BEFORE THE ODISHA SALES TAX TRIBUNAL (FULL BENCH), CUTTACK

S.A.No. 02 & 03(ET)/2012-13

(From the order of the ld.Addl.CST, (Revenue), Orissa, Cuttack, in Appeal No. AA-266 & 268/ACST/Assmnt./BBSR/2007-08, dtd.20.06.2011 modifying the assessment order of the Assessing Officer)

P R E S E N T :

Smt.Suchismita Misra Chairman **Sri S. Mohanty Judicial Member-II** **& Sri R.K. Pattnaik Accounts member-III**

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

-Versus –

M/s. Lafarge India Pvt.Ltd., N-6/514, IRC Village, Jaydev Vihar, Bhubaneswar. ... Respondent

Appearance :

For the Appellant ... Mr. M.S. Raman, A.S.C. (C.T.)
For the Respondent ... Mr. S.R. Sharma, Advocate

(Assessment Period : 2003-04 & 2004-05)

Date of Hearing: 06.03.2019 *** Date of Order: 11.03.2019

ORDER

Sustainability of the order of the learned FAA/Addl.CST deleting thereby the tax liability levied by the Assessing Authority (Entry Tax), Bhubaneswar Range, Bhubaneswar (in short, AA) in assessment u/s.9-C of the Odisha Entry Tax Act, 1999 (in short, OET Act) relating to two successive assessment periods decided by a common order dtd.20.06.2011, is called in question in this second appeal by the Revenue.

2. The relevant facts giving rise to this appeal in hand may be succinctly narrated as follows:

The dealer M/s. Lafrage India, a registered TIN dealer was assessed u/s.9-C of the OET Act for the assessment period 2003-04 and 2004-05. Basing on the admitted fact that, the dealer had received goods/cement such as, goods are brought into local area otherwise than by way of purchase, the dealer brought cement from out of State into local area as branch transfer, the assessing authority applied proviso appended to Sec.2(j) of the OET Act for determination of purchase value for the purpose of levy of Entry Tax. In appeals, at the instance of the dealer, the FAA reversed the findings by accepting the claim of the dealer that, the purchase value should have determined as per the basic price of goods added with excise duty, education cess, higher education cess, cement cess and freight charges from the factory to the destination inside the State and, accordingly, he deleted the tax liability imposed by the AA.

3. Being aggrieved, with the mode of calculation of purchase price adopted by the FAA in the impugned order, Revenue preferred this appeal. The contention of the Revenue is, the goods were brought into local area by the dealer not by way of purchase, but otherwise, i.e. by way of branch transfer. So, while determining the purchase value, the second part of the proviso to Sec.2(j) of the OET Act is applicable and to that effect, the FAA has committed wrong in accepting the calculation of the dealer.

4. The appeals are heard with cross objection from the side of the dealer contending *inter alia,* the determination of purchase value as per the FAA, such as, the ex-factory price added with, the basic price, excise duty, cess, education cess and transportation charges as the purchase value is now settled by many pronouncements of this Tribunal as well as the Hon'ble Court of Madhya Pradesh.

5. The moot question raised for decision is, what should be the purchase value of the cement/goods dealt by the dealer in the case in hand and if the FAA has committed wrong in interpretation and application of the provision under law while determining the purchase value?

6. At the outset, it is pertinent to mention here that, the facts remained undisputed are; the dealer is a trader of cement. It has brought cement from out of Odisha into local area on branch transfer basis. The dealer has filed return showing the purchase value as the sum total of basic price, excise duty, cess, education cess and transportation charges. The AA, held the dealer guilty of under-assessment with the findings that, since the goods are brought into local area not by way of purchase but otherwise i.e. by way of branch transfer, the proviso appended to the Sec.2(j) of the OET Act is applicable and as per the proviso, the dealer is to calculate the purchase value, as the value or price at which the goods are sold or capable of being sold. Conversely, the FAA reversed the order of the AA and accepted the mode of calculation as claimed by the dealer and deleted the tax due calculated by AA.

7. Learned Addl. Standing Counsel, Mr. Raman vehemently argued that, the dealer is not a purchaser of goods. So, purchase price is to be determined on the sale value as it is contemplated under the statute. In support of his argument, he placed reliance on decisions of this Tribunal and the Hon'ble Court deciding the matter involving identical issues but relating to other dealers in (i) S.A.No. 315 (ET) of 2005-06 vide Order dtd.20.06.2014 (Division Bench) (ii) S.A.No. 161(ET) of 2009-10 vide Order dtd.25.08.2014 (Division Bench) (iii) S.A.No. 169 & 170(ET) of 2009-10 vide Order dtd.27.11.2017 (Full Bench).

