BEFORE THE ODISHA SALES TAX TRIBUNAL: CUTTACK
(Full Bench)

S.A. No. 200 (ET) OF 2013-14

(Arising out of order of the learned Additional CST (Revenue), Odisha, Cuttack in Appeal Case No. AA- 153/OET/DCST/Assmt./BH-I/2011-12, disposed of on dated 11.02.2014)

Present: Shri R.K. Pattanaik, Chairman,
Smt. S. Mishra, 2nd Judicial Member, and
Shri P.C. Pathy, Accounts Member-I

M/s. Mahindra & Mahindra Ltd.,
Plot No.511, 2nd Floor, Bomikhal,
Rasulgarh, Bhubaneswar-751010 ... Appellant

-Versus-

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

For the Appellant : Sri C.R. Das, Advocate
For the Respondent : Sri S.K. Pradhan, Additional S.C. (CT)

Date of hearing: 27.05.2020 ***** Date of order: 05.06.2020

O R D E R

As a reminder, we need to put in a worthy advice which is in the following words- 'the payment of taxes gives a right to protection'. In the language of Arthur Vanderbilt 'taxes are the life blood of Government and no tax payer should be permitted to escape the payment of his just share of the burden of contributing thereto'. At the same time, in the uncanny words of S.C. Watts 'death and taxes may be inevitable, but they should not be related'. If really understood, it may mean that a just tax to be realized without subjecting any suffering. In taxation

law, such is always the interpretation and the intent and purpose is only to levy and recover just and admissible tax permissible within the bounds of law.

2. In the present context, the Tribunal is to consider the leviability of penalty and the grounds upon which it can be sustained and whether, in particular facts and circumstances, the authority exercising the jurisdiction under law does have a discretion to play or not? It is also to examine and distinguish a civil obligation in juxtaposition to criminal or quasi-criminal liability.

3. In the instant case, the appeal under Section 17(1) of the Odisha Entry Tax Act, 1999 (in short, 'the Act') is at the behest of the appellant dealer against the impugned order dated 11.02.2014 of the learned Additional Commissioner of Sales Tax (Revenue), Cuttack (in short, 'FAA') promulgated in Appeal Case No. AA- 153/OET/DCST/Assmt./BH-I/2011-12 whereby the demand raised by the learned Deputy Commissioner of Sales Tax, Bhubaneswar-I Circle, Bhubaneswar (in short, 'AA') vide order dated 31.12.2011 vis-a-vis the assessment periods from 01.08.2006 to 31.03.2010 has been confirmed on the grounds inter alia that it is bad in law and thus, deserves to be interfered with.

4. According to the appellant, the order of the FAA is cryptic without analyzing the facts and circumstances of the case and considering the detailed submissions made and, therefore, it is to be set aside. It is further contended that the conclusion of the FAA that the admitted tax due despite being shown in the return but having not been paid in time resulted in non-compliance of statutory provisions and thus, cannot escape penalty is not unassailable, especially, when the admitted tax was inadvertently not deposited and under such circumstances, the

imposition of penalty is nothing but an erroneous exercise of jurisdiction by the FAA. The appellant, thus, challenged the decision in imposing the penalty and sought it to be unsettled.

5. On the contrary, the respondent State vehemently opposed the contention of the appellant by stating that under the provisions of the Act penalty is concomitant and in so far as the AA is concerned, he does not have any discretion to exercise except to impose the penalty once there is breach of civil obligation which is statutorily mandated. A distinction sought to be made by the respondent State between civil liability and criminal prosecution with respect to mens rea and it is contended that the guilty intent of the assessee is not relevant. So, the decision of the authorities below which confirmed the penalty levied on the appellant has been justified by the respondent State. The AA imposed a penalty which is twice the amount of the tax assessed under Section 9C (5) of the Act besides other demand raised which was affirmed by the FAA. The penalty imposed on the appellant is the crux of the dispute assailed on the ground that there was no deliberate or intentional default on its part and, therefore, the decision thereon is in flagrant violation of the law. The learned Counsel for the appellant claimed that a short payment of tax of ₹40,28,229/- on which the AA imposed penalty under Section 9C(5) of the Act is untenable. It is contended that under sub-section (3) of Section 9C of the Act, enquiry is made is to assess the tax due, whereas, under sub-section (5) thereof, penalty is imposable only on tax assessed which substantially makes a difference since on admitted tax, as per the legislative intent, no penalty is leviable, the distinction which failed to be understood and

