

**BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL:
CUTTACK**

S.A. Nos. 11 (VAT) to 30 (VAT) of 2023

(Arising out of orders of the learned Addl. CST, Territorial Range, Bolangir, in Appeal Nos. AA-01 (NUA) of 2021-22 (VAT), AA-02 (NUA) of 2021-22 (VAT), AA-03 (NUA) of 2021-22 (VAT), AA-04 (NUA) of 2021-22 (VAT), AA-05 (NUA) of 2021-22 (VAT), AA-06 (NUA) of 2021-22 (VAT), AA-07 (NUA) of 2021-22 (VAT), AA-08 (NUA) of 2021-22 (VAT), AA-11 (NUA) of 2021-22 (VAT), AA-12 (NUA) of 2021-22 (VAT), AA-13 (NUA) of 2021-22 (VAT), AA-14 (NUA) of 2021-22 (VAT), AA-15 (NUA) of 2021-22 (VAT), AA-16 (NUA) of 2021-22 (VAT), AA-17 (NUA) of 2021-22 (VAT), AA-18 (NUA) of 2021-22 (VAT), AA-19 (NUA) of 2021-22 (VAT), AA-20 (NUA) of 2021-22 (VAT), AA-21 (NUA) of 2021-22 (VAT), & AA-22 (NUA) of 2021-22 (VAT), disposed of on 30.11.2022)

Present: **Shri G.C. Behera, Chairman**

M/s. Rajesh Kumar Sahu,
At/PO- Sinapali, Dist. Nuapada ... Appellant

-Versus-

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

For the Appellant : Sri Nakul Agrawal, Advocate
For the Respondent : Sri D. Behura, S.C. (CT) &
Sri N.K. Rout, Addl. SC (CT)

Date of hearing : 27.09.2023 *** Date of order : 30.09.2023

ORDER

All these second appeals relate to the same party involving common question of facts and law, but for different periods. Therefore, they are taken up for disposal in this composite order for the sake of convenience.

2. Dealer assails the orders dated 30.11.2022 of the Addl. Commissioner of Sales Tax, Territorial Range, Balangir (hereinafter called as 'First Appellate Authority') in F.A. Nos. AA-01 (NUA) of 2021-22 (VAT), AA-02 (NUA) of 2021-22 (VAT), AA-03 (NUA) of 2021-22 (VAT), AA-04 (NUA) of 2021-22 (VAT), AA-05 (NUA) of 2021-22 (VAT), AA-06 (NUA) of 2021-22 (VAT), AA-07 (NUA) of 2021-22 (VAT), AA-08 (NUA) of 2021-22 (VAT), AA-11 (NUA) of 2021-22 (VAT), AA-12 (NUA) of 2021-22 (VAT), AA-13 (NUA) of 2021-22 (VAT), AA-14 (NUA) of 2021-22 (VAT), AA-15 (NUA) of 2021-22 (VAT), AA-16 (NUA) of 2021-22 (VAT), AA-17 (NUA) of 2021-22 (VAT), AA-18 (NUA) of 2021-22 (VAT), AA-19 (NUA) of 2021-22 (VAT), AA-20 (NUA) of 2021-22 (VAT), AA-21 (NUA) of 2021-22 (VAT) & AA-22 (NUA) of 2021-22 (VAT), confirming the assessment orders of the Asst. Commissioner of Sales Tax, Nuapada Circle, Khariar Road (in short, 'Assessing Authority').

