods is not ascertainable on account of non-availability or non-production of the original invoice or bill or when the invoice or bill produced is proved to be false or if the scheduled goods are required or obtained otherwise than by way of purchase, then the purchase value shall be the value or the price at which the scheduled goods of like kind or quality is sold or is capable of being sold in open market."

In view of the mandate of provision above adverting to the case in hand, it is found that the dealer has admittedly not paid freight. The claim of the dealer all through is, freight should have been calculated at 2% whereas, it is found that the assessing authority has added freight at 5%. The orders of both the fora below do not reveal what is the basis to calculate the freight at 5%. As per the first appellate authority freight at 5% is reasonable. On the other hand, the dealer though claimed that freight should have been calculated at 2% but has not adduced any evidence documentary or oral to form a basis of calculation of freight. In absence of any plea that the authority has acted whimsically or arbitrarily and in absence of any rebuttal evidence, mere basing on saying that the freight should have been 2%, the dealer has treated as not discharged the financial burden rest on him if that is, the irresistible conclusion is the findings of fact findings authorities of both the fora below should not be interfered with by this Tribunal. Law is well-settled that a finding on best judgment principle by one authority cannot be replaced or rejected by higher authority without any basis. Thus, in the case in hand, it is held that the determination of percentage of freight is just and proper.

6. Further, it is made clear that the amount of freight as added to the purchase turnover in the assessment under OET Act is might have been a question raised by the dealer in VAT appeal. No intimation about VAT appeal given to the bench. Still, for the ends of justice it is stated that, in the event of any VAT appeal and decision thereon regarding freight contrary to the findings in this appeal will prevail upon this order only when the VAT appeal is already decided prior to this order.

7. So far as the imposition of tax @2% on glass wares instead of 1% as claimed by the dealer, it only can be said that, this plea is a new plea taken in this second appellate stage without any basis. This being a question of fact raised without any evidence is necessarily decided in negative to the dealer.

Again coming to the question of penalty as imposed as per Section 9(C)5 of the OET Act, law is no more res-integra on this issue that in an audit assessment whenever there is liability of tax to be paid on the part of the dealer determined in audit assessment, penalty is a necessary mandatory consequence i.e. to the extent of twice of the tax due. The dealer has failed to adduce any bonafide reason to take a departure from the findings of imposition of penalty in the case in hand in a particular. Hence, it is held that, the penalty as imposed is also not uncalled for.

8. All these issues have answered above the dealer is found not entitled to any other or further relief.

Accordingly, it is ordered.

The appeal is dismissed on contest as of no merit.

Dictated and Corrected by me,

(Subrat Mohanty)
Judicial Member-I

(Subrat Mohanty)
Judicial Member-I