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

S.A. No.96(V) of 2017-18
(Arising out of the order of the learned
JCST(Appeal), Sundargarh Range,
Sundargarh in First Appeal Case No. AA V 24
A of 2012-13, disposed of on 28.02.2017)

Present: **Shri S.K. Rout, 2nd Judicial Member**
&
Shri B. Bhoi, Accounts Member-I

M/s. Shiom Minerals,
OCL Daily Market, Rajgangpur. ..... Appellant.

-Vrs. –

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

For the Appellant: : Mr. B. P. Mohanty, Advocate
: Mr. K.K. Panda, Advocate
For the Respondent : : Mr. D. Behura, S.C.(C.T.)
: Mr. N.K. Rout, A.S.C.(C.T.)

Date of Hearing : 16.12.2023 * Date of Order : 12.01.2024**

O R D E R

The dealer is in appeal against the order dated 28.02.2017 of the Joint Commissioner of Sales Tax (Appeal), Sundargarh Range, Sundargarh (in brevity, called 'ld.FAA') passed in First Appeal Case No. AA V 24 A of 2012-13 enhancing the tax demand raised in

assessment passed under Section 42 of the OVAT Act by the Sales Tax Officer, Rourkela II Circle, Panposh (in short, 'ld STO').

2. The facts that led to emergence of this appeal are considered essential to put forth in nut shell for better appreciation. The dealer-appellant in the instant case under the name and style of M/s. Shiom Minerals, OCL, Daily Market, Rajgangpur, Sundargarh, TIN-21852006073 is engaged in doing business in Refractory bricks, Dolomite, Coal stone chips, Waste and scraps, tinned iron and steel etc. in the course of intrastate trade, interstate trade or commerce. Based on the recommendation in the Tax Audit Report framed under Section 41(3) of the OVAT Act exclusively alleging availment of inadmissible ITC for ₹1557.00 on account of purchases of rejected bricks from an unregistered dealer namely M/s Keshav Enterprises Pvt. Ltd., Kuanmunda, the ld. STO assessed the dealer-appellant under Section 42 of the OVAT Act for the tax period from 01.04.2007 to 31.03.2011 raising an extra demand of ₹2,15,607.00 which comprises tax of ₹68,230.44, penalty of ₹1,36,460.88 and interest of ₹10,916.00. Aggrieved, the dealer-appellant went for first appeal against the order of assessment. The ld.FAA besides affirming the order of audit assessment inclined to utilize the AG Audit objection alleging short determination of TTO to the tune of

₹25,11,868.00. This resulted in re-determination of tax liability of the dealer-appellant as much as ₹5,33,106.00 consisting of tax of ₹1,68,705.00, penalty of ₹3,37,410.00 and interest of ₹26,991.00.

3. The dealer-assessee became aggrieved with the order of the ld.FAA and preferred this second appeal reposing concern over amalgamating audit assessment and AG Audit objection together in first appeal. Mr. B. P. Mohanty, ld. Advocate appearing on behalf of the dealer-appellant contends that the ld.FAA has committed error in law in enhancing the assessment by utilizing the report of the AG (Audit), Odisha which is foreign to the audit assessment. Mr. Mohanty relies on the decision of the Hon'ble High Court of Odisha delivered in case of ***M/s. Bhushan Power & Steel Ltd Vs. State of Orissa & Others*** reported in (2012) 47 VST 466 wherein the Hon'ble Court holds that the assessing authority has no power/authority to utilize any material against the dealer other than the materials available in the Audit Report. The assessing authority is obliged under the statute to make the audit assessment on the basis of the materials available in audit report. The assessing authority cannot travel beyond the materials available in the audit report. Utilization of any other materials from any other sources in audit assessment is completely foreign to audit assessment and the

same is not permissible. Under this principle of law, Mr. Mohanty urges that the order of the ld. FAA is liable to be quashed being devoid of non-sustainability.

Apart from the above, Mr. Mohanty advocates that the dealer-appellant is required to be assessed under Section 42 of the OVAT Act basing on the observation embodied in the Audit Visit Report (AVR). The AVR recommends only reversal of inadmissible ITC to the tune of ₹1,557.00. Accordingly, the ld.STO is refrained under statute from raising demand of ₹68,230.44 together with penalty and interest thereon.

The State has filed cross objection holding the order of the ld.FAA as genuine and thus,the grounds of appeal filed by the dealer-assessee are not sustainable in the eyes of law.

4. Gone through the orders of the forums below. The contentions taken in the grounds of appeal along with the cross objection of the State are perused. Besides, the materials available on record are also gone through. Having heard the rival submissions, it transpires that the ld.FAA has utilized the AG Audit objection while disposing the first appeal filed against the audit assessment. Audit assessment is made under Section 42 of the OVAT Act basing on the Audit Visit Report framed under Section 41

of the OVAT Act whereas assessment of escaped turnover is taken up under Section 43 of the OVAT Act. Thus, the audit assessment and assessment of escaped turnover cover separate and distinct field for the purpose of assessment. The decision of the Hon'ble High Court of Odisha delivered in case of ***M/s. Bhushan Power & Steel Ltd Vs. State of Orissa & Others*** (supra) is quite relevant in the present case which provides that the assessing authority cannot travel beyond the materials available in the audit report. Utilization of any other materials from any other sources in audit assessment is completely foreign to audit assessment and the same is not permissible. In view of this settled principle of law, the ld.FAA is not justified in utilizing the AG Audit objection while disposing the first appeal preferred by the dealer-appellant against the order of audit assessment. Accordingly, the order of the ld.FAA in the instant case is liable to be quashed.

5. On perusal of the order of audit assessment, it is evident that the dealer-assessee has disclosed GTO and TTO at ₹6,99,95,825.00 and ₹6,72,99,811.00 respectively. Tax on TTO @4% calculated to ₹26,91,992.44. On allowing adjustment of ITC to the tune of ₹5,71,403.00 and deducting ₹20,52,359.00 towards output tax already paid at the time of filing returns, the dealer-assessee is

found in assessment as having withheld payment of admitted tax to the tune of ₹68,230.44. Imposition of penalty under Section 42(5) of the OVAT Act under such situation being automatic together with levy of interest on tax withheld as per Section 34(1) of the OVAT Act as mandatory, the dealer-appellant was held liable to pay ₹2,15,607.00 comprising tax of ₹68,230.44, penalty of ₹1,36,460.88 and interest of ₹10,916.00.

It is pertinent to mention here that in response to the Notice No.2378/CT dated 19.11.2012 issued by the ld.FAA asking for payment of withheld admitted tax of ₹67,673.00 as a pre-condition for admission of the first appeal, the dealer-appellant is stated to have deposited ₹61,800.00 vide Challan No.CK22598092 dated 29.11.2012 along with interest of ₹10,646.00 and disputed amount of ₹311.00 besides stating that an amount of ₹15,830.00 was paid earlier at the time of filing first appeal. The above being the fact, the ld.STO is required to verify the factual position of payment of the admitted tax as claimed by the dealer-appellant.

6. Under the above facts and in the circumstances, we opine that the second appeal filed by the dealer-appellant is partly allowed. The order of the ld.FAA is set aside. The ld.STO is advised to verify the payment particulars regarding claim of the dealer-

assessee to have deposited admitted tax as stated above and issue revised demand notice as per the provisions of law. The dealer-assessee may be given an opportunity of being heard, if required. Cross objection is accordingly disposed of.

Dictated and corrected by me.

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

I agree,

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

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