BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 28 (VAT) of 2015-16

(Arising out of order of the learned JCST, Bhubaneswar Range, Bhubaneswar in Appeal No. AA – 106221322000094/BH-IV/ 2013-14, disposed of on 26.11.2014)

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

M/s. Maa Distributors,
Plot No. M/159, Baramunda,
H.B. Colony, Bhubaneswar ... Appellant

-Versus-

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

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

Date of hearing : 19.07.2023 *** Date of order : 18.08.2023

O R D E R

Dealer is in appeal against the order dated 26.11.2014 of the Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar (hereinafter called as 'First Appellate Authority') in F A No. AA – 106221322000094/ BH-IV/2013-14 confirming the assessment order of the Sales Tax Officer, Bhubaneswar IV Circle, Bhubaneswar (in short, 'Assessing Authority').

2. Briefly stated, the facts of the case are that –

M/s. Maa Distributors engages in wholesale-cum-retail trading of spices, tin food, ghee, papad etc. The assessment period relates to 01.04.2007 to 30.06.2012. The Assessing Authority raised tax, interest and penalty of ₹12,09,390.00 u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') in *ex parte* on the basis of Audit Visit Report (AVR).

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority confirmed the tax demand and dismissed the appeal. Being aggrieved with the order of the First Appellate Authority, the Dealer prefers this appeal. Hence, this appeal.

The State files cross-objection supporting the order of the First Appellate Authority confirming the order of assessment as just and proper.

3. The learned Counsel for the Dealer submits that the AVR is bad in law on the point of maintainability in view of Sections 41(4) and 42(6) of the OVAT Act besides Rule 41(1) of the OVAT Rules. He further submits that the First Appellate Authority whispers no single word regarding sales suppression and less payment of VAT. So, he submits that the order of the Assessing Authority is bad in law. He further submits that the sales suppression relates to the period exceeding five years, which is contrary to the rules and the same is not sustainable in law. So, he submits that the order of the First Appellate Authority is erroneous and contrary to the provisions of law and fact involved, and as such, the same needs interference in appeal.

4. Per contra, the learned Standing Counsel (CT) for the State submits that the audit period can be confined to five years segregating the excess period. He further submits that the Assessing Authority has complied with all the requirement of Sections 41(4) and 42(6) of the OVAT Act. He further submits that the First Appellate Authority has already discussed the sales suppression though the Assessing Authority had not done the same. He

further submits that the same can be adjudicated even by this forum if sufficient materials are available. He further submits that penalty is automatic as per Section 42(5) of the OVAT Act. He further submits that the order of the First Appellate Authority is reasoned one and the same requires no interference in appeal.

He relies on the decisions of the Hon'ble Court in cases of ***M/s. Shree Jagadamba Coal Centre v. The Joint Commissioner of Sales Tax & others*** (**WP (C) No. 28030 of 2013** dated 23.07.2015); ***M/s. B. D. Patanaik v. Deputy commissioner of Sales Tax*** (**WP (C) No. 8802 of 2014** dated 13.05.2014; and ***M/s. Priti Oil Ltd. v. Deputy Commissioner of Commercial Taxes*** (**WP (C) No. 10289 of 2018** dated 01.05.2019.

5. Having heard the rival submissions and on going through the materials on record, it transpires from the record that the Dealer has taken a ground of maintainability u/s. 41(4) of the OVAT Act, i.e. submission of AVR within seven days from the date of its completion.

Record reveals that the AVR was completed on 10.01.2013 and the Authorized Officer sent the AVR to the Assessing Authority on the same day. The Assessing Authority issued the notice in Form VAT-306 on 01.02.2013. As the order sheet of the record reveals that the Authorized Officer sent the AVR immediately after completion of audit, the submission of learned Counsel for the Dealer is bound to fail.

6. The Dealer also disputes the maintainability of AVR on the ground of Section 42(6) of the OVAT Act. He submits that the audit assessment can only be completed within a period of six months from the date of service of notice along with AVR.