8. ***Per contra,*** countering the argument of the learned Addl. Standing Counsel learned Counsel for the dealer,

advanced decisions of this Tribunal, the order of CCT in revision and the decisions of the Hon'ble Court of Madhya Pradesh in the case of **CST -Vrs.- Gujarat Steel Tubes (Indore) (2004) 4 STJ 279** and **Commissioner of Sales Tax, M.P. –Vrs.- Hindustan Steel Ltd., Gowalior (1996) Vol.21 VKM 320.**

Learned Counsel strenuously argued that, on two occasions, the Division Bench of this Tribunal by its order relating to the present dealer decided the self-same issue. Here, in the impugned order, the FAA has, only followed the principle settled by the Division Bench above. It is the Commissioner of Commercial Tax also took the same view in Revision No. SU-198/2013-14/dtd.17.04.2017. So, to maintain consistency in one and the provision under law as correctly interpreted and applied by the Division Bench or by the Commissioner in the identical matters relating to the same dealer, on the other, no separate view is legally sustainable. Learned Counsel further argued that, when the Commissioner himself has decided the same issue in favour of the dealer, then he cannot take a different view for the same dealer and prefer appeal.

9. To appreciate the facts in issue and relevant provision under law, it is incumbent upon us to look into the orders passed by this Tribunal, Commissioner, Hon'ble Court and the persuasive value of the decision of the Hon'ble Court of M.P. relied by the dealer. In S.A.No.264/2007-08,vide Order dtd.26.12.2013 and in S.A.No. 185/2009-10,vide Order dtd.06.03.2012, the Division Bench of this Tribunal has taken a view in favour of the dealer's mode of calculation. While arriving at such conclusion, the Division Bench relied on the authority of the Hon'ble M.P. High Court in the case of **CST Vrs. Gujarat Steel Tubes** and **Commissioner of Sales Tax, M.P. –Vrs.- Hindustan Steel Ltd.** (supra). Similarly, the

Commissioner of Commercial Tax vide its Order dtd.28.11.2013 in Revision No. SU-198/2013-14/dtd.17.04.2017, adopted the same mode for calculation of purchase value. The Commissioner was guided by the decision of the Tribunal in two numbers of Second Appeal above. On the other hand, the Hon'ble High Court of Orissa vide STREV No.19/2012, Order dtd.17.04.2012, ordered for stay of the operation of the order in S.A.No.185(ET)/2009-10. However, the order in S.A.No.264/2007-2008 above is remained unchallenged by Revenue.

10. As against the above set of decisions, learned Addl. Standing Counsel advanced another set of decisions of this Tribunal passed by Division Bench i.e. in S.A.No.161(ET)/2009-10 decided on 25.08.2014 and in S.A.No.315(ET)/2005-06 decided on 20.06.2014.

11. Perusal of the above two orders of Division Bench, it reveals the Division Bench at a later period has taken note of the decisions of Division Bench at earlier time and the decisions of the Hon'ble Court of M.P. relied by the dealer, but finally took a contrary view in the determination of purchase value such as sale value. The Division Bench decisions relates to identical issues but of different dealers. 'Judicial Precedent' means a judgment of a Court of law cited as an authority for deciding similar set of facts, a case which serves as authority for the legal principle embodied in its decision. Judicial precedent says, when the earlier decision is considered and then, distinguished, in that case, the later decision will have binding effect. At the same time, the law of precedent also says, when the decision of a Division Bench became conflicting with the decision of another Division Bench, there, the matter should be referred to the larger Bench. It is based on sound principle of the judicial norm to be followed by

any Tribunal or Court. However , it is a common experience in this Tribunal that, the AA, FAA, the revisional authority like Commissioner or the second appellate authority like this Tribunal track decisions contrary to each other on similar matters at different times, which is against the judicial norm.

12. Law of *res judicata* has no application to the taxation matter and this is well settled by the Apex Court time to time. Similarly, it is well settled that, there is no estoppels against the statute as held by Apex Court on many occasions. Similarly, it is not disputed that, the orders of the Commissioner or Division Bench is not binding on Full Bench. It is a fact that, Commissioner himself has taken a view in the revision above but at the same time, as appellant, raised the self-same issue for decision here in this Tribunal.

On the above backdrop, it is necessary to give a fresh look into the relevant provision under the Act, its interpretation and applicability into the case in hand when the goods are brought into the local area by way of branch transfer.

