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IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV No. 15 of 2013

Shree Plastics Pvt. Ltd., Berhampur ***Petitioner***

Mr. P.K. Harichandan, Advocate

-versus-

State of Odisha represented through ***Opposite Party***
Commissioner of Sales Tax, Odisha

Mr. Sunil Mishra, ASC

CORAM:
THE CHIEF JUSTICE
JUSTICE R. K. PATTANAİK

Order No.

ORDER
13.07.2022

Dr. S. Muralidhar, CJ.

06. 1. The Assessee has filed this revision petition against an order dated 1st September 2012, passed by the Orissa Sales Tax Tribunal, Cuttack (Tribunal) in SA No.78(E)/ 2011-12 for the period from 1st April 2006 to 30th November. 2009. By the impugned order, the Tribunal allowed the appeal filed by the State and set aside an order dated 9th March, 2010 of the Joint Commissioner of Sales Tax (JCST), partly allowing the appeal filed by the Assessee and modifying the assessment order of the Sales Tax Officer (STO), Ganjam-I Circle under Section 10 of the Orissa Entry Tax Act, 1999 (OET Act), reducing the tax demand from Rs.2,93,132.00 to Rs.1,46,566.00.

2. While admitting this revision petition on 6th July 2015, the following question was framed by this Court for consideration:

“Whether, under the facts and circumstance of the case, the Tribunal is right in holding that penalty u/S.10 of the OET Act is chargeable when the dispute with regard to Levy of Tax on the goods in question is pending before the Apex Court and penalty is not mandatory?”

3. The background facts are that the Petitioner is a unit, manufacturing PVC suction and Garden pipes. After receipt of the Vigilance Case Report dated 4th December, 2009 from the ACCT, Vigilance, Berhampur, the Assessing Officer, i.e., the STO initiated proceedings under Section 10 of the OET Act and issued notice to the Petitioner. The Petitioner states that it produced its Books of Account and other relevant documents. It has confronted with the Vigilance Report alleging that the dealer had purchased machineries and packing materials from outside the State on which the entry tax had not been paid.

4. The Petitioner sought to explain before the STO in the assessment proceedings that in view of the Judgment dated 18th February, 2008 of this Court in ***Reliance Industries Limited v. State of Odisha (2008) 16 VST 85 (ORI)***, the Petitioner withheld the payment of OET on the disputed goods. However, in view of the interim order passed by the Supreme Court of India on 3rd February, 2010 in the appeals filed by the State of Orissa, the Assessee agreed to pay the entry tax. This was noted by the STO in the assessment order dated 26th May 2010. The balance entry tax

payable was determined as Rs.97,710.69 and penalty under Section 10 of Rs.1,95,421.38 was levied.

5. Aggrieved by the above assessment order, the Petitioner preferred an appeal before the Deputy Commissioner of Sales Tax (DCST), Ganjam Range. The Assessee contended that there was no purchase or sales suppression and therefore, there was no reasonable cause in terms of Section 10 (2) of the OET Act for penalty to be levied on the Petitioner. The DCST, by its order dated 9th March 2010, deleted the penalty but imposed interest of Rs.48,855.34 under Section 7(5)(i) of the OET Act, as the Petitioner had arbitrarily withheld the tax. According to the Petitioner, thereafter, the Petitioner deposited the entire tax amount together with the interest.

6. Meanwhile, the State filed an appeal against the order of the DCST before the Tribunal urging that the DCST had deleted the penalty without any valid ground. The Petitioner also filed a cross-objection before the Tribunal. After hearing both the appeal as well as the cross-objection, the impugned order was passed by the Tribunal deleting the interest while confirming the tax and penalty as levied by the STO.

7. It must be noted that by the order dated 6th July, 2015, this Court directed that no coercive steps should be taken against the

Petitioner in relation to the tax and penalty till the disposal of the petition.

8. This Court has heard the submissions of Mr. P.K. Harichandan, learned counsel appearing for the Petitioner and Mr. Sunil Mishra, learned Additional Standing Counsel for the Department.

9. Relying on the order dated 8th March 2021 in RVWPET Nos.211, 212 and 213 of 2013 (*NALCO v. DCCT*), Mr. Harichandan, learned counsel for the Petitioner, contended that even in terms of Section 43(2) of the Orissa Value Added Tax Act, 2004 (OVAT Act), there was a discretion in the Assessing Officer whether or not to levy penalty and further, it can be levied only if the escapement of tax was “without reasonable basis”. It is submitted that the same wording occurs in Section 10 (2) of the OET Act. In the present case, since the Petitioner bonafide felt justified in withholding the entry tax component on account of the judgment of this Court in *Reliance Industries Ltd.* (*supra*) there was no reasonable basis for the STO to have levied penalty in terms of Section 10 (2) of the OET Act.

10. Section 10(2) of the OET Act reads as under:

“(2) If the assessing authority is satisfied that the escapement ¹[or under assessment of tax on account of any reason(s) mentioned in sub-section (1) above] is without any reasonable cause, he may direct the dealer to pay in addition to the tax assessed under sub-section

(1), by way of penalty, a sum equal to twice the amount of tax additionally assessed under this section.”

11. That can be no doubt that the levy of penalty does not have to be automatic. It is contingent on the STO being satisfied that the escapement of tax was “without any reasonable cause”. In the present case, the justification put forth by the Petitioner is that in terms of the decision of this Court in ***Reliance Industries Ltd.*** (*supra*) it withheld the payment of entry tax. However, in the said decision handed down by this Court on 18th February 2008, the challenge to the validity of the OET Act was negated. The Petitioner did not choose to join the Petitioners who had challenged the vires of the OET Act or even the requirement thereunder of having to pay entry tax on the goods purchased from outside the State. The decision of this Court was applicable to those who had approached it. Even, the interim order passed by the Supreme Court was confined to those parties who had approached the Court. The Petitioner could not have taken advantage of it. Therefore, the Petitioner had no reasonable cause to withhold payment of entry tax when it fell due.

12. Consequently, the Court is of the view that the penalty under Section 10 (2) of the OET Act was rightly levied on the Petitioner by the STO. In other words, the Court does not find any error having been committed by the STO in exercising the discretion in terms of Section 10 (2) of the OET Act to levy the penalty.

13. Accordingly, the question framed is answered in the affirmative, i.e., in favour of the Department and against the Assessee. It is clarified that since the Tribunal has deleted the levy of interest as ordered by the DCST, it is not payable by the Assessee and any amount paid under that head will be adjusted against the penalty to be paid by the Assessee in terms of the impugned order of the Tribunal.

14. The revision petition is accordingly dismissed in the above terms.

(Dr. S. Muralidhar)
Chief Justice

(R. K. Pattanaik)
Judge

S. Behera

