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

**S.A. No. 31 (VAT) of 2019**

(Arising out of order of the learned Addl. CST (Appeal), Bhubaneswar in Appeal No. AA (VAT) 02/BHI/2018-19, disposed of on 26.10.2018)

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

M/s. Auro Agencies,
Plot No.6, Puspa Market,
Cuttack Road, Bhubaneswar,
Dist. Khurda ... 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)

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Date of hearing : 01.05.2023 *** Date of order : 11.05.2023

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**O R D E R**

Dealer is in appeal against the order dated 26.10.2018 of the Addl. Commissioner of Sales Tax (Appeal), Bhubaneswar (hereinafter called as 'First Appellate Authority') in F A No. AA (VAT) 02/BHI/2018-19 confirming the assessment order of the Deputy Commissioner of Sales Tax, Bhubaneswar-I Circle, Bhubaneswar (in short, 'Assessing Authority').

2. The facts of the case, in brief, are that –

M/s. Auro Agencies deals in glass sheet, glass hardware fittings, aluminium products, silicon sealant etc. The assessment period relates to 01.04.2014 to 31.03.2015. The Assessing Authority raised tax and penalty

of ₹19,918.00 u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') 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 to be just and proper.

3. Learned Counsel for the Dealer submits that both the forums below have erroneously determined sales suppression amounting to ₹13,23,140.00 due to mismatch of ITC amounting to ₹66,157.00 in the VATIS with the ledger of purchasing dealer. He further submits that the enhancement of TTO on account of delivery charges for loading and unloading of materials at site is illegal and not sustainable in law. Further, he submits that the imposition of penalty u/s. 42(5) of the OVAT Act is mechanical and non-application of judicial mind since there is no tax due. So, he submits that the orders of the First Appellate Authority and the Assessing Authority are liable to be set aside.

4. On the other hand, the learned Standing Counsel (CT) for the State submits that the Dealer fails to place any material evidence regarding claim of ITC and claim of freight charges. He further submits that the penalty u/s. 42(5) of the OVAT Act is mandatory and automatic on the tax dues. He further submits that the orders of the First Appellate Authority and the Assessing Authority are correct in its perspective and the same suffers from no infirmity, which requires no interference.

5. Having regard to the submissions and on careful scrutiny of the record, it transpires from the record that the Audit Team determined differential turnover of ₹1,27,24,000.00 and differential output tax of

₹6,36,200.02 basing on estimation of sales suppression. The Audit Team has also found that the Dealer has reflected freight charges to the tune of ₹1,41,545.00 under 5% taxable goods and ₹540.00 under 13.5% taxable goods. The order of assessment reveals that the Dealer could not explain the mismatch of ITC to the tune of ₹₹66,157.00. The Assessing Authority determined the sales suppression at ₹13,23,140.00 and determined the output tax at ₹66,157.00 besides penalty of ₹1,32,314.00. The Assessing Authority further found that the Dealer has collected delivery charges of ₹1,41,545.00 under 5% taxable goods and ₹540.00 under 13.5% taxable goods. He computed tax of ₹7,150.00 on the same, besides penalty of ₹14,300.00.

Accordingly, he added ₹1,42,085.00 and ₹13,23,140.00 to the declared TTO of the Dealer and the same came to a sum of ₹35,17,21,996.00. He computed appropriate tax @ 5% and 13.5% and the total output tax came to a sum of ₹1,81,15,323.00. He allowed ITC of ₹61,354.00 and the tax due was for a sum of ₹1,80,53,969.00. The Assessing Authority calculated the penalty and tax of ₹1,82,00,583.00 and adjusted the amount of VAT paid of ₹1,81,80,665.00 and the balance due was ₹19,918.00. The First Appellate Authority confirmed the assessment.

