BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No.402(V) of 2015-16,
S.A. No.211(ET) of 2015-16 &
S.A. No.104(C) of 2015-16

(Arising out of the order of the learned Addl.CST(Appeal), South Zone, Berhampur in First Appeal Nos.AA (VAT)-66/2014-15, AA(ET)-37/2014-15 & AA(CST)-37/2014-15, disposed of on 26.11.2015 & 19.12.2015)

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

M/s. Kirloskar Brothers Limited,
At- 7th Floor, IDCO Tower,
Bhubaneswar. ... Appellant.

- **V e r s u s –**

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

For the Appellant : : Mr. N.K. Das, ld. Advocate
: : Mr. K.R. Mahapatra. ld. Advocate
For the Respondent: : Mr. D. Behura, ld.S.C.(C.T.)
: : Mr. S.K. Pradhan, ld. ASC(C.T)

Date of Hearing : 24.05.2023 * Date of Order :12.06.2023**

O R D E R

The dealer-assessee has preferred second appeals at this forum against the orders passed by the Additional Commissioner of Sales Tax (Appeal), South Zone, Berhampur (in short, ld.FAA) in Appeal Case No.AA(VAT)-66/2014-15, No.AA(ET)-37/2014-15 and No.AA(CST)-37/2014-15 confirming the orders passed by the Deputy Commissioner of

Sales Tax, Bhubaneswar-III Circle, Bhubaneswar (in short, the ld. assessing authority) in respect of the assessment passed under Section 42 of the OVAT Act and allowing partly in case of orders passed under Section 9C of the OET Act and under Rule12(3) of the CST (O) Rules. Since the aforesaid three appeals relate to the same material period of the same assessee involving common question of facts and law, they are taken up together for hearing and disposal by this composite order.

2. Briefly stated the facts of the case reveal that M/s. Kirloskar Brothers Limited, 7th Floor, IDCO Tower, Janapath, Bhubaneswar, TIN-21521106240 is engaged in trading of Electric Pump Sets, Spare and accessories thereof, Electric Motors, Spares and accessories thereof, Alternators, Spares and Accessories thereof, Electric Transformers, Electric Poles, Valves, Machineries etc besides being engaged in execution of works contract. The dealer-assessee was assessed under Section 42 of the OVAT Act by the Deputy Commissioner of Sales Tax, Bhubaneswar II Circle, Bhubaneswar (in short, learned assessing authority) for the tax period from 01.04.2012 to 31.03.2013 basing on the Audit Visit Report (AVR) submitted by Deputy Commissioner of Sales Tax, Bhubaneswar IV Circle, Bhubaneswar which resulted in demand of ₹7,75,701.00 including interest of ₹3,593.00 levied

u/s.34(1) of the OVAT Act and penalty of ₹5,60,813.00 u/s.34(2) and U/s.42(5) of the OVAT Act. Aggrieved, the dealer-assessee preferred first appeal. The ld.FAA confirmed the order of assessment passed under Section 42 of the OVAT Act. Similarly,as for the assessment passed under Section 9 C of the OET Act for the said material period, the demand raised including penalty at ₹10,89,158.00 was reduced to ₹2,97,054.00 by the Ld.FAA on disposal of the first appeal preferred by the dealer-assessee. Furthermore, as for the assessment passed under Rule12(3) of the CST(O) Rules determining tax and penalty of ₹16,07,187.00, the ld. FAA while setting aside the order of order of assessment directed the learned assessing authority to reassess the dealer-appellant causing verification of the declaration forms as may be furnished by the dealer-appellant.

3. The learned Counsel representing the dealer-appellant in its second appeal at this forum submits in defense of the demand raised at assessment under section 42 of the OVAT Act and the same being affirmed in the first appeal to the effect that (i) the ineligible ITC amounting to ₹65,323.00 that was claimed for on account of purchase of office equipments for own use and deposited later voluntarily after issuance of tax notice is not subjected to levy of penalty and interest in terms of Section 42(5) of the OVAT Act, as the

said disputed ITC was not assessed under sub-section (3) or sub-section (4) of Section 42 of the OVAT Act. (ii) With respect to disallowance of TDS to the tune of ₹2,11,294.00, the learned Counsel avers that the works contract awarded by the contractee OWSSB to the dealer-appellant which was executed during the year 2010-11 involves TDS of ₹2,11,294.00. The dealer-appellant discharged the tax liability by filing returns for year 2010-11 without availing adjustment of the deduction of tax made by the contractee, as the TDS certificates for the period in question were then not issued. The TDS certificates were communicated to the dealer appellant during 2011-12 and as such, it is submitted that disallowance of TDS amounting to ₹2,11,294.00 by the assessing authority is unjust and illegal. (iii) As regards demand raised under Section 9C of the OET Act, the learned Counsel of the dealer appellant argues that disallowance of exempted sale under Section 6(2) of the CST Act amounting to ₹87,35,532.24 on account of non submission of Form E-1 is illegal, since there is no evidence on record to the effect that such goods have entered into the local area of the dealer-appellant and not by way of transit sale as per provision of Section 6(2) of the CST Act. It is harped upon that the first appeal order passed under Rule 12(3) of the CST (O) Rules for the material period in question speaks of non submission of E-1 Form to the tune of

