

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

S.A.No.42(ET)/2011-12.

(Arising out of the order of the learned Deputy Commissioner of Sales Tax(Appeal) Sambalpur Range, Sambalpur, in First Appeal Case AA 62/JSG/ET/09-10, disposed of on 25.03.2011)

Present: Smt. Suchismita Misra Shri Subrat Mohanty & Shri P.C. Pathy
Chairman, 2nd Judicial Member Accounts Member-I

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

... Appellant.

- V e r s u s -

M/s. S.P.S. Steel & Power Ltd.,
Badmal, Jharsuguda.

... Respondent.

For the Appellant

... Mr. M. S. Raman, Id. Addl. S.C.(CT).

For the Respondent

... None.

Date of Hearing: 26.03.2019

Date of Order: 03.04.2019

ORDER

This second appeal has been filed by the State Under Section 17 of the Odisha Entry Tax Act, 1999 (in short, 'the OET Act') against the order dtd.25.03.2011 passed by the learned Deputy Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, 'the Id. DCST') in the appeal case No. AA 62/JSG/ET/09-10, reducing to returned figures the demand of Rs.12,22,463.00 raised by the learned Assistant Commissioner of Sales Tax, Jharsuguda Circle, Jharsuguda (in short, 'the Id. ACST') in his order passed on 29.09.2009 under section 10(1) of the OET Act for the period of assessment relating to the year 2003-04.

2. The dealer-respondent in the instant case is engaged in manufacture and sale of sponge iron during the period covered under this appeal. The respondent-dealer has effected purchase of three numbers of loaders for a sum of Rs.79,90,001.00 and was assessed u/s. 7 of the OET Act with levy of entry tax @2% on the purchase value

of the scheduled goods. On post-scrutiny of record by the AG audit it was noticed that while completing the assessment for the period 2003-04 the assessing authority had levied entry tax @2% on purchase value of loader instead of 8% as applicable under the OST Act. As per the provision of section-3(1) of the OET Act, 1999 read with Rule-3(1) of the OET Rules, 1999, goods specified in Part-III of the Schedule to the Act shall be exigible to tax at the same rate as notified by Government under the Orissa Sales Tax Act for such goods, subject to the maximum of 12%. On receipt of objections from AG audit, the Id. ACST finding reason to believe that there is under assessment of tax reopened the case u/s.12(8) of the OST Act read with section-10(1) of the OET Act. Not satisfied with the explanations and written submission advanced on behalf of the dealer claiming that three numbers of loaders is exigible to entry tax @2% as applicable under entry No.9 of Part-II schedule to Entry Tax Act, 1999 as machineries and equipments and spare parts and components used in manufacture, mining, generation of electricity or for execution of works contract or for any other purpose, completed the reassessment imposing tax @8% and penalty one and half times of the tax due u/s.7(5) of the OET Act which resulted in demand of Rs. 12,22,463.00. This led the dealer-assessee to file first appeal.

The Id. DCST after careful consideration of the grounds of appeal and the written submission filed on behalf of the dealer-assessee allowed the appeal in full and quashed the order of assessment with the following observations:-

“It is relevant to mention that as per Entry No.64 of List ‘C’ of tax rates under Orissa Sales Tax Act “Bull dozers, Crawlers, Shovels, Wheeled loaders, Scrappers, Dumpers, Tippers, Motor graders comes under entry of Earth Moving Machineries and not under the entry of motor vehicle. To clarify the difference it is to mention that ‘Motor Vehicle’ comes under the entry at Sl. 110 of list ‘C’ of the O.S.T. Rate Chart. Therefore, it cannot be said that ‘loader’ is motor vehicle. It comes under Earth Moving Machineries and cannot be taxed as per entry at Sl. No. ‘2’ of part-III of the tax rate under the O.E.T. Act.

In the light of above discussion, the argument of the authorized representative that Entry 64 of List 'C' of the rate chart clearly specify the 'Loader' as a 'Earth Moving Machinery' which bears much legal force, when viewed in the light of judicial pronouncement, supra."

3. Being aggrieved with the orders of the Ld. DCST the State has preferred second appeal before this Tribunal with the following grounds:-

- (i) The order of the ld. DCST reducing the demand to return figures is arbitrary, unjust & bad in law.
- (ii) The loaders purchased by the dealer at Rs.79,90,001.00 are scheduled goods as per section 2 (L) of OET Act & Rule 3(1) of the OET Rules read with section 2(28) of M.V. Act 1988.
- (iii) The LAO has rightly levied Entry Tax @8% on purchase of loaders.
- (iv) The orders of the ld. DCST is liable to be quashed and order of LAO be restored.

