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

S.A. No. 88(V)/2015-16

(Arising out of the order of the learned JCST, Sambalpur Range, Sambalpur in first appeal Case No. AA-113/BGH/VAT/2012-13 disposed of on 30.04.2015.)

Present :- Shri A.K. Das, Chairman **Smt. Sweta Mishra, 2nd Judicial Member** **& Shri S. Mishra, Accounts Member-II.**

M/s. Pawan Food Products
At-Nuakhairpali,
Po- Attabira, Dist- Bargarh. ..... Appellant.

-Vrs.-

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

For the Appellant: : Mr. B.N Agarwal, Ld. Advocate.
For the Respondent: : Mr. D. Behera, Standing Counsel.
: Mr. M.S. Raman, ASC.

Date of Hearing : 11.08.2021 *** **Date of Order : 06.09.2021**

O R D E R

The present appeal of the dealer has been directed against the impugned order of learned Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur (hereinafter referred to as ld. FAA) passed on dated 30.04.2005 in Appeal Case No. AA-113/BGH/VAT/2012-13 setting aside the order of assessment of the Learned Sales Tax Officer, Bargarh Circle, Bargarh (hereinafter referred to as LAO) framed Under Section 42 of the Odisha Value Added Tax who raised a demand of

Rs.10,03,350.00 including penalty relating to the tax period from 01.04.2007 to 31.03.2012.

2. Being aggrieved by the impugned order of the ld. FAA, the dealer appellant has preferred second appeal before the Tribunal on the following grounds:-

"i. The orders of assessment and 1st appeal are bad in law as well as in facts.

ii. The learned JCST's finding in the 1st Para of page 8 of his order that the AVR has been received in Bargarh Circle, Bargarh on 27.08.2012, which is within 7 days as required by sec.41(4) is not sufficient to overrule the Appellant's contention that the AVR was received by the learned Assessing Authority, i.e. the learned STO, who has made the impugned assessment, beyond 7 days. The receipt of the AVR in the Office of the learned ACST, Bargarh Circle, Bargarh on 27.08.2012 does not amount to receipt of the same by the learned STO, who has issued the notice for audit assessment on 03.09.2012 as evident from the order sheet, copy of which has been filed before the learned JCST on 20.01.2015.

iii. In view of the undisputed fact on record that the Appellant was not allowed minimum period of 30 days for production of books of account and documents in the notice issued U/s.42(1), as mandatorily required U/s.42(2), the learned JCST is not justified to ignore to record his findings on this score and to remand the case to the LAO for making a fresh assessment after allowing reasonable time to the appellant as

prescribed under the OVAT Act and Rules ignoring the binding judgment of the Orissa High Court in the case of M/s. Delhi Foot Wear V. STO (2015) 77 VST 146 holding a notice in Form VAT-306 not granting minimum time as provided in sec.42(2) as invalid and quashing the consequential order of assessment as bad in law.

iv. In the facts and circumstances of the case, the impugned order of assessment ought to have been quashed by the learned JCST as bad in law instead of setting aside the same for making a fresh assessment after examination of the disputed facts only.

v. In the facts and circumstances of the case, the impugned order of assessment may please be quashed following the above case law…"

The brief fact of the case is that the appellant-dealer is a rice-miller who converts paddy into rice and sells the same with its bi-products in intra-state and inter-state trade or commerce.

3. At the assessment stage, the LAO observed that in spite of reasonable and sufficient opportunities availed by the dealer, he failed to appear in his proceedings for the impugned period that resulted in an ex-parte order based on two numbers of allegations made in the audit visit report as under:-

a. The dealer has availed ITC of Rs.93,124.54 on purchase of consumables and capital goods for which he is not entitled to as per statute.

b. Sale suppression of Rs.60,72,798.00 detected in course of audit involving tax of Rs.2,42,912.00.

All these resulted in a demand of Rs.10,03,350.00 including penalty in the assessment order passed by the LAO for the relevant period.