appreciated. It is also contended that the extra demand as emerged from the return itself furnished by the appellant is not on account of or as a result of incorrect accounts or particulars provided by it, inasmuch as, such demand resulted by accepting GTO and under the above circumstances, the levy of penalty was absolutely unwarranted. While claiming so, the learned Counsel for the appellant cited authorities, such as, State of Tamil Nadu Vs. Vinayaka Engineering Works: [2011] 40 VST 502 (Mad.) and Hindustan Steel Limited Vs. State of Orissa: [1970] 25 STC 211 (SC), wherein, it is observed that penalty is not to be imposed automatically and a lenient view should be taken in case the violation is of technical nature. Furthermore, the decisions of Hon'ble Apex Court in Union of India Vs. Dharamendra Textile Processors: 2008 (231) ELT 3 SC; Hindustan Steel Limited Vs. State of Orissa: AIR 1970 SC 253; Union of India Vs. Rajasthan Spinning and Weaving Mills: 2009 (238) ELT 3 (SC); and Commissioner of Central Excise, Chandigarh Vs. Pepsi Foods Ltd: 2010 (260) ELT 481 (SC) have been referred to and relied upon by the learned Counsel for the appellant. Besides that, the consistent view of the Tribunal and orders passed by it with copies thereof has been produced by the learned Counsel for the appellant. The learned Additional Standing Counsel (CT) predominantly placed reliance on the decision of the Hon'ble Apex Court in Dharamendra Textile Processor's case. Besides the above, the following rulings on the interpretation of a penalty provision of the taxing statute, such as, State of Gujarat Vs. ONGC Ltd: [2017] 97 VST 506 and Riddhi Siddhi Gluco Biols Ltd. State of Gujarat: [2017] 100 VST 305 have been cited by the learned Additional Standing Counsel (CT). In fact, the conclusion which is drawn by

the FAA is to the effect that the appellant did not avail the opportunity in submitting the revised return which could have addressed its penalty liability and moreover, the fact that merely showing in return (self-assessed) as admitted tax due but not paying it in time makes the intention of the appellant about clear non-compliance of the statutory provision of the Act and simply to escape the penalty, admitted tax in the return has been shown. The learned Counsel for the appellant contended that there was no guilty intention and had it been so, the admitted tax would not have been shown in the return and highlighted upon their conduct during the assessment periods by stating that although it was required to discharge the liability of VAT for the periods March, 2007 and 2008 in the succeeding months, but on the request of the department, advance tax was paid. It is also contended that due to oversight the appellant failed to deposit the admitted tax in respect of March, 2007 which has been assessed under Section 9C(5) of the Act but considering the above facts, the AA was not correct in imposing the penalty. The above aspect was to be considered by the authorities below while imposing penalty which is not a natural consequence but depended on the conditions of Section 9C(1) of the Act fulfilled besides mens rea.

6. Admittedly, there is a tax default on the part of the appellant respecting March, 2007 which was pointed out during audit assessment held under Section 9C of the Act. As per the appellant, the alleged default was without any malafide intent but a mistake or an act of inadvertence and, therefore, penalty was not to be imposed. As earlier mentioned, the Additional Standing Counsel (CT) strenuously urged that no mens rea is relevant and once the default is proved, the

penalty is inevitable, morefully when, it shows contravention of a provision of the Act as contained in Section 9C(1) of the Act. Let us examine the law on the point to find out, whether, the penalty is to be levied automatically without considering the guilty mind of the assessee and to what extent discretion plays a role vis-a-vis the assessing authority with respect to Section 9C of the Act.

7. In Dharamendra Textile Processor's case, while dealing with Section 11AC of the Central Excise Act, 1944, mens rea was not held as an essential ingredient stating the difference in Section(s) 271(1)(c) and 276(1)(c) of Income Tax Act, 1961 and the ratio laid down in Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai and another reported in 2007 (219) ELT 15 SC was held not to have been correctly decided while upholding the decision rendered in Chairman, SEBI Vs. Shriram Mutual Fund and another: (2006) 5 SCC 361. It is further held that in a civil liability, the law, if enacted to provide remedy for revenue loss, wilful concealment not to be an essential ingredient unlike a criminal prosecution. Further, it is held that levy of penalty is a mandatory provision, inasmuch as, while discussing the provisions, as above, with the erstwhile Central Excise Rules, 1944, the Hon'ble Apex Court finally concluded that there is no inbuilt discretion left to exercise. It is further held therein that in interpretation of statute courts cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous; the statute being an edict of the legislature and language employed in a statute is the determinative factor of the legislative intent. So, the sum and substance of the law laid down in the above noted case is that in a civil liability mens rea is inconsequential and the assessing authority does not have any

