IN THE HIGH COURT OF ORISSA AT CUTTACK
W.P.(C) No. 11473 of 2022

M/s . Tex Marketing Agency & Another	....	***Petitioners***

Mr. Sanjeev Udgata, Advocate

-versus-

Commissioner of Sales Tax, Odisha & Others	....	***Opposite Parties***

Mr. Sunil Misra, ASC (CT & GST Organization)

CORAM:
JUSTICE JASWANT SINGH
JUSTICE M.S. RAMAN

ORDER (Oral)

Order No. **11.05.2022**

01. **1.** This matter is taken up by virtual/physical mode.

2. The Petitioner, Tex Marketing Agency representing through its managing partner Sri Hariharan Balakrishnan, is before this Court invoking provisions of Article 226/227 of the Constitution of India, seeks intervention in the order dated 5th April, 2022 passed in revision case No.BH-IIAST-223 to 224E of 2017-18 by the Commissioner of Sales Tax, Odisha.

3. Challenging the assessment order dated 27.04.2015 formulated by the Deputy Commissioner of Sales Tax, Bhubaneswar-II Circle, Bhubaneswar raising a demand of Rs.43,05,875/- for the period from 1st November, 2013 to 30th November, 2014 under the Odisha Entry Tax Act, 1999 (for short "the OET Act"), the Petitioner preferred to avail the remedy of appeal under Section 16 before the Additional Commissioner of Sales Tax (Appeal) South Zone, Berhampur which has come to be dismissed *vide* Order dated 28th April, 2017.

4. The Petitioner carried the matter further in second appeal before the Odisha Sales Tax Tribunal by way of filing Memorandum of Appeal under Section 17 of the OET Act and simultaneously by filing application under sub-section (7) of Section 17 before the Commissioner of Sales Tax, Odisha sought for stay of realization of the demand as affirmed by the First Appellate Authority.

5. Sub-section (7) of Section 17 reads as under:-

> *"Where a dealer or person has preferred an appeal under sub-section (1), the Commissioner may, stay realization, either in part or in full, the amount of tax or interest or penalty, as the case may be, remaining outstanding for recovery as a result of disposal of appeal under sub-section (7) of Section 16, on application in that behalf filed by the dealer within the period as provided for Sub-section (1)."*

6. As the matter stood thus, the Petitioner was served with a notice to show cause bearing No.7875/CT dated 25th April, 2022 (Annexure-6) issued by the Joint Commissioner of Sales Tax, CT & GST Circle, Bhubaneswar-II, Bhubaneswar, whereby it was directed to deposit an amount of Rs.30,22,807/- (interest = Rs.1,40,996/- + penalty = Rs.28,81,811/-) consequent upon rejection of petition under Section 17(7) by the Commissioner of Sales Tax.

7. The Petitioner has alleged in the writ petition that it was not afforded reasonable and adequate opportunity to represent before the Commissioner. As it had deposited entire tax liability as demanded and confirmed by the First Appellate Authority, the Commissioner of Sales Tax should have applied his mind to the facts of this case and directed for stay the realization of Rs.30,22,807/- (comprising of interest and penalty) during the pendency of second appeal before the Odisha Sales Tax Tribunal.

8. The counsel for the Petitioner drawing attention to paragraph 14 of the writ petition submitted that prior to COVI-19 Pandemic period when the matter was posted for hearing, the same were not being taken up in spite of the petitioner was present before the Commissioner. During the pandemic period when the matter was posted for hearing, the petitioner was prevented from appearing for the justified cause. It has been averred in the writ petition that on the last occasion when the matter appears to have been posted on 5th April, 2022, "the notice was received by the Petitioner in less than 24 years before the schedule date of hearing". However, the Petitioner contacted his lawyer, but as he was out of station could not appear before the Commissioner of Sales Tax. The said authority without considering the difficulty has proceeded with the matter *ex parte*.

9. Mr. Sanjeev Udgata, learned counsel for the Petitioner also drew attention of this Court to Annexure-8 series to show his *bona fide* that on earlier occasions, *i.e.*, 27th April, 2019, 1st June, 2019 and 3rd August, 2019 (period prior to COVID-19 pandemic) when the matter was being posted, he was vigilant before the Commissioner of Sales Tax in connection with the hearing of the said application filed under Section 17(7) of the OET Act. However, the said Authority did not take up the matter for hearing.

10. Mr. Sunil Mishra, Additional Standing Counsel for CT and GST Organization submitted that though tax component out of the total demand raised in the assessment and confirmed by the Fist Appellate Authority stands deposited by the Petitioner, he has not deposited the rest of the demand constituting interest and penalty. He also submitted that as paragraph 30 of the Judgment rendered by this Court in the case of *Reliance Industries Ltd. Vrs. State of Odishha, (2008) 16 VST 85 (Ori)* has been varied by the Hon'ble Supreme Court in SLP Nos. 14454-14778 of 2008 (State of Odisha Vrs. Reliance Industries Ltd.), the Petitioner is liable to discharge its liability by depositing interest as also the penalty.

11. This Court is satisfied that the Petitioner has been diligently pursuing its matter (apparent from documents act Annexure-8 series. It was given short notice for appearing before the Commissioner of Sales Tax in connection with hearing and the non-appearance was on account of non-availability of his lawyer in the station, which fact remained uncontroverted at the time of hearing of present petition.

12. Without entering into the merits of the matter, this Court feels that ends of justice would be best served if the Petitioner is relegated to the authority-Commissioner of Sales Tax by setting aside *ex parte* Order dated 5th April, 2022 passed in revision case No. BH-IIAST- 223 to 224E/ 2017-18. This Court, therefore, sets aside the Order dated 05.04.2022 and restore the revision case No. BH-IIAST- 223 to 224E/ 2017-18 to file. For this purpose, the Petitioner is directed to appear before the Commissioner of Sales Tax on 31st May, 2022 along with the certified copy of this order. The Commissioner of Sales Tax may hear the matter on the said date or adjourn the matter to any other date for hearing. Needless to say that the Commissioner of Sale Tax is free to take appropriate decision without being influenced by any observation made *supra.* After hearing the petitioner, the Commissioner of Sales Tax shall pass appropriate order in accordance with law. The petitioner is not to be allowed unnecessary adjournments.

13. With the above observation and direction, the writ petition is disposed of.

(Jaswant Singh)
Judge

(M.S. Raman)
Judge

Laxmikant May 11, 2022 Cuttack