Being aggrieved by the aforesaid order, the dealer filed first appeal before the ld. FAA who after due examination of the case set aside the assessment order with a direction to the LAO to re-examine the case on the basis of following observations:-

a. "To examine the particulars of goods purchased (capital and other goods) and tax paid on it and consider eligibility to avail ITC on such goods amounting to Rs.93,124.54.
b. To work out and determine the sale suppression on stock discrepancy as on 31.03.2012 i.e. the period under assessment taking into account the stock discrepancy noted on 15.05.2012.
c. To examine the payment particular and give credit the amount actually paid as the appellant-dealer is stated to have filed a rectification petition U/s.81 of the OVAT Act for crediting tax paid by the dealer to the tune of Rs.37,479.00 as against which a sum of Rs.6,579.00 has been credited in the order of assessment."

Being further aggrieved with the aforesaid appeal order as most of his grounds of appeal had not been properly addressed by the ld. FAA, the dealer knocked the door of this Tribunal by filing second appeal.

4. In course of hearing at second appeal, referring to the grounds of appeal, additional grounds of appeal, written notes of submission with different cited case laws, the ld. Counsel for the appellant raised the following issues for better appreciation of his contention:

i. The AVR has not been submitted before the assessing authority within 7 days as contemplated in sec.41(4) of the Act that vitiates the assessment proceedings and not tenable in the eyes of law as per W.P.C. No.15962 of 2010 delivered by the Hon'ble Odisha High Court in Jindal case.

ii. Non-allowance of statutory period of minimum 30 days U/s.42(2) of OVAT Act.

iii. Violation of provision to Rule 49(4) of OVAT Rules by not granting three adjournments.

iv. Levy of penalty U/s.42(5) of at twice the amount of tax assessed is not tenable as per Full Bench order of this Tribunal dtd.24.12.2018 in S.A.No.102(V)/2011-12 in case of M/s. Zenith Vrs. State of Orissa.

Addressing to issue No. (i) above, it is observed that, in fact, the validity of the proceeding has been questioned for non-compliance of Sec.41(4) of the Act. It is urged that as per the aforesaid provision (as it stood prior to 01.10.2015), on completion of tax audit under sub-section 3 thereof, the authorized officer, who conducted the audit, within seven days from the date of completion of audit, was required to submit the Audit Visit Report (in short 'AVR') to the assessing authority

with all the documents evidencing the suppression of purchases or sales or both, erroneous claims of deductions including ITC and evasion of tax, if any, relevant for the purpose of investigation, assessment, or such other purposes but it has not been accomplished within the time specified, hence the assessment and demand as a consequence is liable to be quashed. It is further argued by the ld. Counsel for the appellant that after examination of books of account on 22.08.2012 with reference to the audit visit made on 15.05.2012, the AVR was submitted to the concerned Range Officer i.e. JCST, Sambalpur Range, Sambalpur who in turn, transmitted the said AVR to Bargarh Circle on 24.08.2012, received by the said Circle on 27.08.2012. The concerned Circle Officer assigned the AVR to a Sales Tax Officer of his Circle for assessment who issued notice to the appellant vide his order in order sheet dtd.03.09.2012. Accordingly, he argued that the concerned STO who made the assessment, has not received the AVR within 7 days from the date of submission of AVR on 22.08.2012 that violates the provision contained in Sec.41(4) of the Act. On the contrary, the State contended that there has been no infraction of section 41(4) of the Act for the fact that, soon after the audit was over, without any amount of delay, the AVR was prepared and along with the documents forming part of the audit record, were sent to the Office of the JCCT, Sambalpur Range, who is, apparently, the head of the Range and is also an Assessing Authority under the Act. The contention so raised by the dealer-assessee suggests that the delay occasioned, since the AVR was not

