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

S.A.No. 148(ET)/2011-12

(From the order of the ld.DCST (Appeal), Bhubaneswar Range, Bhubaneswar, in Appeal No. AA-(ET)70/108111011000137/BHII/10-11, dtd.29.08.2011 confirming the assessment order of the Assessing Officer)

P R E S E N T :

Smt. Suchismita Misra Sri S. Mohanty & Sri R.K. Rout
Chairman Judicial Member-II Accounts Member-II

Reliance Telecom Ltd.,
6th Floor, Fortune Tower,
Chandrasekharpur,
Bhubaneswar. ... Appellant

-Versus –

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

Appearance :
For the Appellant ... Mr. P.K. Harichandan, Advocate
For the Respondent ... Mr. S.K. Pradhan, A.S.C. (CT)

(Assessment Period : 12/07 to 09/2009)

Date of Hearing: 28.02.2019 *** Date of Order: 01.03.2019

ORDER

The legal sustainability of the order passed by the learned First Appellate Authority/Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (in short, FAA/DCST) confirming thereby the tax demand notice raised by the Sales Tax Officer/Assessing Authority, Bhubaneswar-II Circle, Bhubaneswar (in short, AA/STO) through notice in Form 'E-24' and Form 'E-8', is under challenge by the dealer in this appeal.

2. To appreciate the facts relevant for the purpose of this appeal, it may be stated as follows :

The dealer is a Limited Company having it's office within the State of Odisha deals with cellular mobile, telephonic service to the subscribers. For the assessment period 12/2007 to 09/2009, the dealer had filed return without admitting or paying entry tax on the goods brought into local area from out of State, which were not produced in the State. The AA on scrutiny of the return of the dealer, served notice in Form E-24 and then raised demand of tax with penalty and interest, treating the dealer as defaulter in paying admitted tax attracting liability u/r.10(6)(b) of the OST Act.

3. The dealer being aggrieved with such unilateral demand knocked the door of the FAA with a plea like, it had challenged the constitutional validity of the Odisha Entry Tax Act before the Hon'ble Court vide W.P.(C) No.2822/2007 wherein and whereby the Hon'ble Court vide Order dtd.19.02.2008 adopted the order passed by the court on the previous day i.e. 18.02.2008 in a batch of cases vide W.P.(C) No.6515/2006 to 17533/2007 deciding the identical issues. The dealer's contention was, as the Hon'ble Court has held in it's order dtd.18.02.2008 in W.P.(C) No.2822/2007 that the goods brought into local area were not produced in Odisha are not exigible to entry tax and the same finding was deemed to have passed in dealer's writ application disposed of on 19.02.2008 and as because the said order in dealer's writ application was not challenged by the Revenue in higher forum, the order reached its finality. So levy of entry tax on dealer is violation of the Hon'ble Courts order in dealer's writ application above, which is illegal. The above plea of the dealer was not accepted by the FAA with the findings that, the orders of the Hon'ble Court in batch of cases decided in W.P.(C) No.6515/2006 to 17533/2007, dtd.18.02.2007 was challenged before the Hon'ble Supreme Court and the Hon'ble

Supreme Court in a later period, reversed the findings of the Hon'ble High Court to the extent that, the goods not produced in the State, brought into local area are exigible to entry tax. So, the demand notice to the dealer by the STO is valid and enforceable.

4. Felt aggrieved by the aforesaid order of the FAA, the dealer preferred the present appeal with the following contentions :

Since the order of the Hon'ble Court relates to dealer's writ application was not challenged by the State, the order of the Hon'ble Court holds good and binding on the taxing authority. So, the dealer is not liable to pay any tax. Further, the unilateral act of the taxing authority by issuing notices under E-24 and E-28 is violative of the statutory obligations. Hence, the dealer is not liable to pay as demanded.

5. The appeal is heard with cross objection from the side of the Revenue contending *inter alia,* the validity of the levy of tax on the goods which are not produced in the State under the Entry Tax Act is in accordance to the decision of the Apex Court and the Hon'ble Court. So the demand notice by the Department is enforceable.

6. The rival contentions above raises following questions for decision in this appeal, (i) Whether the FAA has committed wrong in upholding the notices and demand of tax from the dealer? (ii) Whether the FAA has committed wrong in confirming the action of the STO declining the plea of the dealer that, there was violation of principle of natural justice by not giving the dealer an opportunity of being heard ? (iii) Whether the FAA has committed illegality by not discharging the dealer from the tax liability in view of the binding nature of the order passed in the W.P.(C) No.2822/2007 dtd.19.02.2008 and (iv) What order?

