BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.
S.A.No.109(ET)/2015-16

(Arising out of order of the ld. DCST (Appeal), Bhubaneswar Range, Bhubaneswar, in First Appeal Case No. AA-108221522000037, disposed of on dtd.22.04.2015)

Present: Sri S.K. Rout
2nd Judicial Member

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

-Versus-

M/s. Namah Shivaya Enterprises,
Plot No.217/796/21, Behind OMFED Plant,
Chandrasekharpur, Bhubaneswar. .... Respondent

For the Appellant : Mr. M.L. Agarwal, Standing Counsel (C.T.)
For the Respondent : None

(Assessment Period : 01.04.2011 to 31.03.2013)

Date of Hearing: 02.04.2022 *** Date of Order : 16.04.2022

ORDER

Challenge in this appeal is the order dtd.22.04.2015 passed by the learned Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar in First Appeal Case No. AA-108221522000037 thereby reducing the demand to rs.4,825/- from Rs.19,725/- assessed by the learned Assessing Authority/Sales Tax Officer, Bhubaneswar-III Circle, Bhubaneswar (in short, AA/STO) for the tax period from

01.04.2011 to 31.03.2013 u/S.9(C) of the Odisha Entry Tax Act, 1999 (in short, OET Act).

2. The case at hand is that, the dealer-respondent runs a hotel under the name and style of M/s. Namah Shivaya Enterprises having TIN-21461117622 and is engaged in automobiles tyres and tubes, wooden furniture, iron and steel, hardware goods etc. from outside and inside the State of Odisha. The Tax Audit Unit of Bhubaneswar-III Circle, Bhubaneswar conducted tax audit on 09.12.2013 pursuant to notice issued on dt.28.10.2013 to ascertain the correctness of the tax compliance of the dealer and submitted Audit Visit Report (in short, the AVR) in Form E-27 to the Assessing Authority. During course of audit, the team verified the books of accounts comprising purchase registers, purchase invoices, sale registers, sale invoices etc. The dealer was initially self assessed u/s.9 of the Act. The assessment was completed on the basis of the AVR pointing out the deficiencies in the books of accounts maintained by the dealer. The only discrepancy detected in the AVR is non-disclosure of inter-state purchases of Rs.3,63,146/-. On receipt of the AVR, statutory notice in Form E-30 coupled with a copy of AVR was issued and served on the dealer pursuant to which representative of the dealer appeared before the learned Assessing Authority and produced books of accounts which were examined with reference to the allegations of AVR and periodical returns filed by him. On verification of books of accounts, learned AA came to the conclusion that the dealer has effected intra-state purchases of

Rs.16,89,225/- from registered dealers within the State of Odisha and inter-state purchases of Rs.14,49,738/-. In view of such total purchases, learned AA imposed a tax liability at Rs.19,725/- including penalty. During course of audit proceedings, the dealer deposited differential tax amount of Rs.6,170/- on dtd.03.12.2013 after receipt of audit notice for which the learned AA reduced the due amount payable to Rs.13,555/- i.e. tax of Rs.405/- and penalty of Rs.13,150/-.

3. Being aggrieved with such order of assessment, the dealer preferred first appeal before the ld.DCST (Appeal), Bhubaneswar Range, Bhubaneswar, who reduced the amount to Rs.4,825/- including tax, interest and penalty instead of Rs.19,725/- as assessed by the learned AA.

4. The State being dissatisfied with the order of the learned DCST/FAA, preferred the present second appeal.

5. No cross objection is filed by the dealer-respondent in this case.

6. Despite due service of notice on dealer-respondent, he neither appeared nor engaged anybody on his behalf to defend him before this forum against the grounds of appeal. So, having no other alternative, this Tribunal heard the argument of Mr. M.L. Agarwal, learned Standing Counsel for the State and proceeded to dispose of the matter on ex-parte basis.

7. Heard the contentions and submissions of Mr. Agarwal, learned Standing Counsel for Revenue, perused the orders of the fora below, the grounds of appeal vis-à-vis the

materials available on record. Mr. Agarwal forcefully submitted that deletion of penalty of Rs.12,340/- by the learned FAA is illegal and not in accordance with law. The penalty u/s.9(C)5 is mandatory and there is no discretion provided under the said statute to waive/reduce or delete it. It is also contended by Mr. Agarwal that if the additional demand is created, penalty twice the tax amount is to be levied. That the OET Act read with proviso appended to Sec.33(5) of the OVAT Act states "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". In view of the language provided under the said proviso, it mandates that no voluntary disclosure shall be accepted after receipt of the notice for tax audit under the Act. So, when the dealer-respondent paid tax amount of Rs.6,170/- on dtd.03.12.2013 after receipt of audit notice on dtd.28.10.2013, the penalty of twice the tax amount is attracted, but the learned FAA has erroneously deleted the same.

After have a glance to the entire scenario of the case, it reveals to decide the genuineness of levy of additional tax and penalty by the learned AA and thereafter how far reducement of the same by the learned FAA is appropriate.