submitted as soon as and within seven days from the date of completion of the audit, as it was received by the JCCT, Sambalpur Range, Sambalpur, who is not the assessing authority. According to the State, there was no delay, as the AVR in form VAT-303 along with other documents forming part of audit record was received by the Office of JCCT, Sambalpur Range on 22.08.2012 and transmitted to the concerned circle duly received by the Circle on 27.08.2012 i.e. within seven days from the date of completion of audit on 22.08.2012. It is further contended that as per sec.2(4) of the Act, the term 'assessing authority' has been defined, which includes a Joint Commissioner of Sales Tax to function and discharge the duties of an assessing authority by issue of notification u/s. 3 read with Sec.5 of the Act and in the instant case, when the Joint Commissioner of Commercial Taxes, Sambalpur Range happens to be an assessing authority, the AVR with the audit record was submitted to him for the purpose of assessment in terms of Section 42 of the Act and under such circumstances, on the ground that it was not really being sent to the assessing authority and thus, Section 41(4) was not duly complied with does not hold water. To alleged that the AVR was not received by the assessing authority, who was to take up the assessment as per Sec.41(4) of the Act, rather, submitted to the Joint Commissioner of Commercial Taxes, Sambalpur Range and as such, there is violation of Sec.41(4) of the Act is totally misconceived. Indeed, the concerned Range Officer is also an assessing authority to whom the AVR was sent and who could even entrust

assessment to any subordinate officers and to claim that such was not received by the assessing authority within the stipulated time and therefore, Sec.41(4) was not complied is clearly unsustainable. If the AVR was submitted and received by the Head of the Range, in what way the dealer –assessee was prejudiced, as a result, is beyond once comprehension. Besides the above, the ld. Standing Counsel (C.T.) by referring to an order 02.03.2016 of the Hon'ble Court in case of Kalka Trading Agency Vrs. Commissioner of Commercial Taxes in W.P.(C) No.1132 of 2016 pointed out that the audit is essentially an administrative function and as such, not quasi-judicial in nature and for that matter, no prejudice in any manner would be caused. As per the State, such a provision to submit the AVR within seven days from the date of completion of audit for the purpose of assessment is directory in nature as held in Bhavnagar University Vrs. Palitana Sugar Mill Pvt. Ltd. reported in (2003) 2 SCC 111. Admittedly, as per Sec41(4) of the Act, the AVR is to be submitted within 7 days from the date of completion of audit. According to sub section 6 of Section 42 of the Act, an assessment shall have to be completed within a period of six month from the date of service of notice under sub-section(1) along with the AVR. A scheme is prescribed in Sec.42 of the Act vis-à-vis the audit assessment and the time limit within which it has to be completed. Having regard to the above, the Tribunal holds that on such a ground the validity of the assessment proceeding cannot be permitted to be questioned. In fact, the AVR was received within seven days from the

date of completion of audit visit. However, the ld. Counsel for the appellant referred to a decision of the Hon'ble Court in case of M/s. Jindal Stainless Steel Vrs. State of Orissa reported in (2012) 54 VST 1 (Ori.) while contending that the AVR was not received by the assessing authority within seven days as contemplated in Sec.41(4), the assessment and the demand thereof stands invalidated. In the decision supra, the Hon'ble Court on account of delay of six months in preparing and submitting the AVR and having regard to the spirit of the law concerning the assessment U/s.42 of the Act held and observed that such inordinate delay defeats or frustrates the very scheme of the act and under such circumstances, declared the AVR as having no validity. However, the said decision is inapplicable to the facts and the circumstances of the present case. In absence of any serious prejudice being caused to the dealer assessee and having regard to the totality of the circumstances, we are of the considered view that the said contention of the dealer assessee is not at all tenable and thus, has to be rejected out rightly. In fact, our aforesaid observation is in consonance with earlier full bench decision of this Tribunal Dt. 15.09.2020 in SA No.42(VAT) of 2016-17 & SA No.60(VAT) of 2016-17 in case of M/s. G.K.Pulses Manufacturing Pvt.Ltd, Cuttack.

