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

S.A. Nos. 39(VAT) & 141(VAT) of 2013-14
S.A. Nos. 33(ET) & 99 (ET) of 2013-14

(Arising out of orders of the learned Addl.CST, North Zone,
Odisha in Appeal Nos. AA-210/2011-12 &
AA-211/2011-12 disposed of on dated 03.01.2013)

Present: Shri R.K. Pattanaik, Chairman,
Shri A.K. Dalbehera, 1st Judicial Member, and
Shri R.K. Pattnaik, Accounts Member-III

S.A. Nos. 39(VAT) & 33(ET) of 2013-14

M/s. Jindal Steel & Power Ltd.,
At/PO-Tensa, Dist. Sundargarh ... Appellant

-Versus-

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

S.A. Nos. 141(VAT) & 99 (ET) of 2013-14

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

-Versus-

M/s. Jindal Steel & Power Ltd.,
At/PO-Tensa, Dist. Sundargarh ... Respondent

For the Dealer : Sri S.C. Sahoo, Advocate
For the State : Sri D. Behura, Standing Counsel (CT)

Date of hearing: 13.10.2020 ***** Date of order: 12.11.2020

O R D E R

. One set of appeals under section 78(1) of the Odisha Value Added Tax Act, 2004 (in short, 'the Act') and the other under Section 17 (1) of the Odisha

Entry Tax Act, 1999 (in short, 'the OET Act') are directed against a common order dated 03.01.2013 promulgated in Appeal Nos. AA-210 and 211/2011-12 by the learned Additional Commissioner of Sales Tax, North Zone, Odisha (in short, 'FAA') who allowed the appeals partly and reduced the tax liability as against the assessment dated 19.12.2011 passed by the learned Deputy Commissioner of Sales Tax, Rourkela-I Circle, Uditnagar (in short, 'AA) for the year 2007-08 on the grounds inter alia that the findings of the authorities below to the extent alleged are not tenable in law and therefore, deserve to be interfered with in order to do substantial justice.

2. In S.A.No.39(VAT) of 2013-14, the dealer assessee questioned the legality of the impugned order dated 03.01.2013 to the extent indicated, whereas, in S.A. No.141(VAT) of 2013-14, the respondent State has assailed reduction in the tax liability as directed by the FAA. Against the impugned assessment, the other two set of appeals i.e. S.A. Nos. 33(ET) and 99(ET) of 2013-14 are pressed into service by the respective parties vis-a-vis the entry tax liability. All the appeals, since involve the same parties and deal with common question of facts and law, have been clubbed together and accordingly disposed of by the following order.

S.A.No.39 (VAT) and 141(VAT) of 2013-14:

3. As per the dealer assessee, the FAA grossly erred in law upholding the proceeding under Section 43 of the Act and assessment based on it for the period under reference, since it is void ab initio as the grounds for its initiation did not exist. It is contended that no self assessment was completed under Section 39 of the Act and more particularly when, sub-section 2 thereof stipulates that when

the returns are filed within the prescribed time and found to be in order, then it shall be accepted as self-assessment and as such, no such procedure was followed. It is also contended that the authorities below committed illegality by not accepting the explanation offered by the dealer assessee on the alleged suppression of sale to the extent of 8159.066 MT of sized iron ore. As per the claim of the dealer assessee, it had not effected any sale either in the State or in course of inter-State and all the despatches were made to its factory against Form-F which are also documented and that apart, there has been no out of account sales prior to the alleged period and even later, no any such charge was made against it. It is alleged that the claim of suppression of sale is merely based on a slip, wherein, the figure in respect of sized iron ore was alleged to be as on 01.04.2007 which in fact related to a particular stack but such an explanation was outrightly rejected. It is also claimed that the despatches of iron ore and fines as branch transfer against Form-F for the alleged period stand recorded at 832999.560 MT and 1099811.420MT respectively and 806035.000 MT of iron ore fines to be on account of export and dealing with such huge quantity of goods, it is beyond one's imagination that the dealer assessee would stoop so low and indulge in such diminutive and disgraceful activity and when, installation of plants at Barbil and Angul with capacities of 4.5 and 6 Million Tonnes had then been commenced with huge investments made. The dealer assessee while responding to the claim of sale suppression claimed that quantity of 5-20 sized iron ore of 934 MT relates to one stack and the quantity of stock as on 31.03.2007 was 9090.066 MT as per the Mining Register and if it is alleged that the opening stock was 934 MT and not 9093.066 MT, then, the

disputed quantity of 8159.066 MT cannot be said as sold during 2007-08; and furthermore, opening stock, if treated to be 934 MT, the closing stock, by no stretch of imagination, can be more than the quantity which should have been treated as sold during 2006-07 (not admitted) and the same, as such, cannot be a basis for assessment for the period 2007-08. It is also claimed that when the closing stock is 9093.066 MT as on 31.03.2007 and opening stock at 934 MT as on 01.04.2007, then the balance quantity cannot also be treated to be sold during 2007-08 and therefore, the allegation of suppression of sale for the period under consideration is factually and legally incorrect. The dealer assessee contends that it had also been assessed under Section 42 of the Act for the tax periods 01.04.2007 to 31.03.2011, wherein, there was consideration of opening stock of sized iron ore of 9093.066 MT as per the books of account and when, the same turnover was assessed, suppression with the opening stock at 934 MT on mere eye estimation would also lead to double taxation. While challenging the assessment, it is also claimed that the assessment is to be carried out on the basis of the books of account maintained by the dealer assessee in its regular course of business and based on the returns filed but the AA entirely proceeded on the basis of the report of the Investigation Unit where eye estimation figure was applied calculating the purchase turnover and suppression; and formula of average carrying capacity was adopted on sale turnover and suppression. So precisely speaking, the dealer assessee disputed reliance placed on the alleged slip so as to reach at a decision on sale suppression to the extent of 8159.066 MT besides questioning the very initiation of proceeding under Section 43 of the ACT in absence of self assessment

duly completed as contemplated in Section 39 and also challenged the levy of penalty as not being justified.

