

check-gate in the regular assessment, in that case, the present appeal if maintainable? and

iii) What order?

2. The appellant dealer in the case in hand was subjected to Audit Assessment for the tax period 01.01.2008 to 31.10.2009. On the basis of audit visit report, the assessment was ended with demand of balance tax due at Rs.30,86,965.43 and penalty of Rs. 3,08,485.20 totaling to Rs.4,62,728. In appeal before First Appellant Authority, the dealer got some relief i.e. to the extent that the tax of Rs.39,040.00 collected at check gate which was adjusted from out of the balance tax due raised by Assessing Authority mentioned as above. As a result, the total demand became reduced to Rs.3,45,608.00 before First Appellate Authority. Still felt aggrieved, the dealer assailed the order of First Appellate Authority in this appeal.

3. The main contention of the dealer is, it had paid tax of Rs.39,040.00 and penalty of Rs.1,15,200.00 at check-gate. The legality of the collection of such tax and penalty questioned by the dealer before in the Revision Forum before Commissioners of Sales Tax, Cuttack which is pending. It is claimed that, when the dealer has claimed for adjustment of the tax and penalty paid at check gate in the total demand raised by taxing authority in regular assessment U/s.42 of the OVAT Act, but the Assessing authority raised tax due & penalty independent of the tax and penalty paid at check gate. Whereas, the First Appellate Authority only took consideration of the tax paid at the check-gate by deducting it from out of the tax due but did not consider the penalty paid at the check-gate by adjusting in from out of the demand raised. It is prayed that the entire amount paid at check-gate should be adjusted from out of the total demand.

4. The appeal is heard with cross objection from the Revenue. In the cross objection, the Revenue has supported the finding of the First Appellate Authority.

5. In the appeal in hand, it is remained undisputed that, the dealer had paid tax and penalty at unified check post on three occasions. It had paid tax to the extent of Rs.39,040.00 and penalty to the extent of Rs.1,15,200.00. In the regular assessment, the Assessing Authority did not adjust the aforesaid amount in calculation of the total demand. Before the First Appellate Authority, the dealer got some relief such as, that the tax amount of Rs.39,040.00 was adjusted whereas the penalty was not adjusted. The claim of the dealer is the penalty amount should have been considered and adjusted from out of the demand raised in the regular assessment above. Penalty collected at check-gate is covered U/s. 74(5) whereas penalty imposed in audit assessment is covered U/s. 42(5) of the overt Act. Section 42(5) of the overt act speaks of penalty without prejudice to the fact of any penalty or interest that may have been levied under any provision of this Act. It indicates the penalty levied U/s.42(5) of the OVAT Act is independent of the penalty as imposed u/s.74 of the OVAT Act. It is pertinent to mention here that, provision u/s.74 of the OVAT act does not speak of levy of tax but of penalty only. So it is not understood under which provision such tax was collected at unified check gate.

However, before delving into this question on merit or before giving any finding on it, it is to born in mind that, the dealer has questioned the collection of tax and penalty at check gate before the Revisional Authority. When the legality of the penalty collected at check-gate is pending before the competent authority in an earlier instituted proceeding, so in that view of the matter it can safely be said that the present proceeding is not maintainable in the eye of law. The Audit assessment U/s. 42 and the revision proceeding against the collection of penalty at check-gate are two independent proceedings. In the event the dealer could succeed before Revision Authority while raising demand, the amount paid as penalty at the check-gate need to be adjusted as per the order of the taxing authority or the dealer may

get it refund. Hence, I am of the considered view that keeping view the pendency of the revision, the appeal before this forum is premature and not maintainable, hence ordered.

The appeal is dismissed as per the observation above.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

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