discretion to play and once the conditions of the law as to penalty are satisfied, imposition of penalty is automatic. In Hindustan Steel Ltd. case, the Hon'ble Apex Court, however, held that liability to pay penalty does not arise merely upon proof of the default in registering as a dealer and while discussing Section 9(1) read with Section 25(1) of the Odisha Sales Tax Act, 1947, it was observed that notwithstanding the penalty imposable, an order in respect thereof, since a failure to carry out a statutory obligation, it results in a quasi-criminal proceeding and penalty is not to be ordinarily imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation; penalty is not also to be imposed merely because it is lawful to do so; whether penalty should be imposed for failure to perform its statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances; even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose it, when there is a technical or venial breach of the provisions of the Act, or where the breach follows from a bonafide belief that the assessee is not liable to act in the manner prescribed by the statute. In Rajasthan Spinning and Weaving Mills' case, the Hon'ble Supreme Court of India clarified the position on the subject and held that mandatory penalty under Section 11AC of Central Excise Act, 1944 is not applicable to every case of non-payment or short payment of duty, but then the authorities are having no discretion on quantum of penalty and the penalty equal to duty as prescribed must have to be imposed once Section 11AC is applicable. In the case (supra), it was clarified that

the decision in Dharamendra Textile Processor's case must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated therein, but once the conditions are satisfied and Section 11AC is made applicable, the concerned authority would have no discretion in quantifying the amount and penalty must be imposed. In that case, depending upon the tenor of the notice issued either under Section 11A(1) or (2), the guilty intent or otherwise of the assessee would be explicit. In case there is an act of deception, concealment or some kind of malafide attributed to an assessee which is required to be ascertained, under such circumstances, unless and until, it is established so, which, of course, related to mens rea or mental faculty, no penalty is to be imposed straight away, but where such is not the case and the legislative intent does not require such an exercise, mens rea loses its relevance. The Hon'ble Apex Court in the Pepsi Foods Ltd. case in clear and unequivocal term with reference to Section 11AC of the Central Excise Act, 1944 categorically observed that in order to attract penalty thereunder, criminal intent or mens rea is a necessary constituent. Of course, in that, decision in Dharamendra Textile Processor's case was not referred to by the Hon'ble Apex Court. On a wholesome appreciation of the law, as expounded, the logical conclusion which is to be deduced there from is that a distinction is clear and apparent inter se civil and criminal liability; in civil liability mens rea is inconsequential, unless contrary appears from the legislative intent, whereas, in criminal or quasi-criminal liability, it is a must, in other words, guilty intent is definitely a necessary constituent, if a proceeding does require an element

of enquiry and a scheme of thing is in place to ascertain the conduct of an assessee and while doing so, the assessee's guilty intent or otherwise emerges in the forefront for a decision, and it is certainly a criminal or quasi-criminal proceeding unlike its counterpart; whether, mens rea has a role to play or not depends on the language of the provision and its contents and, of course, imposition of penalty does depend on the fulfilment of the conditions of a statutory provision; as far as imposition of penalty is concerned, there is no denial to the fact that once the conditions of the provision are fulfilled which proves the default either with the mens rea or without, the assessing authority does not have any discretion and he must have to levy it with the quantum stipulated, in other words, on the satisfaction of the relevant conditions as required under law, the assessing authority is simply to impose the penalty with a fixed quantum and there, discretion has no role to play; and finally mens rea is not to be applied where the nature of provision is such which does not demand for it like in some economic offences where guilty intention is immaterial. According to the Tribunal, if there is a scheme of procedure prescribed which provides an opportunity of hearing to the assessee, a procedure which demands an enquiry to ascertain the reason behind the default, then in that case, depending on the nature of delinquency, application of mens rea or otherwise is to be determined. The learned Additional Standing Counsel (CT), while referring to the decisions (supra) of the Hon'ble Gujarat High Court contended that the word 'shall' as contained in Section 9C(5) of the Act leaves no place for discretion and imposition of penalty, in the event of contravention proved, is inevitable. It is quite known in legal parlance that 'may' and 'shall' are at

times used interchangeably; sometimes, the word 'may' can mean 'shall' or 'must' to imply compulsion and at times, the word 'shall' may not indicate mandatory behaviour but may mean something completely optional – exactly the way in which the word 'may' is used. In this context, it is apposite to make a mention of a decision of the Hon'ble Apex Court in the case of Official Liquidator Vs. Dharti Dhan Pvt. Ltd: [1977] 2 SCC 166, wherein, it has been elaborately discussed the application and interpretation of the words 'may' and 'shall'. It was held therein that the question to be determined in such cases always is whether the power conferred by the use of the word 'may' has annexed to it an obligation that on the fulfilment of certain legally prescribed conditions to be shown by evidence, a particular kind of order must be made; if the statute leaves no room for discretion the power has to be exercised in the manner indicated by the other legal provisions which provide the legal context, even then the facts must establish that the conditions are fulfilled; where the power is wide enough to cover both an acceptance and a refusal, depending upon facts it is directory or discretionary, inasmuch as, it is not the conferment of a power which the word 'may' indicates that annexes any obligation to its exercise but the legal and factual context of it which is based on the principle laid down in Frederic Guilder Julius Vs. Right Rev. Lord Bishop of Oxford; Re Vs. Thomas Thellusson Carter (5 AC 214). Normally, the word 'may' means discretion and is not mandatory but at times, it may be 'shall' and vice versa and what the interpretation would be, depends on the language and legislative intent apparent in the law. It is not that in all cases, under all circumstances, 'shall' means must and 'may' means optional as in both the cases, it

