



and other ancillary charges, which is part of purchase price and non-payment of entry tax on purchase of scheduled goods worth Rs.3,42,85,411.00 effected from unregistered dealers inside the State. The ld. assessing authority adding 5% of the purchase price as freight and other ancillary charges to the purchase value of scheduled goods worth Rs.3,24,52,280.00 from outside the State and bringing the turnover of purchases of scheduled goods from unregistered dealers inside the State to the tune of Rs.3,42,85,411.00 has assessed the dealer-appellant raising demand of Rs.10,97,718.00 including penalty of Rs.7,31,812.00 imposed u/s. 9C(5) of the OET Act.

3. Being aggrieved the dealer preferred appeal before the ld. first appellate authority contending that penalty should not have been levied for the appellant has already deposited under protest an amount of Rs.3,85,000.00 before receipt of assessment order and estimation of freight charges @5% on the high valued items is too much for no freight charges were collected by the sellers and delivery of goods were made at the dealer-appellant's site. The first appellate authority has reduced the enhancement made towards freight and ancillary charges from 5% to 3% considering the same as quite reasonable. Besides, the ld. first appellate authority has allowed deduction of tax of Rs.3,85,245.00 paid by the instant dealer after issue of notice for audit visit which resulted in reduction of demand from Rs.10,97,718.00 to Rs.6,75,924.00.

3. Being further aggrieved, the dealer has approached this Tribunal on the following grounds:-

(i) The appellate is a works contractor who has purchased Scheduled goods from outside the State & mostly machineries which are of high value more than ten lakh and charging of freight @5% or even 3% is too much since freight is chargeable in distance & not on value and hence addition of 3% of value as freight is too much E.T. has also been charged @ 3% on goods purchased locally from unregistered dealers is also too much since most of the goods locally purchased from unregistered dealers as Bricks, Sand, Chips which the supplies give

door delivery & charging of freight thereon adding 3% on value is unwarranted.

(ii) There are certain purchases from outside the State for which freight is borne by the supplier & addition of 3% freight thereon is unwarranted & not sustainable.

(iii) The levy of penalty U/s. 9C(5) is also unwarranted since the appellant has paid a sum of Rs.2,85,245.00 before receipt of Assessment order for which the learned appellate authority should reduce penalty U/s. 9C(5) of OET Act.

4. The respondent State has filed cross objection stating the order of the ld. first appellate authority as based on the statutory provisions under the Act and Rules with regards to the points raised by the dealer-appellant hence requires no further interference.

5. Shri A.K. Agarwal, Ld. Counsel appearing for the dealer-appellant filed a written submission enclosing photocopies of 3 tax invoices raised by the selling dealer M/s. Telco Construction Equipment Company Limited., Kharagpur. He also submitted that should be no addition of 3% towards freight charges for the purchases of machinery, freight charges has been paid and borne by the supplier and levy of entry tax on purchase inside the State from local area like chips, sand and bricks is unwarranted and penalty u/s. 9 C(5) of the OET Act should not have been levied on tax paid before assessment amounting to Rs.3,85,245.00.

6. Per contra, Shri M.L. Agarwal, Ld. Standing Counsel (C.T.) appearing for the Revenue in terms of cross objection filed, supports the imposition of penalty by the first appellate authority to be proper and lawful with the argument that imposition of penalty u/s. 9C(5) of the OET Act is mandatory in nature and hence there is no discretion left with the ld. First appellate authority to delete the same as the tax was paid after issue of notice for audit visit.

In the instant case, there is no dispute that the dealer appellant has deposited tax of Rs.3,85,245.00 after issue of notice for audit visit but before passing of assessment order. The ld.

Counsel could not adduce a single evidence in support of the claimed ground that scheduled goods like chips, sand and bricks are purchased from local area hence not exigible to entry tax. There is no evidence available in assessment record including audit visit report and the first appeal record that the instant dealer has effected purchase of the aforesaid goods from unregistered dealers inside the State from local area. Hence the levy of tax on purchase of scheduled goods from unregistered dealers inside the State are exigible to entry tax as per the OET Act. The ld. Counsel could not indicate payment /non-payment of freight charges for which photocopies are submitted at the time of hearing. He also failed to adduce any evidence in connection with the fact that the freight has been paid/borne by the selling dealers/suppliers of scheduled goods. Hence the contentions of the ld. Counsel on behalf of the dealer-appellant against adoption of 3% towards freight charges to arrive at purchase value of schedule goods and levy of tax on purchase value of the scheduled goods viz. chips, bricks and sand etc are considered reasonable and proper requiring no interference. The ld. assessing authority had not taken into consideration the payment of Rs.3,85,245.00 in the assessment order passed. The ld. first appellate authority has allowed payment of tax of Rs.3,85,245.00 after imposing penalty of Rs.7,07,446.00 against penalty of Rs.7,31,812.00 imposed by the ld. assessing authority u/s. 9C(5) of the OET Act. As per first appeal order against the tax due of Rs.9,70,309.00, the tax paid including tax paid after audit amount comes to Rs.10,01,831.00.

7. Considered the rival contentions. Gone through the grounds of appeal, impugned orders of the fora below, cross objection filed by the respondent, the records of assessment and appeal and the written submission filed by the dealer-appellant at the time of hearing of appeal before the Bench. Under the facts and circumstances of the case we find considerable force in the contention raised by the ld. Counsel on behalf of the dealer that the levy of penalty u/s. 9C(5) of the OET Act by the authorities below without considering the tax paid

before assessment order is passed is not sustainable in law. As such penalty imposed u/s. 9 C(5) of the OET Act is deleted.

8. In the result, the appeal is, therefore, partly allowed. The impugned order is hereby modified to the extent of deletion of penalty imposed u/s. 9 C(5) of the OET Act only. The remaining findings of the ld. first appellate authorities are upheld. The cross objection is disposed of accordingly.

Dictated and Corrected by me.

**(P.C. Pathy)**  
**Accounts Member-I**

**(P.C. Pathy)**  
**Accounts Member-I**

**I agree,**

**(A. K. Panda)**  
**Judicial Member-I**