₹32,90,068.00 which stands in contrast to the order passed under Section 9 C of the OET Act with the claim not supported with E-1 Forms having been mentioned as ₹87,35,532.24 therein. (iv) It is further contended that levy of entry tax against branch transfer for an amount of ₹92,195.00 owing to non submission of Form 'F' is illegal. (v) It is submitted the order of the Ld FAA passed in respect of the assessment framed under Rule 12(3) of the CST (O) Rules allowing the appeal and setting aside the case directing the learned assessing authority to verify the declaration forms is justified. (vi) The learned Counsel rebuts imposition of penalty against all the cases.

4. The State has filed cross objection supporting the order of the ld. FAA passed in respect of OVAT Act in levy of penalty under Section 33(5) of the OVAT Act as justified and the second appeal filed by the dealer-assessee in this score is not sustainable in the eyes of law. The State represented by Mr. D. Behura, ld. S.C. (C.T.) has raised reliance in the judgment passed in the Hon'ble High Court of Odisha in case of *M/s. Laxmi Narayan Bhandar, Cuttack Vrs. State of Odisha* in *STREV No. 9 of 2016.* Further, the State argues that disallowance of exempted sales not supported with E-1 Forms under Section 6(2) of the CST Act and branch transfer without F Forms made by ld. FAA and levy of entry tax thereon is

justified. It is submitted that in respect of Section 42(5) of the Odisha Value Added Tax Act, 2004 (OVAT Act) which is in *pari material* with Section 9(C)(5) of the OET Act, it has been held by the Hon'ble High Court of Odisha in the judgment dated 21.12.2022 in STREV No.118 of 2019 in case of M/s. Nirman Udyog, Berhampur Vrs. State of Odisha to the effect that the penalty thereunder is mandatory with there being no discretion available with the assessing authority. The State contents that as the dealer-assessee has failed to provide statutory forms within the stipulated period as envisaged under Rule12(7) of the CST(R & T) Rules, there should be no further opportunity to be extended to the dealer assessee to submit the statutory forms. Accordingly, these second appeals filed by the dealer-assessee in the present case are urged to be dismissed.

5. The orders of assessment, first appellate orders, grounds of appeal, averments made by the State and the relevant assessment records pertaining to the three second appeals are perused minutely. We have consciously examined the grounds of appeals with reference to the statutory provisions mandated under the OVAT Act, OET Act and the CST Act together with the pronouncements inferred in various legal forums. Our observations are as under:-

(i) The averment pressed by the learned Counsel for the dealer assessee challenging imposition of penalty and interest on ineligible ITC to the tune of ₹65,323.00 that was deposited subsequently after issuance of notice of Tax Audit and before completion of audit assessment is looked into. It is contended that since the disputed ITC was not assessed as per sub-section (3) or sub-section (4) of Section 42 of the OVAT Act, imposition of penalty and interest is illegal and without jurisdiction. In this context, we are of the considered views that the dealer assessee had availed ITC for ₹65,323.00 wrongfully towards purchase of office equipments for own use. Consequent upon service notice for tax audit on 17.7.2013, the dealer appellant deposited the same on 6.8.2013. The learned assessing authority imposed penalty under Section 34(2) and interest under Section 34(1) of the OVAT Act. In this connection, it is inferred that the provisions contained in Section 33(4) of the OVAT Act provide that a dealer may file a revised return within three months following the tax period to which the original relates in case of any omission or error, requirement of adjustments of sale price or tax or both etc in the return furnished under sub-section (1) or sub-section (2) of section 33 of the OVAT Act.

The provision of Section 33(5) of the OVAT Act provides as under:

"If any dealer, after furnishing a return under sub-section (1) or sub-section (2), discovers that a higher amount of tax was due than the amount of tax admitted by him in the original return for any reason, he may voluntarily disclose the same by filling a revised return for the purpose and pay the higher amount of tax as due at any time, in the manner provided under Section 50:

Provided that no such voluntary disclosure shall be accepted where the disclosure is made or intended to be made after receipt of the notice for tax audit under this Act, or as a result of such audit."