3. Briefly stated, the facts of the cases are that –

M/s. Rajesh Kumar Sahu is a manufacturer of out-still liquor and effects sale thereof. The assessments relate to the periods 01.08.2017 to 31.08.2017; 01.09.2017 to 30.09.2017; 01.10.2017 to 31.10.2017; 01.11.2017 to 30.11.2017; 01.12.2017 to 31.12.2017; 01.01.2018 to 31.01.2018; 01.02.2018 to 28.02.2018; 01.03.2018 to 31.03.2018; 01.06.2018 to 30.06.2018; 01.07.2018 to 31.07.2018; 01.08.2018 to 31.08.2018; 01.09.2018 to 30.09.2018; 01.10.2018 to 31.10.2018; 01.11.2018 to 30.11.2018; 01.12.2018 to 31.12.2018; 01.01.2019 to 31.01.2019; 01.02.2019 to 28.02.2019; 01.03.2019 to 31.03.2019; 01.04.2019 to 30.04.2019; and 01.05.2019 to 31.05.2019.

The Assessing Authority levied interest and penalty of ₹22,33,185.00 for the period 01.08.2017 to 31.08.2017; ₹21,84,739.00 for

the period 01.09.2017 to 30.09.2017; ₹21,35,201.00 for the period 01.10.2017 to 31.10.2017; ₹20,87,766.00 for the period 01.11.2017 to 30.11.2017; ₹20,39,273.00 for the period 01.12.2017 to 31.12.2017; ₹19,91,311.00 for the period 01.01.2018 to 31.01.2018; ₹19,48,448.00 for the period 01.02.2018 to 28.02.2018; ₹19,01,497.00 for the period 01.03.2018 to 31.03.2018; ₹21,74,709.00 for the period 01.06.2018 to 30.06.2018; ₹21,19,431.00 for the period 01.07.2018 to 31.07.2018; ₹20,64,808.00 for the period 01.08.2018 to 31.08.2018; ₹20,12,570.00 for the period 01.09.2018 to 30.09.2018; ₹19,59,235.00 for the period 01.10.2018 to 31.10.2018; ₹19,08,244.00 for the period 01.11.2018 to 30.11.2018; ₹18,56,197.00 for the period 01.12.2018 to 31.12.2018; ₹18,04,804.00 for the period 01.01.2019 to 31.01.2019; ₹17,58,948.00 for the period 01.02.2019 to 28.02.2019; ₹17,06,602.00 for the period 01.03.2019 to 31.03.2019; ₹19,03,014.00 for the period 01.04.2019 to 30.04.2019; and ₹18,43,737.00 for the period 01.05.2019 to 31.05.2019 u/s. 34 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') due to non-filing of returns in time by the Dealer.

The dealer preferred first appeals against the orders of the Assessing Authority before the First Appellate Authority. The First Appellate Authority confirmed the levy of interest and imposition of penalty for the periods under appeal. Being aggrieved with the orders of the First Appellate Authority, the Dealer prefers these appeals. Hence, these appeals.

The State files cross-objections supporting the orders of the First Appellate Authority to be just and proper.

4. Learned Counsel for the Dealer submits that the Assessing Authority ought to have taken the recourse of Section 40 of the OVT Act before assessment completed u/s. 34 of the said Act. He further submits that the Dealer had not filed the returns, but it is strange as to how the Assessing

Authority found the tax payable in absence of any return or material available on record. He further submits that the levy of penal interest is illegal. So, he submits that the orders of the Assessing Authority and First Appellate Authority are otherwise bad in law and the same requires interference in appeal.

5. On the contrary, the learned Standing Counsel (CT) for the State submits that the Dealer is liable to pay tax @ 20% of the taxable turnover along with interest and penalty as per the provisions of Sec. 34(2) of the OVAT Act. He further submits that the tax payable as per assessment does not differ from the admitted tax paid and return filed. He further submits that the logical end of the remand assessment will not vary to the present assessments, so, any remand of the matter for reassessment will be unnecessary and no way benefit to the Dealer. So, he submits that the appeals are bound to fail.

