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

S.A. No. 174 (VAT) OF 2014-15

(Arising out of order of the learned JCST, Jajpur Range,
Jajpur Road in First Appeal Case No. AA. 453/KJ/13-14 (VAT),
disposed of on dated 28..06.2014)

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

M/s. Samal Auto (India) Pvt. Ltd.,
At- Maligaon, Near RMC Gate,
Jodia, Keonjhar ... Appellant

-Versus-

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

For the Appellant : Sri A.K. Panda, Advocate
For the Respondent : Sri M.L. Agarwal, Standing Counsel (CT)

Date of hearing: 10.06.2020 ***** Date of order: 30.06.2020

O R D E R

The appeal under Section 78(1) of the Odisha Value Added Tax Act, 2004 (in short, 'the Act') is questioning the legality and judicial propriety of the impugned order dated 28.06.2014 promulgated in Appeal No. AA-453/KJ/2013-14 (VAT) by the learned Joint Commissioner of Sales Tax, Jajpur Range, Jajpur Road (in short, 'FAA') who partly allowed the relief and reduced the demand along with penalty as against the assessment order dated 30.09.2013 directed by the learned Sales Tax Officer, Keonjhar Circle, Keonjhar (in short, 'AA') for the assessment

period 2012-13 on the grounds inter alia that its suffers from non-application of mind, arbitrary and untenable in law, in so far as, the penalty part is concerned, which has been upheld by misinterpreting Section 33(5) of the Act read with Rule 54(1) of the Odisha Value Added Tax Rules, 2005 (in short, 'the Rules').

2. . The AA made the assessment under Section 42 of the Act vis-a-vis the appellant dealer. As is revealed from the record, an audit team of Keonjhar Circle, Keonjhar inspected the appellant's place of business, verified the purchases and sales and inspected all other relevant documents and finally submitted Audit Visit Report (in short, 'AVR'). Then, the assessment by the AA was directed raising a demand of ₹41,16,295/- including penalty. Against the order of assessment dated 30.09.2013, appeal was carried to the FAA, wherein, assessment was challenged on different grounds which included the alleged suppression of sales by stating that it was not a suppression at all as the tax of ₹5,68,913.00 was deposited only after the warranty sales of March, 2013 was finalized. The FAA, as earlier stated, allowed the appeal in part and reduced the demand to ₹14,45,788/- upholding the imposition of penalty under Section 42(5) of the Act. The appellant dealer questioned said decision justifying the penalty imposed without considering the fact that there was voluntary disclosure regarding amount of ₹5,68,913/- though deposited without submission of a revised return. So to speak, the present appeal is only confined to the penalty, which has been imposed and confirmed by the authorities below.

3. The learned Counsel for the appellant contended that Section 33(5) of the Act has not been properly interpreted while determining the balance tax

payable and also penalty by not taking into consideration payment of ₹5,68,913/-. It is further contended that the explanation offered by the appellant during the course of proceedings was rejected and the authorities below acted in a whimsical and arbitrary manner to arrive at an erroneous conclusion on imposition of penalty. It is lastly claimed that Rule 54(1) of the Rules was also not correctly interpreted, while calculating the balance demand, inasmuch as, the computation is arbitrary, excessive and bad in law. By stating so, the impugned order dated 28.06.2014 and its correctness to the extent of penalty imposed has been questioned.

4. On the other hand, while pressing the cross-objection, the respondent State justified the assessment and also the impugned order dated 28.06.2014 claiming that there has been due compliance of the statutory provisions of the Act and the Rules and as regards the penalty, it is contended that such imposition equal to twice of the tax amount assessed under Section 42(5) of the Act is statutorily mandated. So, according to the respondent State since the amount of ₹5,68,913/- was not deposited by a revised return, as is required under law, but having been paid later to the submission of AVR and as such, it could not have been accepted despite being a voluntary disclosure in view of proviso to sub-section (5) of Section 33 of the Act, rightly it was disallowed and consequently, penalty was imposed on the tax due. In other words, the respondent State claimed for confirmation of penalty imposed vide the impugned order dated 28.06.2014 on the ground that it does not suffer from any legal infirmity.

5. The appellant dealer, primarily, deals with medium and heavy commercial vehicles, like trucks, dumpers and its spare parts, tools, equipments as the authorized dealer of TATA Motors Ltd. and was subjected to audit assessment for the alleged period under Section 42 of the Act on the basis of AVR. As per the Revenue, there was deficit in payment of tax on account of suppression of sales which accounted at ₹5,68,913/-, the amount which was deposited on 4th July, 2013, later to the submission of AVR on 29.06.2013 and in view of Section 33(5) proviso of the Act, it was not accepted and rightly the authorities below imposed the penalty under Section 42(5) of the Act. The appellant reiterated the claim and alleged that it was indeed a disclosure during the audit assessment and as such, not to be a suppression of sales, the fact which was disclosed to the audit team by stating that the amount could not be deposited due to non-finalization of warranty sales at its Angul Branch. On the other hand, the learned Standing Counsel (CT) contended that the revised return having not been submitted within three months following the tax period, it was quite obvious for the authorities below not to accept the amount of ₹5,68,913/- notwithstanding the fact that it was voluntarily disclosed during the audit assessment. The question is, whether, imposition of penalty under Section 42(5) of the Act does really call for any interference?