The present issue of the case has been adjudicated by the Hon'ble High Court of Odisha in STREV No. 9 of 2016 passed in case of M/s.Laxmi Narayan Bhandar, Cuttack Vrs. State of Odisha which, in nutshell, is enunciated as under:

"In the present case the wrongful ITC was detected in course of audit and it is only the result of such audit report that the Petitioner sought to reverse of ITC wrongfully claimed by filing the revised returns. Consequently, on a combined reading of Section 33(4) and Section 33(5) of the OVAT Act, it is plain that the Authorities could not have accepted the reversal of the ITC wrongfully claimed by the Petitioner……."

Under the present scenario, the dealer-assessee is found to have not filed revised return within the stipulated

time of three months following the tax periods to which the original returns related as per Section 33(4) of the OVAT Act. The ineligible ITC has been deposited after issuance of the tax audit notice. The proviso to Section 33(5) of the OVAT Act imposes a bar on accepting voluntary disclosure which is made after receipt of the notice for tax audit under this Act, or as a result of such audit. It is, therefore, held that order of the ld. FAA upholding the order of the ld. assessing authority pertaining to levy of penalty under Section 34(2) and interest under Section 34(1) of the OVAT Act is justified.

(ii) As far as the disallowance of TDS amounting ₹2,11,294.00 is concerned, the ld. Counsel of the dealer-assessee asserts that the works contract awarded by the contractee OWSSB to the dealer-appellant which was executed during the year 2010-11 involves TDS of ₹2,11,294.00. The dealer-appellant discharged the tax liability by filing returns for year 2010-11 without availing adjustment of the deduction of tax made by the contractee, as the TDS certificates for the period in question were then not issued. The impugned TDS certificates were communicated to the dealer-appellant during 2011-12. It is felt pertinent that the dealer assessee is entitled to avail adjustment of the TDS that was paid while filing the return during the year 2010-12. The contention of the ld. Counsel in the present scenario appears to be convincing. The

learned assessing authority is required to examine the above aspect of the case taking up reassessment for the tax periods involved.

(iii) The first appeal order speaks that there held an amount of ₹87,35,532.34 not supported with E-1 forms against the claim of exempted sales under Section 6(2) of the CST Act and thus, such sales were taxed @1% of entry tax treating the same as interstate sale. This submission of the learned Counsel of the dealer-assessee arguing the alleged goods to have not entered into the local area with the same having been on transit sale is not accepted. For, the impugned transactions are not adorned with statutory declaration forms which is statutorily mandated under Section 6(2) of the CST Act. Surprisingly, as pointed out by the ld. Counsel, as is apparent from the first appeal order passed under Rule 12(3) of the CST(O) Rules, it is brought to fore that the sales claimed under Section 6(2) of the CST Act for an amount of ₹32,90,068.00 were not supported with E-! forms. Thus, the first appeal order under OET Act suffers from contradiction in as much as that the amount shown against non-submission of E-1 Forms in respect of appeal orders passed under OET Act and CST Act is not in parity. The learned assessing authority is therefore, advised to re-examine the impugned transactions effected under CST Act and the disparity

occasioned under OET Act for the relevant tax period is sought to be dealt as per the provision of law.

(iv) As per provision of Section 6A of the CST Act which speaks about transfer of goods claimed otherwise than by way of sale, it is held that furnishing of form F is mandatory. In the present case, the dealer-assessee is found to have not furnished form F to the tune of ₹92,195.00. The learned FAA disallowed the claim of branch transfer and reckoned the same as interstate sale. Entry tax @1% thereon levied. We find no grounds to interfere in this case.

(v) In respect of first appeal order passed under Rule 12(3) of the CST (O) Rules, it is held that the observation made at (iii) above is self-contained. The learned assessing authority is advised to reassess the dealer appellant as observed therein.

(vi) As for rebuttal of penalty under Section 42(5) of the OVAT Act and Section 9(C)(5) of the OET Act, it is held for certain that imposition of penalty under Section 42(5) of the OVAT Act and Section 9(C)(5) of the OET Act is automatic. It has been decided by the Hon'ble High Court of Odisha in STREV No. 118 of 2019 as stated supra which provides as under:

"In respect of Section 42(5) of the Odisha Value Added Tax Act, 2004 (OVAT Act) which is in *pari materia* with Section

9(C)(5) of the OET Act, it has been held by this Court in the judgment dated 5th July, 2022 in STREV No.69 of 2012 (State of Odisha V. M/s. Chandrakanta Jayantilal, Cuttack) that the penalty thereunder is mandatory with there being no discretion available with the assessing authority."

6. Under the above backdrop of the issues as discussed in the foregoing paras, we therefore order that the second appeals filed by the dealer-assessee under the OVAT Act, OET Act and CST Act are partly allowed and while setting aside/remitting back the cases, the learned assessing authority is advised to re-assess the dealer-assessee afresh in the light of the above observations contained supra within a period of three months from the date of receipt of this composite order. The cross objections are hereby disposed of accordingly.

Dictated and corrected by me.

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

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