

**BEFORE THE JUDICIAL MEMBER-I: ODISHA SALES TAX TRIBUNAL:
CUTTACK.**

S.A. No. 86(V)/2018

(Arising out of the order of the Id. Addl. CST (Appeal), North Zone,
Odisha, Sambalpur, First Appeal Case No. AA-SA-36(V) 15-16,
disposed of on dtd.30.12.2017)

P r e s e n t: **Shri S. Mohanty,
1st Judicial Member**

M/s. Shivam Agro,
Sauntpur, Dist.- Bargarh-768028. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2005 to 31.12.2006

For the Appellant ... Mr. B.N. Agarwal, Advocate
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 12.07.2019 **** Date of order: 12.07.2019

ORDER

This appeal is directed against the order of first appellate authority passed in an escaped assessment u/s.43 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) preferred by the assessee-dealer. As the tax and penalty determined by assessing authority reduced but not deleted, the dealer has carried the impugned order by way of this appeal with a prayer to drop the entire assessment proceeding as bad both in law and fact.

2. The fact of the case is that, the business premises of the dealer was visited on 19.12.2006 by the S.T.O. Enforcement Wing, Balasore. Since the books of account were not produced instantly for

verification, physical stock available in the business premises was recorded and certain incriminating materials were seized for further verification. After verification of documents and other incriminating materials in the books of accounts, the Enforcement Wings worked out the total suppression to the tune of Rs.12,50,42,556.80 whose details are given below:-

Source	Amount of suppression
1. Out of account sales as per excess use of packing materials	- Rs.47,82,430.00
2. Less discloser of wheat grinding as per electricity bills	- Rs.6,58,99,022.84
3. Jama Kharch file	- Rs.53,83,075.00
	Rs.54,20,938.00 (purchase)
4. Discrepancies in respect of physical stock	- Rs.7,17,886.00
5. False Branch Transfer	- Rs.4,27,62,277.00
6. Shortage of cash	- <u>Rs.76,928.00</u>
Total suppression -	Rs.12,50,42,556.80

The entire suppression amount of Rs.12,50,42,556.80 worked out as above was treated as GTO and TTO for assessment u/s.43 of the OVAT Act by the learned assessing officer. Tax payable @ 4% on the entire TTO has been calculated at Rs.50,01,702.27. Further, penalty of Rs.1,00,03,404.54 has been imposed u/s.43(2) of the OVAT Act. Thus, total demand of Rs.1,50,05,156.86 has been raised in the impugned order of assessment.

3. The appeal is heard with Cross Objection from the side of the Revenue supporting the order of first appellate authority.

4. According to the dealer, the proceeding u/s.43 of the OVAT Act in the case in hand initiated by the authority having without jurisdiction, the finding of suppression or escaped turnover by the assessing authority or by the first appellate authority is also baseless. The order of assessing authority was an exparte order, whereas, the impugned order is a contested one. Once the appeal is admitted and decided on contest in present of both the parties then,

the order of exparte by the assessing authority or any allegation of non-extension of sufficient opportunity of being heard, thereby violation of principle of natural justice are all became redundant because, the first appellate authority being an extended forum of assessment had given the opportunity of being heard to the dealer.

The dealer's next plea is, the very initiation of the escaped assessment u/s.43 of the OVAT Act is not tenable in the eye of law. Learned Counsel for the dealer pointed out that, the Audit Visit Report (in short, the AVR) in the case in hand was submitted by STO, Bhubaneswar as head of the audit team, whereas, the AVR as it revealed, the audit team was headed by ACST, Balasore Enforcement Range. The AVR was given from the office of the ACST, Enforcement Range, Balasore but it was signed by STO, Bhubaneswar as head of the audit team. So, according to the counsel for the dealer in the light of observation in *Jindal Stainless Ltd. v. State of Orissa and Others* (2012) 54 VST 1 (Orissa), the very assessment in the case is vitiated in law.

