BEFORE THE DIVISION BENCH, ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No. 258(V) of 2019
&
S.A. No.39 (ET) of 2020

(Arising out of the order of the learned Addl.CST, Koraput Range, Jeypore First Appeal Nos. AAV(KOR)47/18-19 & AAE(KOR)10/18-19 disposed of on 22.10.2019 & 30.08.2019)

Present: Shri S.K. Rout, 2nd Judicial Member
&
Shri B. Bhoi, Accounts Member-II

M/s. Gayatri Projects Ltd.,
Damanjodi, Dist-Koraput. ..... Appellant

-Vrs. –

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

For the Appellant : : Mr. N. Anand Rao, ld. A.R.
For the Respondent : : Mr. S.K. Pradhan, ld.ASC.(C.T.)

Date of Hearing : 13.07.2023 * Date of Order : 09.08.2023**

O R D E R

The dealer is in appeals against the orders dated 22.10.2019 & 30.08.2019 of the Additional Commissioner of Sales Tax, Koraput Range, Jeypore (in short, Ld.FAA) passed in Appeal Case Nos. AAV (KOR)-47/ 2018-19 & AAE (KOR) 10/2018-19 reducing the demand to ₹3,52,05,387.00 as against demand raised at ₹100,62,63,081.00 under Section 42 0f the OVAT Act and confirming the order passed under Section 9C of the OET Act by the Sales Tax Officer, Koraput Circle, Jeypore (in short, STO). Since the aforesaid two appeals relate

to the same material period of the same assessee involving common question of facts and law, they are taken up together for hearing and disposal by this composite order.

2. The dealer assessee's case, in nutshell, is that it is a works contractor under the name and style of M/s Gayatri Projects Limited, Damanjodi executing works contract under different Government agencies as well as private companies. Besides this, it supplied fabricated items to M/s Tata Steel Ltd against contract of supplies. The dealer-contractor was assessed under section 42 of the OVAT Act and under section 9C of the OET Act for the tax period 01.04.2014 to 30.09.2015 on the basis of Audit Visit Report (AVR) resulting in demand of ₹100,62,63,081.00 including penalty of ₹67,08,42,054.00 under the OVAT Act and ₹15,32,079.00 including penalty of ₹10,21,386.00 under the OET Act. Aggrieved, the dealer-contractor preferred first appeals against the demands raised under both the Acts. The ld. FAA in first appeal reduced the demand to ₹3,52,05,387.00 under the OVAT Act and confirmed the demand raised at assessment under section 9C of the OET Act.

3. The dealer-contractor further being aggrieved against the orders of the ld. FAA passed under both the Acts as discussed above, preferred second appeals before this forum endorsing grounds of appeal to the effect that deduction of VAT amounting to ₹29,97,65,608.00 purportedly included in the sale price ought to have been allowed from the gross payments as per Explanation (d) to Section 2(46) of the OVAT Act while arriving at the taxable turnover. It

is also defended that imposition of penalty equal to the amount of tax assessed by the forums below is unjust, illegal and unwarranted. The authorized agent of the dealer- contractor relied on the decision made in case of Mc.Dowell & Co Vs. Sales Tax Officer (Enquiry)(1993)91STC-610(KER) which observed that 'no finding of attempt to evade payment of tax, penalty is not leviable.' It is also placed that in case of Ruchika Metals Vs State of Tamilnadu published in (2011) 41 VST 63 (Mad), the Hon'ble of High Court of Madras at para No.7 observed as under:-

> 'As far as levy of penalty is concerned, under Explanation (1) to section12(3)(b), it is stated that when the turnover represents additions to the turnover as per books made by the assessing authority without reference to any specific concealment of turnover from the accounts for the purpose of levy of penalty, such added turnover should be deducted. In the case at hand, there is no such additions to the turnover except making an apportionment for the purpose of fixing the rate of tax at four percent and eight percent for the domestic utensils and other brass wares. In such circumstances, when the statutory provision providing for imposition of penalty under section 12(3)(b) read along with Explanation (1) does not contemplate levy of penalty, the penalty imposed by the assessing officer and sustained by the appellate authority cannot be sustained.'

Citing another case law, the learned Counsel of the dealer-contractor holds that in case of M.G. Garments Vs Sales Tax Officer, Investigation Unit, Bhubaneswar and Others, the Hon'ble High Court of Odisha published in (2009) 19 VST at page 372 & 373 of the subject synopsis (ii) (iii) have observed as under:-

> "(ii) The authorities had never established that the goods found on the date of inspection and alleged to be unaccounted for were brought from outside the local area by the petitioner. There was no finding as to whether the scheduled goods in question were manufactured in the local area or not, and, if brought from outside the local area, whether any opportunity was given to the petitioner to prove that such goods were already subjected to entry tax. In absence of any such finding, levy and collection of entry tax on the scheduled goods found in the business premises of dealer was not authorized in law
>
> (ii) That therefore collection of the amount towards penalty under Orissa Value Added Tax and entry tax under the Orissa Entry Tax was without authority of law"

In view of the above submissions, it is urged that since there was no concealment of turnover or withholding of payment of tax, imposition of penalty is not sustainable and liable to be deleted from the net of taxation.