6. As per Section 42(1) of the Act, where a tax audit is conducted under Section 41(3) which results in detection of suppression of purchases or sales or both, erroneous claims of deductions including ITC, evasion of tax, or contravention of any provisions of the Act affecting the tax liability of the dealer,

then the assessing authority is to proceed to assess the tax due after causing an enquiry and providing an opportunity of hearing to the dealer in terms of sub-section (4) thereof and finally, to impose penalty under sub-section (5), which shall be an amount equal to twice the tax assessed under sub-section (3) or (4). In fact, the imposition of penalty under Section 42(5) of the Act and its constitutional validity has been upheld by the Hon'ble Court in Jindal Steel Ltd. Vs. State reported in (2012) 54 VST 1 (Orissa). It is well settled that only upon the contingencies as discernible in sub-section (1) of Section 42 of the Act, penalty is to be imposed. The tax audit must result in detection of suppression of purchases or sales or both, erroneous claim of deductions, etc., evasion of tax, or violation of any provisions of the Act and only upon its proof, the assessing authority shall have the jurisdiction to impose penalty under Section 42(5) of the Act. It is frequently questioned as to whether penalty and its imposition under Section 42(5) of the Act and exercising of power in respect thereof to be mandatory or directory. If the decision (supra) is read and understood in its proper perspective, the conclusion would be that the imposition of penalty is never intended to be mandatory in nature as it depends on the contingencies as indicated in Section 42(1) of the Act and its fulfilment. At this juncture, it would be apposite to make a mention of the ruling of the Hon'ble Apex Court in Hindustan Steels Ltd. Vs. State of Orissa reported in AIR 1970 SC 253. In the case (ibid), it is categorically held and observed that penalty does not arise merely upon the proof of default and hence, not to be imposed unless the party acted deliberately in defiance of law, or was guilty of contumacious or dishonest

conduct, or acted in conscious disregard of its obligation. The above decision by the Hon'ble Apex Court was with reference to Section 9(1) and 25(1)(a) of the Orissa Sales Tax Act, 1947. Nevertheless, the said principles vis-a-vis imposition of penalty are equally applicable while considering a case under Section 42(5) of the Act. In fact, as previously stated, the contingencies under sub-section (1) of Section 42 of the Act is or are to be fulfilled and in case any such suppression, erroneous deductions, or evasion of tax or contravention of law is proved and established, then only, penalty is to be imposed. In such an event, the conduct of the dealer assumes significance. It is to be ascertained, if at all there was a deliberate defiance of law by the dealer or it was guilty of contumacious or dishonest conduct, or if at all there was a conscious disregard by it to the statutory obligations. Having read and appreciated the relevant provisions of Section 42 of the Act with reference to the decisions (supra), the Tribunal is of humble opinion that imposing penalty is not mandatory or automatic, inasmuch as, certain amount of discretion lies with the assessing authority in that behalf. In other words, the conduct of the dealer is relevant for that matter.

7. When the conduct of the dealer is spoken to, it is indeed relevant for the purpose of considering imposition of penalty, which can well be ascertained by the assessing authority. In catena of decisions, it has been consistently held that penalty is not to be imposed on the drop of a hat, but it should be decided and determined taking into account the overall conduct of the dealer. The rulings in cases of Tamil Nadu Housing Board Vs. Collector of Central Excise, Madras: 1994

(74) ELT 9 (SC); Padmini Products Vs. Collector of Excise:1989 (43) ELT 195 (SC); Puspam Pharmaceuticals Vs. Collector of Central Excise, Bombay: 1995 (78) ELT 401 (SC) and many other on similar lines may profitably be quoted in order to reflect as to what a wilful or deliberate conduct could really be. A wilful suppression is nothing but a conscious or deliberate or intentional withholding of information with malafide which is to be deducted from the entire conduct of a dealer. In so far as the Act is concerned, a scheme of thing is in place to enquire as to what was the reason that prevailed upon the dealer vis-a-vis its tax default and in such a proceeding, the conduct whether malafide or not is also to be ascertained. If Section 42(4) of the Act is meticulously examined, such an exercise as to enquiry is provided for the assessing authority. If upon such enquiry, the assessing authority finds that the default on the part of the dealer is without any reasonable explanation and rather an act of deliberate and intentional infraction of law, then, in that case, penalty can be imposed in terms of sub-section (5) of Section 42 of the Act. So, to impose penalty or otherwise, it is always an exercise filled with discretion which is dependent on the conduct of the dealer. Having regard to the facts and circumstances of the case in hand, it is to be ascertained, whether, the appellant was really guilty of suppression of sales and only after so found, made the payment of ₹5,68,913/- without a revised return being furnished. According to the learned Counsel for the appellant, a voluntary disclosure was made with respect to the said amount and it was during the audit assessment itself and as such, there has been no suppression of sales, but it could not be accepted for