could be opposite. So, the provisions are to be properly understood, statement and object of the law besides the intention of the legislature are to be carefully examined before implying any meaning to the words 'may' and 'shall'. In the case at hand, what the Tribunal understands is, if the conditions of sub-section (1) of Section 9C of the Act are fulfilled, then it leaves no discretion for the assessing authority from imposing penalty and fixing the quantum in terms of sub-section (5) thereof, inasmuch as, the word 'shall' appearing therein is mandatory in nature but only to the extent described above, which means, it is unconnected to the guilty intent or otherwise of the assessee. The imposition of penalty, in the considered view of the Tribunal vis-a-vis Section 9C(5) of the Act entirely depends on fulfilment of the conditions of sub-section (1) thereof and in case, the conditions are not satisfied which may depend on mens rea of the assessee, the assessing authority may either proceed to impose the penalty or otherwise, but once the fulfilment of the conditions is ensured, no discretion remains or left for the assessing authority to exercise which is in relation to imposition of penalty and its quantum.

8. If Section 9C(1) of the Act is read and understood properly, it is to mean that if in course of tax audit under Section 9B, the suppression of purchases or sales or both, erroneous claims of deduction, evasion of tax, or contravention of any provisions of the Act affecting the tax liability of the dealer is or are detected and then invoking subsequent provisions, such as, sub-section(s) (2), (3) and (4), it is established, then penalty is to be imposed under sub-section (5) thereof. A whole lot of exercise is to be made by the assessing authority and if the assessee is successful in establishing that there was no guilty intent with regard to the

suppression, evasion etc. the assessing authority may have to drop the decision to impose penalty. So to say, the entire scheme as prescribed in Section 9C of the Act unerringly suggest that the mens rea of the assessee plays a vital role in order to determine, whether, there was any guilty intent or otherwise before levying penalty. So far as the appellant is concerned, it does not deny the alleged default but claimed such default to be in relation to admitted tax which was self assessed and the same is definitely not relatable to any of the counts/heads mentioned in sub-section (1) of Section 9C of the Act. In other words, the appellant is not alleged of suppression of purchases or sales or both, or claimed any kind of false deductions, or evaded tax or contravened any provisions of the Act touching upon its tax liability, but it is a case of non-payment of admitted tax simpliciter. So in that case, no guilty intent can be attributed. The conduct of the appellant during the assessment periods can also be gone into. According to the learned Counsel for the appellant tax was paid under the OET Act and not only that, advance tax was paid too under the VAT Act during the relevant periods of 2007 and 2008, the fact which has not been denied or controverted in any manner by the respondent State. Notwithstanding the conduct of the appellant, whether, the State attempted to rebut it by evidence or not with regard to payment of tax during the relevant periods, it is only guilty of not paying the admitted tax shown in the return which may be on account of a mistake or by way of inadvertence. The fact that the admitted tax was shown in return but was not paid in time was with an intent to defeat the tax liability, as has been held by the FAA, cannot be comprehended. It is also alleged that the appellant in order to escape penalty submitted the return with

admitted tax without depositing it and thus, had no intention to comply it, is purely hypothetical to conceive of. It is plain and simple a case of default in payment of admitted tax and not that liability was avoided or evaded and deliberately any suppression was made or claim was advanced or law was contravened by the appellant and, therefore, the AA was not right and correct to impose penalty under Section 9C(5) of the Act. Without elaborating further, finally the Tribunal arrives at an inescapable conclusion that the impugned order to the extent vis-a-vis the penalty is wholly unjustified and thus, required to be set at naught.

9. Hence, it is ordered.

10. In the result, the appeal stands allowed. As a corollary, the impugned order dated 11.02.2014 promulgated in Appeal Case No. AA-153/OET/DCST/Assmt./BH-I/2011-12 is hereby set aside to the extent above indicated. Consequently, the learned AA is directed to undertake recomputation of the tax liability with respect to the appellant for the alleged periods on the conclusions drawn supra. Resultantly, the cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(Smt. S. Mishra)
2nd Judicial Member

I agree, Sd/-
(P.C. Pathy)
Accounts Member-I