After through perusal of the case record, it becomes evident that the dealer had effected inter-state purchases of Rs.14,49,738/- which became clear and authenticated by the ld.STO (Audit) after verification of books of accounts. In assessment, the default of non-disclosure of inter-state purchases

of Rs.3,63,146/- was accepted by the dealer. Such non-disclosed amount was the purchases of scheduled goods @2% for Rs.3,11,575/-, @1% for Rs.34,211/- and non-scheduled goods for Rs.17,360/-. So, ET @1% on Rs.1,16,095/- and @2% on Rs.13,84,869/- totaling to Rs.28,859/- was levied by the learned AA as against which the dealer had paid ET of Rs.22,284/- along with the periodical return. After receipt of audit notice out of the balance amount of Rs.6,575/- an amount of Rs.6,170/- was deposited by the dealer. So, in toto, the dealer deposited Rs.28,454/- against the due of Rs.28,859/- remaining an amount of Rs.405/- as unpaid.

With regard to imposition of penalty u/s.9(C)5 of the Act by the learned AA is to be adjudicated upon. Now the question twinkles whether levy of penalty twice the amount of tax assessed at Rs.6,575/- is genuine or against the settled principle. The assessment order makes it clear that an amount of Rs.6,170/- was deposited by the dealer on receipt of audit notice and as such that deposited amount was deducted from the total amount. Such default was also candidly admitted by the dealer before the learned FAA stating that soon after detection of such fact, entry tax was deposited. So, here one thing becomes clear that such default on the part of dealer was not intentional rather he was prevented by certain circumvening circumstances. So, at this juncture, it cannot be construed that the statutory obligation was violated by the dealer with a malafide intention. If that is so, at no point of time, it will be genuine to impose penalty on the

person concerned where violation to a statutory provision occurred and that too without any malafide intention. In the present scenario, imposition of penalty is the discretion of the authority concerned. As a rule, the power of discretion is to be exercised judiciously and at no point of time, it should be exercised whimsically or capriciously. Learned FAA has also given due regard to the verdict of the Hon'ble Madras High Court decided in the case of State of Tamil Nadu Vrs. Anamolies Engineering reported in (2010) 28 VST 322 (Madras) in which it is held that when the assessment has been made based on the accounts produced by the dealer before the department and not on the basis of other materials, imposition of penalty under the Act does not arise. The details of purchases and sales reported by the STO (Audit) were based on the materials available in the books of accounts by the dealer concerned. Apart from this, learned FAA has also given due regard to the verdict of the Hon'ble Apex Court decided in the case of Shree Krishna Electricals Vrs. State of Tamil Nadu and Another reported in (2009) 23 VST 249 wherein Hon'ble Apex Court has enunciated that penalty cannot be levied in case where sales were reflected in the books of accounts. But in the present case, inadvertently, the dealer had not collected nor paid Entry tax by due date on inter-state purchases of scheduled goods for Rs.3,45,786/- even if reflected almost all the purchases in the books of accounts. Moreover, the books of accounts says with certainty that the payable Entry Tax was being regularly deposited by the dealer. So, it cannot be construed that the dealer

was in the habit of evading of payment of any tax. So, in view of such, imposition of penalty on the dealer by the learned AA is not at all genuine. After completion of Tax Audit, on dtd.03.12.2013, an amount of Rs.6,170/- instead of Rs.6,574/- was also deposited by the dealer as per the table given below.

Purchase Price of Goods	Date of Receipt of Goods	Due Date of Payment	Rate of Tax	ET Due	ET Paid on (in Month)	Late by	Interest Payable
3,11,575.00	07/11	08/11	@2%	6,232.00	12/13	28	3,490.00
34,211.00	05/12	06/12	@1%	342.00	12/13	18	123.00
3,45,786.00				**6,574.00**			**3,613.00**

Learned FAA has appreciated that the said tax ought to have been paid on the date of sale and if there was delay in payment of the said tax, by virtue of Section 7 of the OET Act which made payment of interest automatic and mandatory, the dealer was liable to pay tax and interest. The dealer was compensating the Revenue for the delay in payment of tax which should have been legitimately paid on the date return was filed. So, in view of Sec.7(5) of the Act, learned FAA decided that the dealer is required to pay interest @2% per month from the date the return for the period was due to the date of its payment and interest @2% per month on Rs.6,574/- calculated to Rs.3,613/- which the dealer is required to pay. So, learned FAA calculated the Entry Tax to Rs.28,858/- on purchases. An amount of Rs.22,284/- being deposited by the dealer, he was assessed to Rs.404/-. Besides, penalty amounting to Rs.808/- which is equal to twice the amount of tax due is imposed u.s.9C(5) of the Act. Learned FAA held that, as per calculation mentioned above, the dealer is required to pay interest amounting to Rs.3,613/- and as

such, tax, interest and penalty together becomes Rs.4,825/- instead of Rs.19,725/- as assessed by the learned AA. All the aspects have rightly appreciated by the learned FAA for which the assessment was reduced to Rs.4,825/- and as such, the order of learned FAA needs no interference.

8. In the result, the second appeal preferred by the State is dismissed and the order of the ld.FAA is hereby confirmed.

Dictated and Corrected by me,

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

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