1st proviso to Section 42(6) of the OVAT Act provides that the Commissioner can allow for further six months on the merit of each case for completion of the assessment proceeding. Second proviso provides that by recording good and sufficient reason, the Commissioner can extend further

six months beyond the time allowed for completion of the assessment proceeding.

In the case at hand, the notice along with AVR was issued on 01.02.2013 and the same was received by the Dealer on 02.02.2013. The record reveals that the assessment order was passed on 30.07.2013. So, it cannot be said that the assessment was completed beyond the period of six months. Therefore, the contention of the Dealer on this score fails.

7. The Dealer also challenges the maintainability in additional grounds of appeal as per provision of Rule 41(1) of the OVAT Rules.

He contends that the Commissioner shall under the provision of Section 41, select a certain number of registered dealers ordinarily before the close of the year of audit during the following year; provided that while selecting the registered dealers for audit, the Commissioner shall also specify the periods for audit, not being a period which is ended five years previous to the year during which audit is to be taken up. He further contends that the AVR is beyond five years and the same cannot be utilized for audit assessment and as such, the AVR should be quashed.

On the contrary, learned Standing Counsel (CT) for the State objects such contention and submits that the period which exceeds more than five years can be excluded as per the decisions cited supra.

7.1. Section 41(1) of the OVAT Act is quoted hereunder :-

> "41(1) The Commissioner may select such individual dealers or class of dealers for tax audit on random basis or on the basis of risk analysis or on the basis of any other objective criteria, at such intervals or in such audit cycle, as may be prescribed."

The bare reading of Section 41(1) of the OVAT Act, it provides that the Commissioner may select individual dealers for tax audit at such interval or in such audit cycle as may be prescribed. Rule 41(1) of the OVAT Rules provides that the procedure to select the audit cycle and to direct for audit of the selected dealers.

It reveals that no material is forthcoming on record regarding the date when the Commissioner passed order for audit visit, i.e. before the close of the year or thereafter, and the period for audit. Dealer raises no dispute in this respect. Dealer only disputes the period comprises for audit, which should not exceed five years to the year of audit. Admittedly, the audit period relates to 01.04.2007 to 30.06.2012. The audit period, not being a period which has ended five years previous to the year during which audit is to be taken up. This means the audit is to be conducted in the year 2012-13 and the same was taken up on 24.09.2012 and the period of audit shall not exceed five years previous to the year 2012-13.

Therefore, the audit period should have been confined from 01.04.2007 to 31.03.2012. But, in fact, the AVR reveals that the audit period comprises from 01.04.2007 to 30.06.2012. So, the period 01.04.2012 to 30.06.2012 should not have been included in view of the statutory provisions, which can be treated merely as irregular and the same can be rectified by excluding the exceeding period of five years, i.e. 01.04.2012 to 30.06.2012. The AVR reveals purchase and sale details for the period from 2007-08 to 2011-12 and 2012-13 (01.04.2012 to 30.06.2012).

In this regard, Revenue relies on the decisions in the cases of M/s. ***Shree Jagadamba Coal Centre; M/s. B.D. Patnaik; & M/s. Priti Oil Mill*** cited supra, wherein the Hon'ble Court have been pleased to exclude the period under dispute and remit the matters to the Assessing Authority for assessment afresh. In view such settled law, we are of the considered opinion that the period from 01.04.2012 to 30.06.2012 can be segregated from the audit period. Moreover, the AVR reveals that the fact and figures for each year, i.e. 2007-08 to 2011-12 and 2012-13 (01.04.2012 to 30.06.2012), are separate and distinct.