4. The Revenue filed cross objections. Mr.S.K Pradhan, learned Additional Standing Counsel (CT) appearing for the State vehemently defends the arguments advanced by the authorized agent of the dealer-contractor submitting that imposition of penalty under Section 42(5) of the OVAT Act in the event of assessment completed under Section 42 of the OVAT Act determining an amount assessed to tax is automatic. Mr. Pradhan, learned Counsel placed reliance on a decision of **the Hon'ble of High Court of Odisha in STREV No.69 of 2012 dated 05.07.2022** delivered in case of State of Odisha Vs M/s Chandrakanta Jayantilal,Cuttack and Another. Para 14 of the said decision is relevant and quoted as under:-

> "It will be straightway noticed that the very wording of Section 42(5) indicates that once an assessment is completed under Section 42(4) of the OVAT Act, the penalty leviable under Section 42(%) automatically follows. There is no discretion in the STO unlike the penalty imposable under Section 43(2) of the OVAT Act. This was what explained by this Court in M/s National Aluminium Company Limited (Supra)."

Mr. Pradhan, Learned Counsel (CT) apart from endorsing of the above case law under the OVAT Act involving matter particularly on imposition of penalty under Section 42(5) of the OVAT Act, has further relied on another decision with respect to penalty under Section 9C (5) of the OET Act passed by **the aforesaid Hon'ble Court in case of Nirman Udyog, Berhampur Vs State of Odisha in**

STREV No.118 of 2019 dated 21.12.2022 which observes as under:-

> " In respect of Section 42(5) of the Odisha value Added Tax Act,20049OVAT Act) which is in pari materia with Section 9(C) (5) of the OET Act it has been held that by this Court in the judgment dated 5th July,2022 in STREV No.69 of 2012 (State of Odisha Vs. M/s Chandrakanta Jayantilal, Cuttack) that the penalty thereunder is mandatory with there being no discretion available with the assessing authority. Accordingly, the Court is not inclined to admit the present revision petition and frame the question as urged by the Petitioner-assessee"

5. Having heard both the parties and on perusal of the materials such as order of assessment, order of the ld.FAA and other allied documents available on record, it is observed that the authorized agent of the dealer contractor relied on a decision made by the Hon'ble High Court of Tamil Nadu in case of M/s Ruchak Metals Vs. State of Tamil Nadu (Supra) which is relating to matter under the Tamil Nadu general sales Tax Act,1959. The observations in that case which justified the deletion of the penalty may not be relevant in the present case. We are not persuaded that the decision contained in the said judgment is of any assistance to the dealer-contractor in the present case. Further, the reliance of the authorized agent of the dealer-contractor on a decision of the Hon'ble High Court of Odisha in case of M/s M.G. Garments Vs.Sales tax Officer, Investigation

Unit, Bhubaneswar (Supra) is not at all relevant to the present facts and circumstances of the case.

As to the verdicts of the Hon'ble High Court of Odisha tabled by the learned Counsel of the State and discussed vividly supra, we are in complete agreement with the averments of the State. As is held, quantification of penalty is dependent on the tax assessed under Section 42 of the OVAT Act. No discretion is left with the assessing authority to travel beyond the provisions prescribed under Section 42(5) of the OVAT Act, since penalty is not independent of the tax assessed under section 42 of the OVAT Act. Thus, if the tax is assessed, imposition of penalty under section 42(5) of the OVAT Act is warranted. In view of the above, we are of the considered view that Section 42(5) of the OVAT Act authorizing imposition of penalty equal to twice the amount assessed under Section 42(3) or 42(4) of the Act is constitutionally valid. Accordingly, the forums below are justified in levying penalty in the present case. The averment of the authorized agent of the dealer-contractor on his score results in no cost and thus is dismissed.

As regards claim of deduction of VAT from the gross turnover as has been agitated in the grounds of appeal, as rightly observed in the first appeal order, it is inferred that TDS to the tune of ₹26,40,88,090.00 has been separately shown and the same has not been included in the gross payments. This apart, the law is settled that levy of tax in respect of works contract is on the transfer of property in goods. The goods/materials used in the works contract is

not construed as sale and thus, the provision of Section 2(46), Explanation-(d)) which defines "Sale Price" of the OVAT Act shall not come into play. Besides, determination of taxable turnover as provided in Rule 6 (e) of the OVAT Rules in case of works contract, there is no such allowance of deduction of VAT from the gross receipt prescribed. Thus, deduction of VAT from the gross payments as claimed does not arise. Accordingly, the claim as sought for on this account is discarded.

6. Under the above facts and in the circumstances, it is hereby ordered that the appeals filed by the dealer-contractor under both the Acts are dismissed and the orders of the ld.FAA passed thereunder are confirmed based on observations meted out in the foregoing paras.

Dictated and corrected by me.

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

I agree

Sd/-
(S.K. Rout)
2nd Judicial Member