Addressing to issue no.(ii), it is observed from the Assessment Record that notice for hearing of assessment was issued by LAO as per order sheet dtd.03.09.2012 bearing No.4575 dtd.03.09.2012 fixing date of hearing on 05.10.2012. However, on 04.10.2012, a time petition was

filed by the appellant and the case was adjourned to 12.10.2012. On the said date, the appellant filed another time petition and the case was adjourned to 03.11.2012. Due to non-appearance by the appellant on the said date, one more intimation was issued on 15.11.2012 fixing date of hearing on 26.11.2012. On the said date, the appellant again filed time petition, but the case was heard ex-parte and assessment order passed accordingly by the LAO. From the above chronological events for hearing, it is crystal clear that the dealer was given reasonable opportunity of being heard as per proviso to Rule 49(4) of the OVAT Rules that envisages that not more than three adjournments shall be granted to a dealer for hearing his case. Accordingly, the contention taken by the appellant on this score is to be rejected, being devoid of any merit.

Addressing to issue no.(iii) i.e. non-allowance of statutory period of minimum thirty days U/s.42(2) of the Act, it is revealed from the assessment record that notice in Form VAT-306 along with a copy of the AVR was issued to the appellant for assessment vide No.4575 dtd.03.09.2012 fixing date of hearing on 05.10.2012. However, the said notice was dispatched by RP with AD on 12.09.2012, received by the appellant on 15.09.2012. Accordingly, the ld. Counsel for the appellant contended that only twenty days time has been allowed to the dealer as against thirty days statutorily required U/s.42(2) of the Act. Referring to the case law of Delhi Foot Wear reported in (2015) 77 VST 146 (Ori.), he argued that in the said case, it has been held that an order of

assessment passed in violation of requirement of sec.42(2) by not granting minimum thirty days time is bad in law and accordingly quashed. Per contra, the Revenue argued that the factual variation of the case at hand compared with the reported case as aforesaid would not make the decision applicable to the present fact-situation. In the instant case, the notice in Form VAT-306 initiating proceeding u/s.42 for assessment was issued on 03.09.2012 with instruction to the appellant to produce books of account on 05.10.2012. Accordingly, it is argued that no infirmity could be imputed by the appellant in this regard by submitting that there was non-compliance of Sec.42(2) of the OVAT Act that contemplates that where a notice was issued to a dealer under Sub-section(1), he shall be allowed time for a period not less than thirty days for production of relevant books of account and documents. However, it is factually observed that though the said notice was issued on 03.09.2012 fixing date of hearing on 05.10.2012, it was sent by RP with AD on 12.09.2012, received by the appellant on 15.09.2012. Thereafter, series of adjournments were made that finally culminated in passing of the assessment order ex-parte. At this stage, it may be noticed that the Hon'ble High court of Orissa in case of Patitapabana Bastralaya Vrs. Sales Tax Officer reported in 2015 (I) ILR-CUT283, while addressing sole issue of non-adherence to mandate of sec.42(2) of the Act by the assessing authority, directed for reassessment by setting aside the matter. Further, it is observed that inadequacy of period as stipulated in Sec.42(2) is also not put to before the assessing authority.

Moreover, Section-98(2) stipulates that "the service of any notice, order or communication shall not be called in question if the notice, order or communication, as the case may be, has already been acted upon by the dealer or person to whom it is issued or where such service has not been called in question at or in the earliest proceedings commence, continued or finalized pursuant to such notice, order or communication." However, we observed that since the assessment order has been passed on ex-parte basis, it somehow violates the principle of natural justice. Accordingly, we are of the considered view that one more opportunity of being heard is to be provided to the appellant to appear before the LAO for hearing of his case with books of account and relevant documents to rebut the allegations made in the AVR.