5. Per contra, learned Standing Counsel Mr. M.L. Agarwal argued that, this question was raised by the dealer before the fora below and even before the Hon'ble Court. The Writ Petition by the dealer before the Hon'ble Court was withdrawn. So, in that event, it can definitely be presumed that, the dealer has lost the opportunity to raise the question of maintainability of the proceeding. However, it is apt to mention here that, neither party has produced the order of the Hon'ble Court in W.P.(C) but the dealer has admitted to have filed one writ application before the Hon'ble Court. The order of the first appellate authority as it revealed, the Hon'ble Court has disposed of the writ application with a direction to dispose of the first appeal on merit.

With this backdrop and rival submissions, if we accept the submission of the learned Standing Counsel that, writ application was preferred by the dealer challenging the sustainability of the

initiation of the proceeding and it was withdrawn in a later period, in that case it can safely be said that, by withdrawal of application before Court, the dealer has lost the opportunity to raise this point again before any other forum, that too subordinate to the Hon'ble Court. In absence of any rebuttal from the side of the dealer, this Tribunal is undone to take any contrary view from above. So, it only can be said that, the AVR and initiation of proceeding u/s.43 in the case in hand is maintainable in the eye of law.

So far as the allegation of suppression is concerned, it is found that, the assessing authority on acceptance of the AVR had calculated the suppression on five counts as mentioned in the chart in the foregoing paragraph. In appeal before the first appellate authority, the less disclosure of wheat grinding for electricity bills as calculated by the assessing authority to the tune of Rs.6,58,99,022.84 was deleted. However, the rest amount of suppression as determined by the assessing authority became confirmed by the first appellate authority. The allegation of the dealer is, there was no proper verification of the books of account and stock, the method of calculation is based on surmises and conjecture, the dealer was not given proper opportunity to confront the Vigilance report of suppression, so the suppression as determined is incorrect.

6. On careful perusal of the order of the first appellate authority, it is found that, after a threadbare discussion the first appellate authority has determined the suppression. It is a factual aspect decided in presence of the parties by the learned authorities below. So, in absence of any rebuttal evidence it is hard to accept that, the determination of suppression is incorrect and interceptable by this Tribunal. The dealer has not filed any rebuttal evidence to dispute the determination of suppression by the first appellate authority. The dealer has harped the appeal on the point of maintainability. In that view of the matter, it only can be said that, the subjective satisfaction on due scrutiny of the documents by the

first appellate authority calls for no interference. Resultantly, the suppression has been determined in the impugned order holds good and confirmed.

7. The next point raised by the dealer i.e. the penalty as per Sec.43(2) of the OVAT Act, the assessing authority and thereafter the first appellate authority have imposed penalty at two times of the tax due. Learned Counsel for the dealer argued for reduction of the penalty upto one times placing on reliance in the decision of this Tribunal in a Division Bench vide S.A. No.321(V) of 2017-18. By now, different Benches of this Tribunal, taking cognizance of the amendment of the provision u/s.43(2) of the OVAT Act has held that, the amended Act is applicable to the pending cases looking at the very intention of the Legislature behind such amendment. The view as such taken by the Division Bench and Full Bench cannot be overturned by this Single Bench, hence I am of the considered view that, the penalty as imposed in this case should be reduced to one times of the tax due.

With the observation hereinabove, it is held that, the suppression as determined by the first appellate authority is hereby confirmed, the penalty is reduced to one times. Accordingly, it is ordered.

8. The appeal is allowed in part. The dealer is liable to pay a sum of Rs.6,55,250.27 as tax due and penalty at one times of the tax due i.e. Rs.6,55,250.27. Accordingly, total liability towards tax and penalty is calculated at Rs.13,10,500.55. Demand be raised accordingly. Cross Objection is disposed of accordingly.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

Sd/-
(S. Mohanty)
1st Judicial Member