6. Heard rival submissions of the parties, gone through the orders of the First Appellate Authority and Assessing Authority vis-a-vis the materials on record. Record transpires that the following facts are undisputed fact :-

(i) The first appeals were rejected summarily for non-payment of statutory payment and the same were restored to file on the strength of order passed in revision by the Commissioner of Sales Tax, Odisha in Revision Case No. NUA 52-73/2021-22 dated 16.11.2021;

(ii) The Dealer is required to pay turnover tax in respect of its liquor business as per Govt. of Odisha in Finance Department Notification No. 17806-CTA-19/2005/F dated 04.04.2005 (SRO No. 211/2005).

(iii) The Dealer paid the tax of ₹3,24,28,736.00 and interest of ₹11,58,843.00 along with returns for the periods August, 2017 to May, 2019 on different dates, i.e. from 10.07.2019 to 13.12.2019, only after

completion of the orders of assessment on 08.07.2019. The Dealer has also made interest payments on 21.01.2022 and 22.01.2022.

(iv) The Assessing Authority had served notices in Form VAT-205 calling for the Dealer to show-cause why interest and penalty shall not be levied for failure to file return and make payment of tax and interest due as per the returns u/r. 39(1) of the OVAT Rules.

(v) The Assessing Authority also passed the orders in Form VAT-206 imposing interest and penalty for default payment in filing of returns and payment of admitted tax for ₹3,27,58,122.00 besides interest of ₹34,31,818.00 and penalty of ₹78,46,316.00 for the impugned periods u/r, 39(2) of the OVAT Rules.

(vi) The first appeals were restored to file and the First Appellate Authority confirmed the levy of interest and penalty thereby dismissed the appeals.

7. The Dealer claims that the Assessing Authority ought to have resort the provisional assessment u/s. 40 of the OVAT Act before imposing tax, interest and penalty u/r. (1), (2) and (3) of Section 34 of the OVAT Act.

The Dealer was obliged to file the returns u/s. 33 of the OVAT Act, but it fails to discharge the statutory obligation. Section 34 of the OVAT Act deals in default filing of returns and Section 40 of the said Act deals in provisional assessment.

The relevant statutory provisions under the OVAT Act, as it stood then, are quoted hereunder for better appreciation :-

“34. Default in filing of return –

- (1) *Where a dealer required to file return under Section 33 –*
- (a) *fails without sufficient cause to pay the amount of tax due as per the return, revised return or final return, as the case may be, for any tax period; or*
 - (b) *makes voluntary disclosure under sub-section (5) of Section 33 showing a higher amount of tax to be due than was shown by him in the original return; or*

- (c) *fails to furnish return, revised return or final return, as the case may be; or*
- (d) *fails to pay the amount of tax due for any month in the manner prescribed;*

such dealer shall be liable to pay interest in respect of—

- (i) *the tax, which he fails to pay according to the return, revised return or final return, as the case may be; or*
- (ii) *the difference of the amount of tax according to the voluntary disclosure; or*
- (iii) *the tax payable for the period for which he has failed to furnish return, revised return or final return, as the case may be; or*
- (iv) *the tax payable for any month or months within the prescribed time,*

at the rate of one per centum per month from the date the return for the period or payment for the month was due to the date of its payment or to the date of order of assessment, whichever is earlier.

- (2) *If a registered dealer, without sufficient cause, fails to pay the amount of tax due and interest payable thereon along with return, revised return or final return, as the case may be, in accordance with the provisions of sub-section (1), the Commissioner may, after giving the dealer a reasonable opportunity of being heard, direct him to pay in addition to the tax and the interest payable by him, a penalty at the rate of two per centum per month on the tax and interest so payable, from the date it had become due to the date of its payment or the order of assessment, whichever is earlier.*
- (3) *If a registered dealer or any other dealer required to furnish return under sub-sections (1), (2) or (3) of Section 33, without any sufficient cause, -*
 - (a) *fails to comply with the requirements under sub-sections (1), (2) or (3) of Section 33; or*
 - (b) *fails to furnish, the proof of payment in relation to any voluntary disclosure made in accordance with sub-section (5) of Section 33; or*
 - (c) *fails to furnish the proof of payment as required under sub-section (6) of Section 33,*

the Commissioner may, after giving the dealer a reasonable opportunity of being heard, direct him to pay in addition to any tax, interest and penalty under sub-sections (1) and (2) payable or paid by him, a penalty of a sum of rupees one

hundred per each day of default subject to maximum of rupees ten thousand.”