8. Assessment orders reveals that audit assessment was made on the strength of AVR on the following allegations :-

(i) Less paid VAT of ₹629.00 during the Financial Year 2007-08;

(ii) Sales suppression of ₹76,95,903.00;

(iii) Detection of 18 nos. of damaged return slip reflecting return of damaged goods of ₹1,16,558.00 and the Dealer has claimed ITC of ₹4,742.00;

(iv) The Dealer has not submitted the audited report for the period 2007-08 to 2012-13; and

(v) The Dealer has not paid interest mount amounting to ₹2,527.00 along with return.

However, the Dealer did not press the point nos. (iv) and (v) for adjudication before this forum.

8.1. As regards less payment of VAT of ₹629.00 during the Financial Year 2007-08 and sales suppression of ₹76,95,903.00 are concerned, the Assessing Authority whispers no single word in the assessment order while adjudicating the matter, but detected sales suppression of ₹76,95,903.00 and determined the tax liability of the Dealer, which shows the whimsical, arbitrary and callous approach of the Assessing Authority.

The First Appellate Authority in the impugned observed that the Dealer fails to substantiate allegation at point no. (i) regarding less payment of VAT of ₹629.00 during the financial year 2007-08 though he has taken a stand before the First Appellate Authority that the Assessing Authority has taken less ITC and payment made challan. He has also taken the said plea before this forum, but unable to file any document to that effect. So, we not impressed upon the submission of the learned Counsel for the Dealer on this score. However, the Dealer is at liberty to produce any document before the Assessing Authority to rebut the allegation of less payment of VAT at the time of reassessment.

8.2. As regards the allegation of sales suppression of ₹76,95,903.00, the impugned order of the First Appellate Authority reveals that it relates to the period of assessment year 2012-13 (01.04.2012 to 30.06.2012). We have already rendered our observation to the effect that the audit should be comprised of five years and not more than that. On that ground only, we have already remitted the matter to the Assessing Authority for segregation of the period, i.e. 01.04.2012 to 30.06.2012, from the entire audit period and the same cannot be utilized against the Dealer for the sake of assessment. So, the sales suppression of ₹76,95,903.00 alleged in the AVR does not have leg to stand against the Dealer.

9. As regards the disallowance of ITC amounting to ₹4,742.00, the Assessing Authority did not discuss specifically regarding the disallowance of ITC by not taking into consideration the plea of the Dealer that reversal of ITC relates to damaged stock of 18 nos. of slip. The First Appellate Authority did not accept the contention of the Dealer that the said damaged stock relates to the period prior to 01.04.2005 as the Dealer failed produce any material evidence to that effect. The AVR reveals that the Audit Team detected 18 nos. of slip reflecting return of damaged stock, but the First Appellate Authority and Assessing Authority did not take any pain to verify the said allegation though mentioned specifically in AVR with page nos. So, the findings of the First Appellate Authority and Assessing Authority on this score are not sustainable and require fresh examination by the Assessing Authority.

10. Regarding levy of penalty u/s. 42(5) of the OVAT Act, the same is mandatory in nature as per settled law and the Assessing Authority shall impose penalty as per law, if any liability to pay tax is determined against the Dealer in reassessment.

11. For the foregoing discussions, we are of the considered view that the allegation of sales suppression of ₹76,95,903.00 cannot be fastened against the Dealer since the same relates to the segregated period of audit assessment. The matter is remitted back to the Assessing Authority to re-examine the allegation of less payment of VAT of ₹629.00 and disallowance of ITC of ₹4,742.00 as per the AVR only when the Dealer will produce any relevant material documents before him. Hence, it is ordered.

12. Resultantly, the appeal stands allowed in part and the impugned order of the First Appellate Authority is hereby set aside. The matter is remanded to the Assessing Authority for assessment afresh as per law keeping in view the observations made supra within a period of three months from the date of receipt of this order. The Dealer is directed to produce the relevant material documents before the Assessing Authority for proper adjudication of the matter, or else the Assessing Authority shall proceed to complete reassessment as per law. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

Sd/-
(G.C. Behera)
Chairman

I agree,

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

I agree,

Sd/-
(B. Bhoi)
Accounts Member-II