4. No cross objection has been filed by the dealer-respondent.

5. Mr. M.S. Raman, the ld. Additional Standing Counsel (C.T.) appearing on behalf of the State reiterated the grounds of appeal filed and filed a written note of submission along with a copy of order passed on 18.12.2017 by the Full Bench of this Tribunal in case of S.A. No.158 (ET)/2009-10 in the case of M/s. Coronation Infrastructure Ltd. Vrs. State of Odisha and the Judgement passed by the Hon'ble High Court of Odisha in OJC No.5399 of 1993 in the matter of M/s. Ferro Scrap Nigam Ltd. Vrs. State of Orissa & Others (2018 (I) ILR-CUT-1084). The ld. Addl. S.C.(C.T.) took the stand that the Ld. DCST erred in relying on the entries contained in the OST Act for the purpose of levy of entry tax on bringing 'excavator' loader in to the local area for consumption, use or sale therein in terms of section-3 of the OET Act. Notwithstanding availability of separate entry at Sl. No.2 of Part-III of Schedule appended to the OET Act read with section-2(h) of the said Act which provides for levy of entry tax on motor vehicles during the period of assessment 2003-04. He brought

to the notice of this Bench that the Id. ACST has made the following observation at Page-3 of the assessment order while determining the tax liability of the dealer-assessee

“...Loaders being used to roll by tyre on the road and also in other place comes under the definition of Motor Vehicle Act, 1988. Motor vehicle as per the above section and rules under OET Act stated to be included in the part-III of the Schedule it is to be taxed as applicable under OST Act on maximum to 12% under OET Act.”

Hence the loader as rolled by tyre on the road comes under the definition of Motor Vehicle Act, 1988. ...”

He stated that the entry at Sl. No.2 of Part-III of Schedule appended to entry tax is as follows:

“2.Motor vehicles, two-wheelers, three-wheelers”

He argued that section3(3) of the OET Act specifically deals with levy of entry tax on motor vehicles which runs thus:

“Notwithstanding anything contained in sub-sections (1) and (2), but subject to the provisions of this Act, there shall be levied and collected a tax on the entry of any motor vehicle into any local area for use or sale therein which is liable for registration in the State of Odisha under the Motor Vehicles Act, 1988 (59 of 1988), and rate of tax shall be at such rate or rates as may be specified by the Stat Government by notification on the purchase value of such motor vehicles.” Mr. Raman, the Id. Addl. S.C. (C.T.) made the following further submissions in furtherance of the grounds against the order of the Id. DCST:-

(i) Rule 3(1) of the OET Rules during the relevant period stood thus:

“(1) Goods specified in Part-III of the schedule to the Act shall be exigible to tax at the same rates as notified by Government under the Sales Tax Act for such goods, subject to the maximum of 12%.”

ii. Rate of sales tax specified on “motor vehicle” at that relevant point of time under the OST Act stood as follows:

Sl. No.	Description of goods with date of effect	Rate of tax
110	Motor vehicle including chasis of motor vehicle but excluding motor car, trekker, jeep, tractor and its trailer	12%

iii. Section 2(h) of the OET Act defines the term “Motor Vehicle” to mean a motor vehicle as defined in clause (28) of Section 2 of the Motor Vehicles Act, 1988 (59 of 1988)”

iv. Section 2(28) of the Motor Vehicles Act, 1988 defines the term “motor vehicle” as follows:

“Motor vehicle or vehicle means any mechanical propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chasis to which a body has not been attached and a trailer, but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than 4 wheels fitted with engine capacity of not exceeding 35 cubic centimeters.”

v. The legislature has adopted the definition contained in the Motor Vehicles Act by legislative reference instead of giving any separate definition. Therefore, the words “Motor Vehicle” occurring in the Act and the Schedule will have to be understood with reference to the term as defined under the Motor Vehicles Act, 1988. [Reference may be had to Ray Constructions Ltd. Vrs. Intelligence Officer, (2005) 142 STC 323 (Ker)]

vi. It may be noted that the “Loader” of the type described by the assessing authority which moves on tyres would fall within the meaning of definition of the term “motor vehicle” contained in Section 2(28) of the Motor Vehicles Act, 1988. Furthermore, it may not be out of place to say that such “Excavator Loader” is required to be registered under the provisions of the Motor Vehicles Act, 1988 which is one of the requirements under Section 3(3) of the OET Act.