being made after the receipt of tax audit notice or submission of AVR on 29.06.2013. However, the deposit in that respect was finally made on 04.07.2013. The contention is that there was no deliberate act of suppression or dishonest conduct on the part of the appellant to evade payment tax, the fact, which was completely lost sight of at the time of assessment. From the record, it is revealed that during the audit inspection, the appellant appeared to have claimed that the tax allegedly due could not be disclosed in return due to non-finalization of warranty claim at one of its branch. The above fact was reiterated by the appellant, but it was not accepted by the authorities below. As per the materials on record, it is made to suggest that the warranty claim for the year 2012-13 was credited in favour of the appellant in the month of May i.e. on 15.05.2013 and 17.05.2013. However, in the meantime, the audit notice dated 14.05.2013 was issued, later to which on 21.05.2013 the audit team visited the appellant for inspection and finally, AVR was submitted on 29.06.2013. The allegation of sales suppression to the tune of ₹42,14,173/- excluding collection of VAT of ₹5,68,913/- and the explanation offered by the appellant as to its voluntary disclosure was not found favour with. Since the warranty claim was credited in the month May, 2013, the appellant was to pay the differential admitted tax on or before 30th June, 2013 i.e. within three months of the tax period to which the sales related in view of Section 33(4)(b) of the Act. Before the revised return could be filed within three months, the audit notice was served upon the appellant in the month of May, 2013 itself which ultimately resulted in submission of AVR on 29.06.2013. In fact, there was no bar for

submission of revised return within three months. However, had there been a revised return in terms of Section 33(4)(b) of the Act, after audit notice issued or receipt of it by the appellant, in any ways, such a voluntary disclosure would not have been accepted on account of proviso to sub-section (5) thereof. However, the fact of the matter is, a voluntary disclosure was apparently made by the appellant with regard to the VAT collection of ₹5,68,913/- but since it was credited in the month of May, 2013 and as there was non-finalization of the warranty claim; the revised return had not been submitted and such was the explanation offered during the audit inspection. No doubt, the payment of ₹5,68,913/- was made on 04.07.2013 which was after submission of AVR on 29.06.2013. In view of proviso to sub-section (5) of Section 33 said voluntary disclosure could not be accepted. The acceptance or otherwise of the disclosure so made with or without revised return being filed is one aspect, whereas, imposition of penalty as per Section 42(5) of the Act is altogether different and as earlier described, it depends on the conduct of the dealer. If there is deliberate suppression or evasion of tax, or in case any of the contingencies as appearing in Section 42(1) of the Act is or are alleged to exist, in that case alone, penalty should be imposed in terms of sub-section (5). However, in the instant case, it does not appear to be a case of suppression of sales, rather, the appellant made a voluntary disclosure during the audit inspection and also offered an explanation as to why and under what circumstances the deposit of ₹5,68,913/- could not be made. In any case, even if there was revised return being filed by the appellant within three months following the tax period, it could not have been

accepted by the assessing authority, but the very disclosure made during the audit inspection speaks volume of the conduct of the appellant, which at no stretch of imagination, can be termed as a wilful or deliberate act of suppression of sales. The AA could not have treated such a conduct of the appellant as something or a kind of mischief falling within one of the contingencies stated in Section 42(1) of the Act. It is to remind that each and every default without any malafide ought not to be treated as a circumstance for imposing penalty, which must depend on the conduct of the dealer.

8. In view of the above discussions, the Tribunal is of the considered opinion that no doubt there was a default on the part of the appellant in paying the differential admitted tax due to the tune of ₹5,68,913/- but it was under peculiar circumstances, such as, receipt of the warranty claim in the mid of May, 2013 and there was time for submission of revised return up to 30th June, 2013, which was, in fact, been intervened by the audit notice dated 14.05.2013 and its subsequent payment on 04.07.2013 so on and so forth and therefore, no malafide can really be attributed against it. The Tribunal does not consider it to be a wilful or deliberate act of defiance by the appellant. On account of the above finding, the Tribunal is also of the considered view that there was no need of imposition of penalty considering the conduct of the appellant and regarding its voluntary disclosure albeit without a revised return. The aforesaid aspect, as it seems, has not been duly appreciated and considered by the authorities below before imposing the penalty, which according to the Tribunal, deserves to be interfered with.

9. Hence, it is ordered.

10. In terms of aforesaid reasons, appeal stands allowed. As a logical sequitur, the impugned order dated 28.06.2014 promulgated in Appeal No. AA-453/KJ/13-14 (VAT) by the FAA is hereby set aside to the extent of imposition of penalty. Consequently, the AA is directed to take up recomputation vis-a-vis tax liability of the appellant for the assessment period 2012-13 in the light of the finding and observation (supra) of the Tribunal and to complete the exercise preferably within three month from the date of receipt of the above order. The cross-objection is accordingly disposed of.

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