BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A.No. 160(V)/2017-18

(From the order of the ld.JCST (Appeal), Sambalpur Range, Sambalpur, in Appeal No. AA.133/SAII/VAT/2013-14, dtd.31.05.2017, modifying the assessment order of the Assessing Officer)

Present: Sri S. Mohanty
2nd Judicial Member

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

-Versus-

M/s. Shanti Rice Mill, Dist. Sambalpur. ... Respondent

For the Appellant : Mr. M.S. Raman, Addl. Standing Counsel (C.T.)
For the Respondent : None

Date of Hearing: 13.07.2018 Date of Order: 13.07.2018

ORDER

Correctness of the reduction of tax due with penalty assessed by Assessing Officer in a proceeding u/s.43 of the OVAT Act in first appeal by the learned First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur (in short, FAA/JCST) is under challenge in this appeal by the State.

2. Originally the assessee-dealer/respondent was subjected to assessment u/s.43 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act) for the period 01.04.2012 to 31.03.2013 initiated basing a report submitted by Enforcement Wing, Sambalpur with an allegation that, the dealer was guilty of escapement of turnover. The assessee-dealer was a rice miller engaged in custom milling of paddy. The Enforcement Wing during visit of the dealer's unit on 04.03.2013 detected, the dealer had effected sale of bran, which was not

accounted for in the sale register and the dealer had also found not issued any tax invoice for such sale. On being confrontation of the report to the dealer, the dealer admitted the fact of sale suppression but pleaded that, weight of per bag containing rice bran was around 45 K.g. instead of 55 K.g. as reported and the value of the bran per Quintal should be Rs.700/-. The AO accepted both the claim of the dealer regarding weight and price and then basing on admission of the dealer assessed the sale suppression, which was calculated at Rs.21,10,320/-. Tax on escaped turnover was calculated to Rs.1,05,516/- and penalty at two times u/s.43(2) of the OVAT Act was also imposed as a result, the demand was raised at Rs.3,16,548/-.

3. The order of the AO was challenged before the FAA. The ld.JCST (Appeal) Sambalpur Range, Sambalpur as FAA found that, the dealer was charged with suppression of 5862 bags of bran. However, the dealer could produce Xerox copies of tax invoices against sale of 3757 bags to one M/s. Priti Oil (P) Ltd. As a result, the FAA hold the dealer guilty of sale suppression of 2105 bags of rice bran. The tax due and penalty at two times on such sale suppression became calculated at Rs.1,13,670/-.

4. When the demand reduced as above, the Revenue has preferred this appeal on the grounds that, the FAA has accepted the Xerox copies of tax invoices without proper verification and the FAA has also accepted the weight of bran per bag mechanically.

5. The appeal is heard without cross objection and ex-parte as well since the dealer did not turn up in spite of service of the notice of hearing.

6. When recapitulating the facts involved in this case in brief, it is found that, the dealer's unit was visited by the Enforcement Wing on 04.03.2013. On the basis of report submitted

by Enforcement Wing alleging sale suppression, the AO initiated proceeding u/s.43 of the OVAT Act for the period 01.04.2012 to 31.03.2013. There is no quarrel on the proposition of law that, a proceeding u/s.43 of the OVAT Act only can be initiated on the basis of an information succeeded by forming an opinion that, the whole or any part of the turnover of the dealer in respect of such tax period or tax periods has :

> "(a) escaped assessment, or
> (b) been under-assessed, or
> (c) been assessed at a rate lower than the rate at which it is assessable;
> Or that the dealer has been allowed –
> (i) Wrongly any deduction from his turnover, or
> (ii) Input tax credit, to which he is not eligible,
>
> the assessing authority may serve a notice on the dealer in such form and manner as may be prescribed and after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he deems necessary, proceed to assess to the best of his judgment the amount of tax due from the dealer.]"

Thus, the provision above contemplates there must be an assessment u/s.39, 40, 42 or 44 of the OVAT Act preceded to proceeding u/s.43 of the OVAT Act. Adverting to the case in hand, it is found that, the AO has not spelt a word, whether the dealer was self-assessed or subjected to audit assessment under any of the provisions above earlier to the proceeding u/s.43 of the OVAT Act. However, since this question was never raised then it only can be said that, this forum cannot make out a third case where the parties are not at issue.

7. Adverting to the allegation as brought in this case, it is found that, the dealer had admitted in writing before the Enforcement Wing that, he had unaccounted for stock of the goods detected and those were purchased from local market. Before the reporting authority on 24.07.2013 the dealer stated that he has not

issued invoice against sale nor he had accounted for the same in the sale register. However, in a latter period during the assessment proceeding, the dealer by a separate statement before the AO though admitted the fact of sale suppression but disputed the weight and price of the bran. However, it is found that, the AO accepted the claim of the dealer regarding weight and price. Before both these forums the dealer had admitted in expressed terms about the sale suppression. But to utter surprise, the dealer is found to have taken a 'U' turn from his earlier stand before the FAA by taking the plea that, he has sold bran of 3757 bags to M/s. Priti Oil (P) Ltd., Rengali supported with tax invoices. From the impugned order, it is found that, the FAA had verified the tax invoice in Xerox and accepted the plea of the dealer and thereafter he reduced the quantum of sale suppression. The plea of the dealer before the Enforcement Wing and before the AO are contradictory to the extent of weight and price whereas, the plea of the dealer before the FAA is inconsistent with the earlier pleas before the AO or before the Enforcement Wing. The impugned order does not reveal under what circumstances, the dealer could give statement admitting the sale suppression when he had sold some quantity out of it being supported with necessary documents. For sake of argument, if it is assumed but not construed that, the dealer had actually effected sale of bran of 3757 bags to M/s. Priti Oil (Pvt.) Ltd., in that case, the FAA had the option to verify the periodical return of the dealer and that of the purchasing dealer M/s. Priti Oil (Pvt.) Ltd. to ascertain the truth if there was such sale transaction, which are disclosed in the periodical return. Learned Addl. Standing Counsel for the State, Mr. Raman seriously doubted the genuineness of the tax invoices. At the same time, he has also argued that, since the assessment period in question is from 01.04.2012 to 31.03.2013 and during this period, the dealer must

have some transactions disclosed in his register effected between M/s. Priti Oil (Pvt.) Ltd. then, it cannot definitely be said that, the Xerox copy of tax invoice produced before the FAA are relatable sale suppression in the case in hand. There is considerable force in the argument of the learned Addl. Standing Counsel. Further, as mentioned above when the dealer took contrary and inconsistent pleas time to time, which are evident from his own statements before the authorities, in that case, this Tribunal is constrained to opine that, the FAA has gone in a slip-shod manner without in-depth investigation into the fact that, the tax invoice relates to the sale suppression in question or not ?

In ultimate analysis, it is held that, the impugned order is not sustainable in law. Hence, need to be set-aside. Resultantly, it is found that, this is a fit case where the matter should be remitted back to the FAA to rehear the matter by calling for the evidences regarding genuineness of the tax invoice advanced by the dealer and then calculate the taxable liability of the dealer. Hence, ordered.

The appeal is allowed. The impugned order is set-aside. The mater is remitted back to the FAA for assessment afresh in the light of the observation above.

Dictated and Corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

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