6. As regards mismatch of ITC, the Dealer had claimed that the mismatch was due to non-disclosure of proper purchase in Annexure to VAT-201 by the purchasing dealers. The Assessing Authority observed that the explanation furnished by the Dealer before him was correct. It is settled principles of law that Dealer should not be penalised for the latches of the purchasing dealers.

In the case of ***On Quest Merchandising India Pvt. v. Government of NCT of Delhi and others*** in batch appeal decided on 26.10.2017 in **WP (C) No. 6093 of 2017**, wherein the Hon'ble Delhi High Court have been pleased to observe as under :-

> "54. The result of such reading down would be that the Department is precluded from invoking Section 9 (2) (g) of the DVAT to deny ITC to a purchasing dealer who has bona fide entered into a purchase transaction with a registered selling dealer who has issued a tax invoice reflecting the TIN number. In the event that the selling dealer has failed to deposit the tax www.taxguru.in W.P.(C) 6093/2017 & connected matters Page 40 of 40 collected by him from the purchasing dealer, the remedy for the Department would be to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC. Where, however, the Department is able to come across material to show that the purchasing dealer and the selling dealer acted in collusion then the Department can proceed under Section 40A of the DVAT Act."

The aforesaid decision of the Hon'ble Delhi High Court have been confirmed by the Hon'ble Apex Court in SLP in the case of ***Commissioner of Trade & Taxes, Delhi and others Vs. Arise India Limited and others,*** **[TS-2-SC-2018-VAT**], has dismissed the Special Leave Petition filed by the Revenue against the decision of the Hon'ble High Court of Delhi in the case of ***Arise India Limited and others Vs. Commissioner of Trade & Taxes, Delhi and others,*** **[TS-314-HC-2017(Del)-VAT]** ("Arise India case").

7. In view of the ratio decided by the Hon'ble Delhi High Court, the State cannot deny the ITC of the Dealer merely on the ground that the purchasing dealers failed to disclose proper purchase in Annexure to VAT-201. So, the First Appellate Authority and the Assessing Authority went wrong in disallowing the claim of ITC of the Dealer due to mismatch, which warrants interference in appeal. The Department, however, is at liberty to proceed against the defaulting purchasing dealers for non-disclosure of proper purchase and cannot deny the ITC to the Dealer. Further, the Department is able to come across material to show that the purchasing dealers and the selling dealer acted in collusion then the Department can proceed in accordance with law.

8. As regards non-inclusion of delivery charges on sale price, the assessment order reveals that the Dealer has collected delivery charges of ₹1,41,545.00 under 5% taxable goods and ₹540.00 under 13.5% taxable goods, but the invoices shows that the Dealer has not collected tax on the

delivery charges which violates the provision of Section 2(46) of the OVAT Act. The Dealer could not show any material before this forum that it relates to the service provided towards loading and unloading charges. So, I do not find any merit in the contention of the Dealer on this score.

9. As regards imposition of penalty u/s. 42(5) of the OVAT Act, it is settled principles of law that the imposition of penalty is mandatory and automatic. So, the Assessing Authority shall compute the penalty on the tax dues as per law.

10. On the foregoing discussions, I came to an irresistible conclusion that the First Appellate Authority and the Assessing Authority went wrong in saddling the tax dues on the Dealer for mismatch of ITC, but the First Appellate Authority and Assessing Authority have rightly levied tax on non-inclusion of delivery charges on sale price. Hence, it is ordered.

11. Resultantly, the appeal is allowed in part and the impugned order of the First Appellate Authority stands modified to the extent indicated above. The matter is remanded to the Assessing Authority for computation of tax liability 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 Department, however, is at liberty to proceed against the defaulting purchasing dealers for non-disclosure of proper purchase and cannot deny the ITC to the Dealer due to mismatch. Further, if the Department is able to come across material to show that the purchasing dealers and the selling dealer acted in collusion then the Department can proceed in accordance with law.*

Cross-objection is disposed of accordingly.

**Dictated & Corrected by me**

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

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