“40. Provisional assessment –

- (1) *Where a registered dealer fails to furnish the return in respect of any tax period within the prescribed time, the assessing authority, if he is satisfied that provisional assessment is necessary in that case, may proceed to assess the dealer provisionally for that period, notwithstanding anything contained in Section 42.*
- (2) *The provisional assessment under sub-section (1) shall be made on the basis of past return or past records and, where no such returns or records are available, on the basis of information received by the assessing authority and in every such case, the assessing authority shall direct the dealer to deposit the amount of tax so assessed in such manner and by such date as may be prescribed.*
- (3) *If the dealer furnishes return along with evidence showing full payment of the tax due and the interest and penalty, payable, if any, under Section 34 on or before the date specified under sub-section (2), the provisional assessment made under sub-section (1) shall stand revoked on the date on which such return is filed by the dealer.”*

The relevant provisions under the OVAT Rules, as it stood then, is extracted hereunder –

“39. Levy of interest and penalty for default of payment of tax and/or interest due –

- (1) (a) *Where a dealer required to file return under Section 33 commits any one or more of the offences referred to in sub-sections (1), (2) or (3) of Section 34, the Commissioner may issue notice in Form VAT-205 calling upon the said dealer to show cause as to why interest and/or penalty shall not be levied under sub-section (1) and sub-section (2) and/or (3) of Section 34 respectively.*
- (b) *Where the dealer fails to respond to such notice or explain the default in conditions specified in the notice to the satisfaction of the authority issuing the notice under sub-rule (1), interest shall be levied under sub-section (1) and/or penalty shall be imposed under sub-section (2) and/or sub-*

section (3) as the case may be, of Section 34 and an order to that effect shall be issued in Form VAT-206.”

8. A bare reading of Rule 39(1) & (2) of the OVAT Rules, it stipulates that the Commissioner shall issue notice in Form VAT-205 to the Dealer if the Dealer commits any one or more of the offences referred to in sub-section (1), (2) or (3) of Section 34 calling upon the Dealer to show-cause as to why interest and/or penalty shall not be levied under sub-section (1) and sub-section (2) and/or of sub-section (3) of Section 34 respectively.

Likewise, where the Dealer fails to respond or explain the default condition to the satisfaction of the authority under sub-rule (1), interest shall be levied under sub-section (1) and/or penalty shall be imposed under sub-section (2) and/or sub-section (3), as the case may be, of Section 34 and an order to that effect shall be issued in Form VAT-206.

Further, Section 34(2) of the OVAT Act provides that if a registered dealer without sufficient cause fails to pay the amount of tax due and interest payable thereon along with return in accordance with the provision of sub-section (1), the Commissioner may after giving the dealer a reasonable opportunity of being heard, direct the dealer to pay addition to the tax and interest payable by him, a penalty @ 2% per month on the tax and the interest so payable from the date it had become due to the date of its payment or the order of assessment, whichever is earlier.

Section 34(3) of the OVAT Act provides that if a registered dealer or any other dealer required to furnish return under sub-section (1), without any sufficient cause (a) fails to comply with the requirement under sub-section (1) of Section 33, the Commissioner may after giving the dealer a reasonable opportunity of being heard direct him to pay any tax, interest and penalty under sub-section (1) and (2) payable or paid by him, a penalty of sum of ₹100.00 for each day of default subject to maximum of ₹10,000.00.