- vii. In *Ray Constructions Ltd. Vrs. Intelligence Officer*, (2005) 142 STC 323 (Ker) it has been observed as follows:
- “7.In that case, apart from the admission made by the parties that the excavators in question are suitable for use on roads, the fact remains that the type of excavator in respect of which it was held as a motor vehicle was an excavator loader mounted on four wheels is a mobile digging and loading machine. It was suitable to move from one place to another and the vehicle was fitted with four rubber tyres. It was capable for being driven at a speed of 30k./hr. with other features like brakes, parking brakes etc. Therefore, it was found that the above provisions made are suitable for being used on the roads.”
- viii. The Hon’ble Apex Court in *Central Coal Fields Ltd. Vrs. State of Odisha*, (1992) Supp.3 SCC 133 = AIR 1992 SC 1371 while considering as to whether DUMPERS and ROCKERS using rubber tyres are vehicles adapted for use on roads and are motor vehicles liable to taxation, held they have been adapted for use on roads, which means they are suitable for being used on public roads.
- ix. The Hon’ble Supreme Court of India in yet another case, *Bose Abraham Vrs. State of Kerala*, (2001) 121 STC 614 (SC) referring to the cases, viz., *Bolani Ores Ltd. Vrs. State of Odisha*, (1974) 2 SCC 777 = 1975 (2) SCR 138 and *Central Coal Fields Ltd. Vrs. State of Odisha*, (1992) Supp. 3 SCC 133 – AIR 1992 SC 1371 held that “Excavators” and “Road Rollers” are motor vehicles falling within the ambit of definition of “motor vehicle” contained in section 2(28) of the Motor Vehicles Act and therefore, they are amenable to be levied with entry tax under the Kerala Tax on Entry of Motor Vehicles into Local Areas Act, 1994.
- x. In the matter of *Natwar Parikh Vrs. State of Karnataka*, AIR 2005 SC 3428 = (2005) 7 SCC 364 the Hon’ble Court said that tractor-trailer which is proposed to be used for transporting goods from one place to another place is “motor vehicle”.

xi. In State of Gujarat Vrs. Dhorajia Construction Co., Special Civil Application No.15815 of 2008, disposed of vide Judgment dated 31.07.2014 [(2014) 74 VST 373 (Guj)], the Hon'ble Gujarat High Court held that "merely because "DUMPER" is not specifically mentioned in that case, it cannot be said that the "DUMPER" is not subjected to entry tax. Considering the fact that "DUMPER" can be said to be motor vehicle, the same is subjected to entry tax under the Act.

xii. Full Bench of this Hon'ble Tribunal in Coronation Infrastructure Ltd. Vrs. State of Odisha, S.A. No.158 (ET) of 2009-10 vide Order dated 18.12.2017 held "DUMPER", "DROZER" and "EXCAVATOR" would be exigible to entry tax as "MOTOR VEHICLES" falls within the meaning of Section 2(h) of the OET Act.

xiii. The first appellate authority misdirected himself by referring and relying heavily on the entries available under the OST Act which are meant for levy of Odisha Sales Tax. In this context it may be worthwhile to quote the ratio of the Order dated 21.01.2010 passed by the Hon'ble High Court of Orissa in W.P.(C) No.11400 of 2005 in the matter of Hindustan Lever Limited Vrs. Sales Tax Officer, which is to the following effect:

"13. In Entry Tax Act, tax can be levied on the goods mentioned in the Schedule. As there is no mention of "washing soap" in the entry in the Schedule under the Odisha Entry Tax Act, the assessing authority has fallen into error by taking the generic entry "soap and detergent" from the Odisha Sales Tax Act and levying tax under the Entry Tax Act."

6. The dealer-respondent has neither filed cross objection nor appeared before the Bench on the date fixed for hearing hence this appeal is disposed of on merit basing on the materials available in the record.