7. To determine the questions framed above, the backdrop of the case relating to validity of the entry tax on the entry of

goods into the local area, which are not produced in the State are necessary. Admittedly, by filing writ applications in batches, many dealers of the stat had challenged the constitutional validity of the Odisha Entry Tax Act and the authority of the State to levy entry tax on the goods, which are not produced in Odisha before the Hon'ble Court. The Hon'ble Court while upholding the validity of the Entry Tax Act held that, the State authority cannot impose Entry Tax on such goods, which are not produced in Odisha. This view of the Hon'ble Court was challenged in SLP before the Apex Court of the land. In the said SLP, the Apex Court passed interim orders time to time. At first instance, the order of the High Court was stayed and then in a later period by another order, direction to stay realisation of the tax liability on deposit of 30 per centum of the tax due was passed, but finally, while disposing the SLP, the Apex Court has decided the matter in favour of the State. Consequent upon the above view of the apex court, the Hon'ble Court has held that, the dealer is liable to pay entry tax on such goods, which are not produced in Odisha.

When these developments relating to the validity of act and tax liability were taking place before the court of law, many dealers had deposited 30% of tax due and waited for the final result in the SLP. Many dealers who are not parties before the Supreme court have opted the same principle and on the other hand the taxing authority also found accepted 30% deposit in some cases. Whereas, in some cases it is found, they have proceeded in raising demand, who are not parties before the Supreme Court.

In the case in hand, the dealer had preferred a separate W.P.(C) bearing No.2822/2007 which was disposed of on 19.02.2008 adopting the same view taken by the Hon'ble Court vide it's order dtd.18.02.2008. (The details of the order will be produced later for better appreciation.)

As against the order of the Hon'ble Court dtd.18.02.2008, State had preferred SLP. But the order dtd.19.02.2008 relating to the dealer's writ application in particular was not challenged by the State. On the other hand, at a later period, on the strength of order of the Hon'ble Supreme Court in batch of cases, the taxing authority proceeded against this dealer, as if the instant dealer's case was not under sub-judice before the Court of law. Here, the taxing authority proceeded with the realisation of the tax amount treating the dealer as not a party before the Supreme Court and not eligible to concession temporarily allowed by Apex Court.

Now such being the undisputed facts, at the outset, it can be said that, the taxing authority has committed wrong in ignoring the order of the Hon'ble Court in dealer's writ application mentioned above, as it had not lost its binding force because of the fact of pendency of SLP before Apex Court. It is also apt to mention here that, the interim order passed by the Apex Court for realisation of tax up to 30% are not having any overriding effect on the order in dealers appeal, since the dealer's writ application is covered by a separate order of the Hon'ble Court which was not challenged by the revenue. But at the same time, it is unsafe to hold that, Para 30 of the order in W.P.(C) No.6515/2006 to 17533/2007 dt.18.02.2008 of the Hon'ble Court deciding the question in favour of the dealer like the tax liability is not there on the entry of goods, which are not produced in the State has reached its finality in between revenue and instant dealer. It is incumbent upon us to read orders in both the writ applications conjointly. The order in W.P.(C) No. 6515/06 to 17533/07 dtd.18.02.2008, Para-30 is reproduced here for better appreciation :

> "30. The State has taken the plea that the Orissa Entry Tax Act has been enacted under clause (a) of article 304 of the Constitution. Therefore, as discussed above, no tax can be imposed on those goods imported from outside the

> State which are not manufactured or produced in the State of Orissa. However, we do not find any discrimination in the provisions of the Act between the goods imported from outside the State and those manufactured or produced in the State of Orissa and are brought into the local area within a State. In this regard, the definition of 'entry of goods' given in clause (d) of Section 2 is relevant which shows that there is no discrimination between the goods produced or manufactured within the State of Orissa or imported from outside and are brought within the local area. The rate of tax imposed under the Act or the Rules are also applicable uniformly on the goods imported from outside or goods manufactured within the State which are brought into a local area. Therefore, it cannot be said that the Orissa Entry Tax Act is not made under clause (a) of article 304 of the Constitution. However, the State has no jurisdiction to impose tax on such goods imported from outside and are not manufactured within the State of Orissa. Therefore, the opposite may make scrutiny of the same and not realize entry tax on such goods but for this the Act cannot be declared ultra vires."