Addressing to issue no.(iv), it is argued by the Ld. Counsel for the appellant that imposition of the penalty u/s.42(5) of the Act, if any, is to be applied as per OVAT (Amendment) Act, 2015 that speaks up imposition of penalty equal to the amount of tax assessed under Sub-section (3 or 4) of that section. On a bare reading of the said Amended Section, it is revealed that the said Amendment Act U/s. 1(2) conferred power on the State Govt. in the following words:

"It shall come into force on such date as the State Government may, by notification , appoint." Accordingly, the State Govt. appointed the date of effect of the said amendment Act as "01.10.2015" *vide* Finance Department Notification No.28080-FIN-CT1-TAX-0017/2013/F. [SRO 490/2015], dated 19.10.2015. At this juncture, the ld. Counsel for the

appellant referring to the judgment of Full Bench of this Tribunal delivered on 24.12.2018 in S.A. No.102 (V)/ 2011-12 in the case of M/s. Zenith Vrs. State of Orissa, argued that penalty should be equal to the amount tax assessed even for the tax period prior to 01.10.2015. As against such averment, the ld. Standing Counsel for State argued that the amendment itself was not given retrospective effect and as such the imposition of penalty as amended would not apply to the present context where the transactions during the tax periods in question were effected prior to effective date of the OVAT (Amendment) Act, 2015, relying on the case law of Bansapani Iron Ltd. Vrs. State of Orissa reported in 2016 (I) ILR-CUT 50 and other cases as contained in their written note of submission.

5. From the records of fora below, it is observed that the assessment order was passed by the LAO on 26.11.2012 whereas the first appeal order bearing No.AA-113/BGH/VAT/2012-13 was passed by the ld. FAA, Sambalpur Range on 30.04.2015 and both the dates fall prior to the amendment on 01.10.2015. Accordingly, it may be safely concluded that imposition of penalty at twice the amount of tax assessed has been made prior to such amendment. Moreover, on this issue, the Tribunal relies on the following two judgments of different Hon'ble Courts as under:-

a. That, in case of Commissioner of Gift Tax Vs. C. Muthukumarswami, Mudauar, the Hon'ble Madras High Court in their judgment dtd.23.09.1974 held as under:

"...thus, on a due consideration of the matter, we hold that the amendment which took effect from first of April, 1963 would not be applicable to cases where the default has been committed before the amended Act came into force and that the law applicable to the levy of penalty for such defaults is the law as it stood at the time when the default is committed and not as it stood in the financial year for which the assessment is made as urged by the learned Counsel for the assessee, nor when penalty order was imposed as urged by the revenue."

b. That, in case of Sebi through its Chairman vs. Roofit Industries Ltd., the Hon'ble Supreme Court vide their order dtd.26.11.2015 in Civil Appeal No. 1364-1365 of 2005 held as under:

"the amendment of section 15A did not indicate that the amended section would apply to penalties imposed after 29.10.2002. The amendment was merely made with effect from that date, indicating that the change would be applicable for failures occurring after that date. The date on which the failure occurred was thus relevant for deciding the applicable law, not the date on which penalty was imposed."

6. Taking into consideration the above case laws and facts in hand in the instant case, we are of the reasonable view that penalty is imposable as per pre-amended provision of Sec.42(5) of the OVAT Act.

7. Hence it is ordered.

In the result, the appeal filed by the appellant is rejected being devoid of any merit. As a necessary corollary, the impugned order dtd. 30.04.2015 passed by the ld. FAA in appeal case No.AA-113/BHG/VAT/2012-13 is confirmed and the matter is remitted back to the LAO to re-assess the appellant in the light of the above findings and observations of the Tribunal along with the observations made in the first appellate order and to pass appropriate order as per and according to law, preferably, within a period of three months from the date of receipt of this order after giving the appellant a reasonable opportunity of being heard.

The cross objection filed by the Revenue is disposed of accordingly.

Dictated & corrected by me.

Sd/-
(S. Mishra)
Accounts Member-II

Sd/-
(S. Mishra)
Accounts Member-II

I agree,

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(Sweta Mishra)
2nd Judicial Member