7. Heard the ld. Addl. S.C. (C.T.) in absence of dealer-respondent. Gone through the impugned orders of assessment and appeal, grounds

of appeal filed and written submission filed at the time of hearing by the State, relevant records of assessment and appeal, and the case laws cited. The question before us to be addressed is whether the order of the Id. DCST holding the item 'loader' exigible to entry tax @2% reversing the findings of the Id. ACST that the item is exigible to tax @12% under part-III of schedule appended to the Orissa Entry Tax Act which says that the goods specified in part-III of the schedule to the Act shall be exigible to tax at the same rates as notified by Government under the Sales Tax Act for such goods, subject to the maximum of 12%? Section-2(h) of the OET Act defines the term "MOTOR VEHICLE" to mean a motor vehicle as defined in clause (28) of Section-2 of the Motor Vehicles Act, 1988 (59 of 1988).

Section 2(28) of the Motor Vehicles Act, 1988 defines the term "motor vehicle" as follows:

"Motor vehicle or vehicle means any mechanical propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer, but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than 4 wheels fitted with engine capacity of not exceeding 35 cubic centimeters."

The Id. ACST has stated that the loader of the type described by the assessing authority which rolls/moves by tyre on the road comes under the definition of Motor Vehicle Act, 1988. Mr. Raman, the Id. Addl. S.C. (C.T.) also forcefully argued that it may not be out of place to say that such excavator loader is required to be registered under the provisions of the Motor Vehicles Act, 1988 which is one of the requirements u/s.3(3) of the OET Act. The judgments of the Hon'ble Supreme Court and the Kerala High Court, Gujarat High Court and Hon'ble High court of Orissa in W.P.(C) No.11400/2005 in the matter of Hindustan lever Ltd. Vrs. Sales Tax Officer, go a long of way in proving that the item loader comes under the entry Motor Vehicles as per the schedule-III

appended to the Orissa Entry Act and the appropriate tax under the entry Tax Act for the item is in accordance with the rate at which the item is exigible to tax under the OST Act. The first appellate authority indeed misdirected himself by referring and relying heavily on the entries available in the OST Act which are meant for levy of Odisha Sales Tax Act as contended by the Id. Addl. S.C.(C.T.) in the written note of submission filed before this Forum. As the assessment/reassessment has been completed under the OET Act and there is availability of provision defining the goods motor vehicles and the entry motor vehicles, “two-wheelers, three-wheelers, appearing against Sl. No.-2 mentioned under Part-III appended to the Orissa Entry Tax Act which was in force for the period under appeal, the Id. first appellate authority ought to have taken into consideration the appropriate rate of tax for motor vehicles under the Orissa Sales Tax Act inasmuch as the goods loader comes under the definition of Motor Vehicles as per section 2(28) of the Motor Vehicles Act, 1988. Full Bench of the Hon’ble Sales Tax Tribunal in the case of M/s. Coronation Infrastructure Ltd. Vrs. State of Odisha, S.A. No.158(ET)/2009-10 in their order dtd.18.12.2017 held dumper, dozer and excavator liable to entry tax as motor vehicles coming under the definition of Section-2(h) under the Entry Tax Act. Under the circumstance it is concluded that the goods ‘loader’ comes under the definition of motor vehicles hence exigible to entry tax at the appropriate rate fixed by the Government for motor vehicles for the relevant period under the Orissa Sales Tax Act. So far as the imposition of penalty u/s. 7(5) of the OET Act, 1999 suggested by the AG Audit and adopted by the Id. ACST and reversed by the Id. DCST is concerned, it is very appropriate to reproduce the relevant provision under the Act as relevant for the period in question.

“7(5) ...While making any assessment under sub-section (4), the assessing authority may also direct the dealer to pay in addition to the tax assessed a penalty not exceeding one and a half times the amount of tax due that was not disclosed by the dealer in his

return or in the case of failure to submit a return one and a half times the tax assessed, as the case may be.”

It is an un-disputed fact that the dealer has not been assessed u/s.7(4) of the OET Act in the instant case. Consequent upon post-scrutiny of assessment records the AG Audit has raised the objection showing under assessment of entry tax due to application of entry tax @2% which is lower rate than the applicable rate of @8% for which suggested levy of penalty u/s.7(5) of the OET Act not exceeding one and half times the amount of tax due that was not disclosed by the dealer-respondent in his return. As the reassessment/assessment in the instant case has been completed u/s. 10(1) of the OET Act and the tax charged @2% by the dealer was accepted by the assessing authority u/s.7 of the OET Act for the very period earlier their appears to be no valid and reasonable ground for imposition of penalty u/s.7(5) of the OET Act. Hence imposition of penalty u/s.7(5) of the OET Act in the instant case is not justified hence deleted. So far as the goods ‘loader’ coming under definition of ‘motor vehicles’ is concerned it would be appropriate to quote the following ratio of order dtd.21.01.2010 passed by the Hon’ble High Court of Orissa W.P.(C) no.11400 of 2005 in the matter of M/s. Hindustan Lever Ltd, Vrs. Sales Tax Officer