13. Learned Advocate for the dealer placed reliance on two of the decisions of the Hon'ble Court of Madhya Pradesh i.e. in **CST Vrs. Gujarat Steel Tubes** and **Commissioner of Sales Tax, M.P. –Vrs.- Hindustan Steel Ltd.** (supra). In both these decisions, the Hon'ble Court has held that, entry tax is to be levied on entry of goods and not on its sale. If sale price is taken as the basis, then it will not remain entry tax on entry of goods, because the sales depend upon the time when the goods are sold. If the goods are sold after six months by that time the price may go or go down, then on what price the entry tax will be charged. Therefore, the sale price cannot be the basis of taxation". He draws the attention of the Bench to the relevant provision under Madhya Pradesh Entry Tax Act. Provision u/s.2(l) of the Madhya Pradesh Entry Tax Act, reads as follows :

> 2(l) **"Value of goods"** in relation to a dealer or any person who has effected entry of goods into a local area shall mean the purchase price of such goods as defined in [clause (s) of Section 2 of the VAT Act] [and shall include excise duty and/or additional excise duty and/or customs duty, if levied under the Central Excise and Salt Act, 1944 (No.1 of 1944), the Additional duties of Excise (Goods of Special Importance) Act, 1957 (No.58 of 1957) or the Customs Act, 1962 (No.52 of 1962), as the case may be,] or the market value of such goods if they have been acquired or obtained otherwise than by way of purchase;]

Taking cue from the definition of the value of goods as above, the Hon'ble Court of Madhya Pradesh has laid down the ratio that, the purchase price never can be the sale price. Argument of the learned Counsel for the dealer is, the definition of purchase price under OET Act is akin to the definition of value of goods under Madhya Pradesh Entry Tax Act as above.

It is pertinent to mention here that, the Division Bench of this Tribunal, relied by the dealer adopted the ratio decided by the Hon'ble Madhya Pradesh High Court mentioned above.

On the other hand, learned Addl. Standing Counsel, Mr. Raman advanced the definition of "purchase value" as per OET Act and the Andhra Pradesh Act. The provision u/s.2(n) of the Andhra Pradesh Tax on entry of motor vehicle into Local Area Act, 1996 reads as follows :

> "2(n) 'purchase value' means the value of a motor vehicle, as ascertained from the original invoice and includes the value of accessories fitted to the vehicle, insurance, excise duties, countervailing duties, sales tax, transport fee, freight charges and all other charges incidentally levied on the purchase of a motor vehicle;
>
> Provided that, where the purchase value of a motor vehicle is not ascertainable on account of non-availability or non-production of the original invoice or when the invoice produced is proved to be false or if the motor vehicle is acquired or obtained otherwise

> than by way of purchase, then the purchase value shall be the value or price at which a motor vehicle of like kind or quality is sold or is capable of being sold, open market,".

Sec.2(j) of the OET Act reads as follows :

> "(j) "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 schedule goods of like kind or quality is sold or is capable of being sold in open market:"

14. The definition of purchase value as per Sec.2(n) of the Andhra Pradesh Act is almost replica of the definition u/s.2(j) of the OET Act. Under the Madhya Pradesh Entry Tax Act, there is no such proviso as appended to OET Act. The proviso appended to Sec.2(j) of the OET Act makes a difference and it denotes a separate mode of determination of purchase value, if the goods are received otherwise than purchase. In the case in hand, admittedly the goods are received on branch transfer basis. So, it cannot be said that, the goods are purchased. Consequently, while determining the purchase value the proviso appended to Sec.2(j) will necessarily be applicable.

Consequently, we are of the view that, the purchase price is to be determined in accordance to Sec.2(j) of the OET Act for the goods, which are not purchased but

brought into the local area otherwise. Then, in that event, the purchase value for the purpose of tax liability under Entry Tax Act shall be the value or price at which the schedule goods of like, kind or quality sold or is capable of being sold in the open market. The price at which the goods is sold or is capable of being sold can obviously mean only the price at which the goods are actually sold in the market but not any tentative or whimsically estimated price. In the wake of above, we are of the view that, in the case in hand, the price at which the cement are sold by the dealer after availing all kinds of discounts or concessions, is to be treated as purchase value for the purpose of determination of entry tax as per Sec.2(j) of the OET Act.

From the discussion above, we can summarise the final outcome as follows :

(i) The definition value of goods as per Sec.2(l) of the M.P. Act is not akin to Sec.2(j) of the OET Act.

(ii) Rather, the definition under Section 2(j) of the OET Act is found similar of Sec.2(n) of the A.P. Act.

(iii) The goods/cement brought into local area by the dealer by way of branch transfer is other than by way of purchase. In consequence thereof, in adherence to the definition u/s.2(j) provision of the OET Act should be levied on sale value.

(iv) Sale value can't be tentative but the actual sale value to be determined from the return and liability under VAT by the dealer.

The findings above, prompt us to reach at a conclusion that, the matter should be remitted back to the AA for computation of Entry Tax liability in the light of observation above. Hence, ordered.

The appeals are allowed on contest. The matter is remitted back to AA to raise demand on re-computation of tax liability as directed above.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

Sd/-
(S. Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

Sd/-
(R.K. Pattnaik)
Accounts Member-III