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

S.A. No.287(VAT) of 2016-17

(Arising out of the order of the learned Addl.CST(Appeal), South Zone, Berhampur Appeal Case No. AA(VAT)190/2013-14, disposed of on 20.09.2016)

Present: **Shri G.C. Behera, Chairman**
Shri S.K. Rout, 2nd Judicial Member
&
Shri B. Bhoi, Accounts Member-II

M/s. Hardware Junction,
(Prop:- Sri Vaibhav Raonka)
At- Plot No.49, Ashok Nagar,
Bhubaneswar. ..... Appellant

-Vrs.–

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

For the Appellant : Mr. B.K. Patnaik, ld. Advocate
For the Respondent : Mr. D. Behura, ld. S.C. (C.T.)
: Mr. N.K. Rout, ld. A.S.C.(C.T.)

Date of Hearing : 20.07.2023 *** **Date of Order : 19.08.2023**

O R D E R

This second appeal has been preferred by the dealer-assessee under section 78 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') against the order of the Additional Commissioner of Sales Tax (Appeal), South Zone, Berhampur (in

short, 'ld.FAA') passed on 20.09.2016 in the Appeal Case No. AA(VAT)190/2013-14 in remitting the order of assessment back to the learned Deputy Commissioner of Sales Tax, Bhubaneswar-II Circle, Bhubaneswar (in short, 'ld. assessing authority') for fresh adjudication.

2. The facts in nutshell of the case are that M/s. Hardware Junction, Plot No.49, Ashok Nagar, Bhubaneswar is engaged in trading of hardware goods, sanitary fittings, plywood, kitchen accessories, sink, architectural glass fittings & Pipe fittings. The ld. assessing authority assessed the dealer-appellant under Section 42(1) of the OVAT Act for the tax period 01.04.2007 to 31.12.2012 basing on the observation contained in the Audit Visit Report (AVR). The ld. assessing authority relying on the findings of the AVR held that the physical stock of goods noted and evaluated thereof by the Audit Team on the date of visit i.e. 19.12.2012 was at ₹3,83,43,599.00. The stock of goods as per book stock as disclosed as on 19.12.2012 was at ₹2,56,83,964.26. Thereby, there existed discrepancy of ₹81,59,635.00 that occurred due to excess stock of goods stored in the business premises. This was alleged as purchase suppression. As observed in the AVR, the ld. assessing authority determined the sale suppression on this account at

₹1,11,20,766.54 by adding a markup of 36.29% over ₹81,59,635.00. This markup percentage was determined by taking purchase and sale price of a sample of 12 items of goods. Further, as suggested in the AVR, the ld. assessing authority held that the total purchase value of goods during the tax period under appeal was disclosed at ₹4,78,52,256.25. On application of the above markup of 36.29% on such purchase value, the total sales during the material tax period was determined at ₹6,52,17,158.55 against which, the dealer-assessee has disclosed total sales at ₹5,49,85,376.66. In result, there existed discrepancy in sales for an amount of ₹1,02,31,730.95. This was held as sale suppression. Accordingly, the total sale suppression alleged both on account of purchases and sales totaled to ₹2,13,52,498.49. On addition of the said sale suppression of ₹2,13,52,498.49 with the GTO of ₹6,19,83,109.81 returned, the GTO got determined at ₹8,33,35,608.30. Allowing deduction of ₹69,00,762.59 towards collection of VAT, the TTO was determined at ₹7,64,34,845.71. VAT @4% on ₹13,24,288.17, @5% on ₹28,32,263.47, @12.5% on ₹2,67,73,838.92 and @13.5% on ₹4,55,04,455.15 calculated to ₹96,84,425.30. After allowing deduction of ITC for ₹9,04,633.47 and ₹59,86,261.00 towards VAT that already paid at the time of

filing returns including VAT paid at the Check gate, the dealer-assessee was to pay ₹27,93,530.00 which on imposition of penalty under Section 42(5) of the OVAT Act arrived at ₹83,80,592.00.

The ld.FAA observes in the first appeal order to the effect that the tax period under appeal relates to 01.04.2007 to 31.12.2012. Thus, as per provision of Rule 41(1) of the OVAT Rules, as provided therein, while selecting the registered dealers for audit, the Commissioner shall also specify the period(s) for audit, not being a period which has ended five years previous to the year during which audit is to be taken up. Accordingly, since the instant AVR covers a tax period for more than five years, the ld.FAA deleted tax period from 01.04.2007 to 31.12.2007 from the purview of audit assessment being barred by limitation. Further, the ld. FAA inclined to exclude the tax period from 01.04.2010 to 30.09.2011 from the purview of the audit assessment, since the said tax period was earlier assessed under section 43 of the OVAT Act on 09.10.2012. As to the stock discrepancy of ₹81,59,635.00 alleged as purchase suppression at assessment, the ld. FAA re-calculated the stock discrepancy at ₹7,59,420.95 basing on the submission of the dealer-assessee to the effect that the value of some of the stock

of goods noted by the audit party on 19.12.2012 was not correctly noted and the total stocks were at ₹2,64,43,385.21. It is inferred by the ld.FAA that markup of 36.29% was derived in the AVR taking bare purchase price of the sample 12 items of goods. The ld.FAA on addition of excise duty, CST and other expenses over the purchase value of the said 12 items of goods derived at 19.22% as markup percentage. The ld. FAA remitted the case back to the ld. assessing authority for fresh adjudication under section 42 of the OVAT Act after exclusion of the tax period from 01.04.2007 to 31.12.2007 and from 01.04.2010 to 30.09.2011 as discussed supra from the purview of the audit assessment on application of markup of 19.22%.

