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

Present: Smt. Suchismita Misra, Chairman,
Sri Subrata Mohanty, 1st Judicial Member
&
Sri R.K. Pattnaik, Accounts Member-III

S.A. No.42 of 2007-08

(From the order of the ld. ACST, Balangir Range, Balangir, in First Appeal Case No. AA-190 (KA) 2003-04, disposed of on 14.12.2006)

S.A. No.45 of 2007-08

(From the order of the ld. ACST, Balangir Range, Balangir, in First Appeal Case No. AA-189 (KA) 2003-04, disposed of on 14.12.2006)

S.A. No.46 of 2007-08

(From the order of the ld. ACST, Balangir Range, Balangir, in First Appeal Case No. AA-188 (KA) 2003-04, disposed of on 14.12.2006)

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

- V e r s u s -

M/s. T.D.M. (B.S.N.L.), Bhawanipatna, At/P.O./Dist.- Kalahandi. ... Respondent

For the State : Mr. M.L. Agarwal, S.C.
For the Dealer : Mr. P.K. Harichandan, Advocate

Date of Hearing: 08.08.2019 ******** Date of Order: 16.08.2019

O R D E R

All three appeals above involving same and one question for decision raised by the Revenue as appellant by way of second appeal challenging the orders of first appellate authority in

assessment u/s.12(5) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as, OST Act) for different tax periods mentioned above relating to the assessee-dealer M/s. B.S.N.L., Bhawanipatna, hence for sake of convenience all are decided by this common order.

2. At the outset it is pertinent to mention here that, the appeals preferred by the dealer against the confirming orders of first appellate authority imposing thereby tax liability under OST Act on the rent collected against use of telephone handset from the customers are already decided by this Tribunal, whereas the present appeals by the Revenue against the orders of the first appellate authority were not pointed out, so could not be taken up jointly and decided along with the dealer's appeals. But, as the dealer has raised a distinct question for decision in these appeals, the question is taken up and decided as under.

3. In all these appeals the dealer has contended that, the authority below has committed wrong in imposing penalty at a rate of one time of the tax liability though ignoring the provision under law as per sec.12(5) of the OST Act as it is amended w.e.f. 03.10.2000. The claim of the Revenue is, the tax period in the assessment period under S.A. No.46 of 2007-08 was 2000-01, in S.A. No.45 of 2007-08 was 2001-02 whereas in S.A. No. 42 of 2007-08 was 2002-03. In all these cases the assessing authority imposed penalty at one times. However, the provision has been amended w.e.f. 03.10.2000 envisages penalty a sum equal to one and half times of the liability. Thus, a part of the assessment period of 2000-01 is dispute in S.A. No.46 of 2007-08 and the entire assessment periods covered under S.A. No.45 of 2007-08 and S.A. No.42 of 2007-08 should be revisited and penalty should be imposed at one and half times.

4. On the other hand, in objection to aforesaid claim of the Revenue the dealer's contention is, the tax liability of the dealer on the rent against telephone handset collected from subscribers is under

challenge before the Hon'ble Court relating to the dealer of different circles within the State. The taxing authority has not raised the question of penalty or quantum of penalty in many of the cases relating to different circles but selectively chosen to file appeal in some cases without any basis. The contentions in the appeal are mechanical, it is the discretion of the assessing authority to impose penalty and moreover the question of penalty was never before both the fora below.

5. **Findings**:-

At the outset, it is pertinent to mention that, the assessing authority has levied penalty at one time. The first appeal has confirmed it. There was no occasion for the first appellate authority to decide the quantum of penalty. Argument of the learned Standing Counsel is, the first appellate authority being an extended forum of assessment could have passed order on the quantum of penalty sou motu but, he did not prefer to do so.