9. On perusal of the Form VAT-205, i.e. notice to the Dealer reveals that the interest, penalty and penal penalty are to be calculated on the turnover of the Dealer. Admittedly, the Dealer had not filed the returns for the periods under assessment. The record does not disclose how the Assessing Authority got the turnover of the Dealer for the impugned periods. The Assessing Authority should have followed the recourse of Section 40 of the OVAT Act, i.e. provisional assessment, by taking into account the turnover of the Dealer for the past periods or should have obtained the same from the Excise Department or otherwise.

10. The assessment orders reveal that the Assessing Authority was directed the Dealer to pay the tax due, interest, penalty and also penalty u/s. 34(3) of the OVAT Act for the impugned periods. The Dealer claims that the Assessing Authority cannot impose tax u/s. 34 of the OVAT Act. Section 34(2) of the Act provides that the Dealer is liable to pay interest in addition to the tax payable.

It is apt to observe here that Section 40(3) of the OVAT Act provides that the provisional assessment shall be revoked after completion of assessment u/s. 34 of the OVAT Act. So, the recourse of Section 40 normally precedes the assessment u/s. 34 of the OVAT Act. Evidently, the Assessing Authority has not adhered the provisions of provisional assessment to ascertain the tax payable. Even though the record does not disclose the source with regard to Dealer's turnover thereby computing the tax payable especially when the admitted tax payable does not differ the amount mentioned in the returns and the Dealer also does not dispute the amount of tax payable.

On perusal of Annexure-IV filed by the Dealer, i.e. detail statement showing tax and interest paid on different dates, for the months August, 2017 to May, 2019, under the heads 'TTO' and 'Tax Due'. On

further perusal, the tax dues computed in the impugned orders and admitted as per Annexure-IV are same, which is payable by the Dealer in terms of Section 34(2) of the OVAT Act. It is also not dispute that the Dealer has filed the returns along with admitted tax and interest on 11.07.2019 after the orders passed by the Assessing Authority. It is also settled principles of law that the Dealer is required to pay the interest and penalty till the date of filing of return along with admitted tax due for failure to comply the provisions of Section 33 of the OVAT Act. As the Dealer has already filed the return, i.e. on 10.07.2019, only after the orders of assessment, i.e. on 08.07.2019, and he is required to pay the interest, penalty and penal penalty as per the provisions of Section 34(1), (2) and (3) of the OVAT Act.

The Dealer does not dispute that he had offered his explanation to the show-cause notice in Form VAT-205, which was considered and was rejected by the Assessing Authority. Rule 39(1)(b) of the OVAT Rules specifically provides that interest shall be levied under sub-section (1) and/or penalty shall be imposed under sub-section (2) and/or sub-section (3), as the case may be, of Section 34 and an order to that effect shall be issued in Form VAT-206. The word 'shall' connotes that levy the interest is mandatory. So far as levy of penalty is concerned, the word 'and/or' denotes that sub-section (1), (2) and (3) are conjunctive as well as disjunctive and it depends upon the discretion of the Assessing Authority, which is further clear from the word 'may' used in sub-section (2) and (3) of Section 34 of the Act. The Assessing Authority exercised his discretion in imposing penalty under sub-section (2) and (3) for the default in payment of due tax and interest as the Dealer carries on business regularly and fails to furnish any materials regarding disruption of its business, but subsequently deposited the due tax and interest by withholding the admitted tax to the State exchequer for certain period. Moreover, the result of the reassessment

will be same in the event of remand of matter to the Assessing Authority for de novo assessment as the Dealer does not dispute the amount of tax payable for each of the months, the interest and penalty will be assessed as per the provisions of Section 34(1), (2) and (3) of the OVAT Act, so, at this stage, the remand of the assessment will become academic. Hence, it is ordered.

11. Resultantly, the appeals are dismissed. The orders of the First Appellate Authority are allowed to stand. Cross-objections are disposed of accordingly.

Dictated & Corrected by me

**Sd/-
(G.C. Behera)
Chairman**

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(G.C. Behera)
Chairman**