“13. In Entry Tax Act, tax can be levied on the goods mentioned in the Schedule. As there is no mention of “washing soap” in the entry in the Schedule under the Odisha Entry Tax Act, the assessing authority has fallen into error by taking the generic entry “soap and detergent” from the Odisha Sales Tax Act and levying tax under the Entry Tax Act.”

Further, Mr. Raman, the ld. Addl. S.C. (C.T.) brought to the notice of this Bench the Judgment passed by the Hon’ble High Court of Odisha on 18.06.2018 in the case M/s. Ferro Scrap Nigam Ltd. Vrs. State of Orissa & Others in 2018 (I) ILR-CUT 1084. The relevant portion of the Judgment is reproduced below:-

“5...Considering the rival contentions of the parties, this Court finds the matter strictly involves herein is with regard to levy of the Octroi Tax by

the Notified Area Council (Steel Township), Rourkela on the entry of five consignments, vide Annexure-13 for use of the sae inside the Notified Area Council area. From the documents appended to the writ petition, this Court finds the consignments involved in the assessment of Octroi of levy is either loader, dozer, bulldozer or heavy earthmoving equipments.

The Hon'ble Court further held that This court here finds, the document at Annexure-10 appended to the writ petition by the petitioner lacks no doubt that Government in the department of Housing & Urban Development exercising the power conferred on it by proviso to Clause-11 of Sub-Section (1) of Section 131 of the Orissa Municipal Act, 1950 has accorded sanction of imposition of Octroi on goods brought within the limits of the district of Sundargarh for consumption, use or sale therein of the items indicated therein. Clauses-12, 15 & 64 of the Government's order dated 30th May, 1984 appearing at Annexure-10 bearing the following :-

“12. Motor vehicles, Motor Car, Jeep, Tractor, Rickshaw and Trailer Motor Cycle, Scooter Auto Rickshaw etc.

15. Spare parts of Motor car, Trucks, Motor cycles and other vehicles as detailed in item 12 not including dozers and dumpers and heavy earth moving machinery.

64. All kinds of cycles and watches and their parts, tyres, tubes, flaps, except for heavy vehicles for industrial use.”

Reading of serial no.12 therein, it appears, Government has sanctioned the imposition of Octroi Tax on motor vehicles etc. Similarly, reading of serial no.15 makes it clear that there shall be no Octroi Tax in respect of spare parts involving dozers, dumpers and heavy earth moving machineries. Reading of the above two provisions makes it clear that the word 'motor vehicle' has a wider inclusion and also includes dozers, dumpers and heavy earth moving machineries for its clear indication in the Section 15 taken note herein above. Similarly reading of serial no.64, the same only prescribes exclusion of charging of Octroi Tax for spare parts, tyres, tubes, flaps etc. used in heavy vehicles for industrial

use. A microscopic scan of the provision at serial no.64, it further clarifies that this item keeps the parts, tyres, tubes and flaps only involving heavy vehicles for industrial use away from Octroi Tax.”

In view of the judgments of the Hon’ble Apex Court and the Hon’ble High Courts discussed above and the provisions contained under both the Orissa Sales Tax Act, 1947 and the Orissa Entry Tax Act, 1999. We come to the conclusion that the item ‘loader’ comes under the definition of motor vehicle hence exigible to entry tax at the rate applicable for motor vehicle under the Orissa Sales Tax Act for the relevant period. For the foregoing reasons, therefore, we are inclined to interfere with the impugned order of the ld. DCST.

8. In the result, the appeal is partly allowed. The order of the ld. DCST is set-aside. The matter is remanded to the ld. assessing authority to assess the tax liability afresh in accordance with provisions under the Law in the light of the aforesaid observations within a period of three months from the date of receipt of this order.

Dictated and corrected by me,

Sd/-
(P. C. Pathy)
Accounts Member-I

I agree,

I agree,

Sd/-
(P. C. Pathy)
Accounts Member-I

Sd/-
(Suchismita Misra)
Chairman

Sd/-
(Subrat Mohanty)
2nd Judicial Member