5.1 Provision u/s.23(e)(a) of the OST Act relates to the appeal and the jurisdiction of the Tribunal. Section 23(3)(a) empowers the Tribunal to hear second appeal preferred by either parties, dissatisfied with the order of first appellate authority. Bare reading of the provision u/s.23 as it understood, unless a question is dealt with by the first appellate authority and unless the decision on that question is not up to the satisfaction of the parties, there is no scope of appeal. Here, in the case in hand, as the question relating to penalty was not raised and dealt with by the first appellate authority then, scope in the hands of the Revenue preferring appeal to this Tribunal is not wide enough to include the question of penalty.

5.2 It may be noted here that, admittedly, the dealer is not guilty of any kind of suppression. He has paid service tax on entire amount of rent received from telephone subscriber. He has a arguable case in his hand. Authorities are ample where penalty is denied when the dealer has arguable case.

In this behalf the observations of the Apex Court made in *Sree Krishna Electricals* v. *State of T.N.* [(2009) 11 SCC 687: (2009) 23 VST 249] as regards the penalty are apposite. In the aforementioned decision which pertained to the penalty proceedings in the Tamil Nadu General Sales Tax Act, the Court had found that the authorities below had found that there were some incorrect statements made in the return. However, the said transactions were reflected in the accounts of the assessee. The Court, therefore, observed: (SCC p. 688, para 7)

> *"7. So far as the question of penalty is concerned the items which were not included in the turnover were found incorporated in the appellant's accounts books. Where certain items which are not included in the turnover are disclosed in the dealer's own account books and the assessing authorities include these items in the dealer's turnover disallowing the exemption penalty cannot be imposed. The penalty levied stands set aside."*

The situation in the present case is still better as no fault has been found with the particulars submitted by the assessee in its return."

5.3 Further, the penalty under the provision of sec.12(5) of the OST Act is not mandatory in nature as it can be successfully construed from the word "may" as contemplated in the section. But, once the authority decided to levy penalty, the quantum must be one time till 30.07.2000 and for the period thereafter must be one and half times of the tax due. The term 'shall' used in the provision before quantum indicate, no discretionary jurisdiction has been vested under law with the assessing authority to determine the quantum of penalty otherwise than as per the provision.

5.4 It is also not out of place to mention here that, a series of appeals are preferred by the dealer-BSNL authority of different telephone circles of the State involving the identical issue relate to

sustainability of sales tax on rental charges against handset have been disposed off by this Tribunal. The matter is admittedly carried before Hon'ble Court by the dealer. The same question involving in **BSNL v/s. State of AP SLP (CIVIL) CC No.7650-7654/12** is still pending for disposal before the Apex Court of the land. The Revenue has not claimed for imposition of levy of penalty in all the assessments in appeals or in revisions right from this Tribunal to the Apex Court but, selectively chosen few assessment periods and prayed for imposition of penalty by filing appeals. Such a half hearted casual approach of the Revenue itself is against the principle of rule of consistency. The Revenue has not prayed for imposition of penalty for the periods prior to or subsequent to the aforesaid three periods. This itself is against the principle of "rule of consistency" as laid by many pronouncements. Reliance is placed on the decision of the Apex Court in Radhasoami Satsang v. CIT (1992) 193 ITR 321 (SC).

5.5 There is one more aspect to the matter which needs to be narrated below.

Can an assessee be in a position worse off, as a result of the matter being carried in appeal before the Tribunal by the Revenue, than the position the assessee was in after the assessment order? To put it differently, can there be situations in which the assessee ends up paying more, as a result of the matter having been carried in appeal before the Tribunal, than what it would have paid if the AO's order was simply accepted by the assessee?

The dealer has challenged the assessment before the first appellate authority and then before this Tribunal. Now, the unsuccessful dealer cannot be vexed with additional burden of penalty as it is against the aforesaid principle. The principle of "*no reformation in peius*" (a person should not be placed in a worse position as a result of filing of appeal) is applicable here.

6. From the discussion hereinabove, it is held that, all these three appeals by the State are devoid of merit hence dismissed.

Dictated & corrected by me,

Sd/-
(Subrata Mohanty)
1st Judicial Member

Sd/-
(Subrata Mohanty)
1st Judicial Member

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

Sd/-
(R.K. Pattnaik)
Accounts Member-III