3. The dealer-assessee being not satisfied with the first appeal order preferred second appeal before this forum. A written submission has also been filed. It is submitted that the dealer-assessee in the instant case maintains books of accounts like purchase register supported with the purchase invoices, sale register supported with sale invoices and files periodical returns and pays admitted tax as per the statute. The accounts of the assessee are also audited by the statutory auditor.

It is submitted that the allegation of purchase suppression and the corresponding sale suppression as alleged

by the forums below has no basis. Furthermore, the discrepancy in stock estimating ₹81,59,635.00 at audit assessment relying on AVR and the same being reduced to ₹7,59,420.95 at first appeal is unwarranted and unreasonable. Estimation of sale value based on markup/average profit margin that arose on taking purchase and sale price of only 12 items of goods accruing thereby markup of 36.29% is anti-law. On the basis of this markup, determination of sale suppression at ₹1,11,20,766.54 against the alleged purchase suppression of ₹81,59,635.00 is termed as illegal by the learned Counsel of the dealer assessee. Application of the said the markup percentage on the alleged discrepancy in sale determining sale suppression at ₹1,02,31,730.95 is vehemently refuted.

It is also submitted that the dealer-assessee deals in more than 100 varieties of goods. The same items of goods are of different brands/companies. The gross profit margin of the business during the tax period under appeal is invariably at 15.73%, 19.03%, 20.19%, 11.76% as per the balance Sheet and Trading, Profit and loss Account.

The tax period in the instant case covers for five years. Accrual of profit in each year differs as reflected in the Balance Sheet as stated above. Whimsical adoption of identical markup

for the entire period of audit assessment at 36.29% is vehemently opposed by the learned Counsel of the assessee. The learned Counsel relies on the decisions of the Hon'ble High Court of Odisha passed in case of ***M/s Mahavir Store v. State of Odisha and*** in case of ***M/s Prusty & Prusty, Puri v. State of Odisha*** and ***M/s Ramchandra Ram Nivas v. State of Orissa in 25 STC 501(Orissa).***

Further, the learned Counsel of the dealer-assessee rebuts imposition of penalty relying on the judgment passed by the Hon'ble Apex Court in case of Hindustan Steel Limited Vs. State of Orissa reported in 25 STC at page 211.

4. Cross objection has been filed by the respondent-State supporting the orders of the forums below.

5. Having heard the rival submissions and after going through the orders of assessment/first appeal and other materials available in the first appear record, the substantial dispute that led the dealer-appellant to approach this forum is on whether under the facts and in the circumstances, the markup/average profit margin brought forth in consequence of adoption of purchase and sale price of a selected 12 items of goods would prevail as a yardstick for determination of

purchase or sale suppression for the entire tax period ranging for a period of five years.

6. Now, we look into the substantial dispute as to the applicability of identical markup/average profit margin on purchase value to arrive at sale value for the entire periods of assessment that ranges for more than five years. It is far from perception as to the application of an irrational method to draw out purchase and sale suppression in the wake of the dealer-appellant having a set of books of accounts together with audited accounts as observed in the order of assessment. The methodology of markup as resorted to has been discussed in the foregoing paragraphs. For a better appreciation, it is to note that the stock of goods as noted by the Audit Team on 19.12.2012 was evaluated at ₹3,38,43,599.00. The book stock as on 19.12.2012 being at ₹2,56,83,964.26, there registered a discrepancy of ₹81,59,635.00. This was alleged as purchase suppression. To substantiate sale suppression on this alleged purchase suppression, the markup of 36.29% was applied. The sale suppression on this purchase suppression was derived at ₹1,11,20,766.54. Similar is the case with the alleged sale suppression that surfaced as a result of discrepancy in sale. The total purchase value disclosed at ₹4,78,52,256.25 during the

tax period under assessment being applied with markup of 36.29% calculated to ₹6,52,17,158.55. The dealer-assessee having disclosed total sale at ₹5,49,85,376.66, there appeared sale discrepancy of ₹1,02,31,730.95. The total sale suppression during the tax period under assessment worked out to ₹2,13,52,498.49 which was added to the GTO and TTO disclosed by the dealer-appellant. Nonetheless, the ld.FAA, on the other hand, adopted markup of 19.22% without any credible and logistic base. This is unjust, unreasonable and inconceivable in asmuch as that applying identical markup for the entire tax period of five years regardless to that disclosed by the dealer-assessee besides being uncalled for lacks legal sanctity. This is an unrealistic method of deriving sale suppression in the wake of the dealer-appellant maintaining books of account supported with Balance Sheet and Trading, Profit and loss Account wherefrom, the profit margin/markup could be derived. The assessing authority is required to establish a reasonable nexus between the purchases and sales effected during the material period and the markup/profit margin to be employed all through the tax periods under appeal. Under this eventuality, resorting to best judgment is unwarranted.

7. As regards rebuttal of penalty as urged upon, since there is no sale suppression established under the fact and circumstances of the case, question of either imposition or deletion of penalty does not arise.

8. In view of the above discussion, the appeal filed by the dealer-appellant is allowed partly. The impugned order of the ld. FAA setting aside the order of assessment stands modified to the extent observed above. The assessing authority is directed to make the reassessment is accordance with the law keeping in view of the observation made supra within a period of three months from the date of receipt of the this order. Cross objection is disposed of accordingly.

Dictated and corrected by me.

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

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