The order of the Hon'ble Court in dealer's Writ Petition No.2822/07 reads as follows :

> "Therefore, following the said decision, we dismiss this writ petition with a liberty to the petitioner to file an appeal against the demand order/assessment order or appellate order, as the case may be, within a period of thirty days from today and if the appeal is filed within the same specified, the same shall be entertained and shall be disposed of in accordance with law. To enable the petitioner to file an appeal, it is provided that for a period of thirty days or till the date of filing of the appeal whichever is earlier, no coercive action shall be taken against the petitioner for realisation of the amount as per assessment order/demand order".

The above order in true sense is of no avail to the dealer, since the dealer was not assessed by the AA and there was no scope for the dealer to prefer appeal. However, the fact remains, the taxing authority, acting upon the dealer's return issued demand notice. So, it is held that, the tax liability of the dealer cannot be excused on the strength of the order of the Hon'ble

Court in dealer's W.P.(C) dtd.19.02.2008. Moreover, when the Apex Court of the land and the Hon'ble Court thereafter have set the disputed question in rest deciding in favour of the State allowing them to tax the dealer, then the view of the Apex Court became law of the land and it covers all including the instant dealer. Accordingly, we are of the view that, the raising demand of tax ignoring the order of the Hon'ble Court in dealer's writ application is wrong and not enforceable but the taxing authority has assumed jurisdiction as per the authoritative pronouncement recognising the validity of the act tax liability.

Coming to the next question that, the demand raised by the taxing authority by issuing notices under Form 'E24' and 'E28' following the provision u/r.10(6)(b), we are constrained to take a view at the outset that, when the dealer has not admitted any tax liability, then there was no question of raising demand following the provision u/r.10(6)(b). The taxing authority should have assessed the dealer by giving an opportunity of being heard to the dealer and thereafter any tax due to which the dealer is found liable could have raised. The decision of the Hon'ble Court in **M/s. Toyota Engineering India Ltd. Vrs. Sales Tax Officer and Others** relied by the dealer, is squarely applicable to the case in hand. In the reported case, the dealer had challenged the unilateral action of the taxing authority by issuing such notices and the Hon'ble Court in ultimate analysis held the notices to be invalid and not enforceable but gave a fresh opportunity to the AA to proceed against the dealer in accordance with law. So avoiding discussion in details of the notices, we are of the consensus opinion that, the demand raised through such defective notices is not enforceable in law. In consequence thereof, the order of the AA and the impugned order of FAA both can't withstand in law.

The necessary outcome of the discussion above, can be summarised as follows :

(i) The order passed by the Hon'ble Court in W.P.(C) No.2822/2007, dtd.19.02.2008 being independent of the order passed in batch of cases in W.P.(C) No.6515/2006 to 17533/2007, dtd.18.02.2008, the taxing authority should not have proceeded with raising demand of tax by serving notice under E-24 and E-8.

(ii) As the Hon'ble Court vide order dtd.19.02.2008 enabled the dealer to prefer appeal against the order of assessment, in that case, the order became limited to the extent of preferring appeal.

(iii) Though the notice of demand is not appealable, but once the appeal was entertained by the FAA, then this second appeal arised out of the First Appellate Authority is maintainable in the eye of law. Moreover, the dealer is also enabled by the order of the Hon'ble Court to prefer appeal against any order relating to the tax period in question.

(iv) The view of the Hon'ble Court in Para-30 of the order dtd.18.02.2008 relating to other dealers, which became reversed by the Apex Court followed by the Division Bench of the Hon'ble Court is the judgment in rem covers all the dealers in the State which includes the present dealer.

(v) Since the demand notice issued to the dealer is, in violation of the procedure laid down under the statute, no demand can sustain against those notices. Consequently, the order of the appellate authority confirming the demand notice is illegal.

(vi) Keeping view the provision as settled by the Apex Court of the land, when the dealer is liable to pay tax then, while setting aside the impugned order, the taxing authority should be given liberty to assess the dealer afresh for the period in question.

Accordingly, it is ordered.

The appeal is allowed on contest. The impugned order is reversed. The matter is remitted back to the AA with liberty to initiate assessment proceeding a fresh in accordance to law and then, to fix the tax liability of the dealer to which the dealer is found liable.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
Judicial Member-II

Sd/-
(S. Mohanty)
Judicial Member-II

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

Sd/-
(R.K. Rout)
Accounts Member-II