4. Per contra, the respondent State would contend that the commencement of Section 43 of the Act cannot be challenged with reference to Section 39 and that apart, considering the slip and the explanation offered by the dealer assessee, the suppression of sale was justly concluded. It is apprised by the respondent State that on inspection of the books of account and other documents in the premises of the dealer assessee by the Vigilance Unit, certain discrepancies were noticed, whereupon, a report was forwarded to undertake assessment, whereafter, it was framed under Section 43 of the Act and demand of ₹60 lac was raised which was later reduced to ₹29,73,264/-. According to the respondent State, the authorities below did take notice of the slip in question and found it to be significant and a valid piece of information used and utilised in course of assessment and such evidence which was retrieved during the inspection could not have been ignored and discarded in absence of a plausible explanation from the dealer assessee and for the contradictory stands it had taken at a different times, and therefore, the FAA rightly upheld the alleged suppression. Regarding the maintainability of the action under Section 43 of the Act, it is urged by the respondent State that the dealer assessee having wholeheartedly participated in the proceeding without raising any objection as is required in terms of Rule(s) 50 read with 49(3) of the OVAT Rules, 2005, it was not competent to challenge the legality of the notice, after finalisation of assessment and that apart, in view of Section 98 of the Act, it is unassailable. Further, it is alleged that since the dealer

assessee claims to have filed return, it is to be construed that it had furnished so by determining own liability in accordance with Section 2(47) of the Act and hence, it must not be allowed to turn around to claim that there is no self assessment, or had not self assessed itself, for that matter, more so when, it would rather run the risk of contradicting its declaration furnished in Form VAT-201. The respondent State made the Tribunal apprised about a scheme brought out by the Empowered Committee dealing with various aspects of VAT including self assessment. The amendment of Section 39(2) of the Act with effect from 2015 is also placed reliance in order to contend that the Tribunal, while appreciating the said provision, must peep into the legislative intent and also to iron out the creases by interpreting that such amendment was introduced in order to put in place more clarity on the provision as to self assessment. In this connection, besides an order of the Tribunal (FB) in S.A.No.244 (VAT) of 2013-14 decided on 03.09.2018, the ruling of the Hon'ble Apex Court in the case of Nilachal Ispat Nigam Ltd. Vrs. State of Odisha reported in 2016 SCC Online Orissa 946 has been cited from the side of the respondent State.

5. The ground so raised by the dealer assessee, as to sustainability of the proceeding under Section 43 of the Act is to be considered by the Tribunal. It is claimed that there was no ground existed to commence a proceeding under Section 43 of the Act in absence of self assessment by the dealer. The learned Standing Counsel (CT) contended that when there was no objection in terms of Rule 50 of the OVAT Rules and assessment was finalized, the dealer assessee was not entitled to challenge the proceeding by raising infirmity in the notice. In this

connection, specific reference is also made to Section 98 of the Act. Admittedly, the dealer assessee furnished the returns. The expression 'self assessment' as per Section 2(47) of the Act means a true and correct determination of net tax liability by a dealer in relation to any tax period. As per Section 33 of the Act read with Rule 34 of the OVAT Rules, 2005, periodical returns are furnished on self assessment. It is the dealer assessee who is to submit the returns in accordance with the Act and Rules. The dealer assessee is to determine its own liability by undertaking self assessment and such determination is as per Section 2(47) of the Act. A declaration is furnished as per Form VAT-201 by the dealer assessee in respect of self assessment. The term 'assessment' as defined in Section 2(5) of the Act means determination of tax liability under the Act including self assessment and other kinds of assessments, such as, provisional, audit, escaped turnover and assessment of unregistered dealers liable to be registered besides assessment of casual dealers and reassessment. In the instant case, the dealer, as there is no denial to the fact, self assessed by furnishing returns as per Section 39 of the Act. According to the said provision, the amount of tax due from a registered dealer or a dealer liable to be registered under the Act shall be assessed in the manner prescribed for each tax period or tax periods, as the case may be, during which the dealer is so liable and sub-section (2) thereof, as it stood prior to 01.10.2015 envisaged that in case return is filed in respect of a tax period within the time stipulated and the same is found to be in order, it shall be accepted as self assessed, which post amendment vide Odisha Value Added Tax (Amendment) Act, 2015 introduced a legal fiction with an effect that a registered dealer who furnishes

the return shall be deemed to be self assessed. It is to be noted that at the stage of self assessment, no separate order is passed under Section 39 of the Act and in this regard, it would be profitable to quote the cited ruling of the Hon'ble Court in Nilachal Ispat Nigam Ltd. case ibid, wherein, it is categorically observed that under the taxation rule, the assessee is required to furnish self assessment and the authority is supposed to assess it and as such, there is no provision under the Act to communicate such acceptance of assessment; although, as per Section 38 of the Act each and every return in relation to a tax period furnished under Section 33 is subjected to scrutiny by the assessing authority, who is to verify the correctness of the calculation, application of correct of rate of tax and interest etc., in fact, there is no statutory obligation to intimate the outcome of scrutiny and intimation is only sent to the assessee with a notice served in case of any mistake detected in course of such scrutiny, and if there is no notice issued, it shall have to be concluded that no any mistake or defect was found and the return held to have been accepted for being in order. The decision (supra) is, of course, with reference to the provisions of the OET Act, 1999. But, the fact of the matter is, the dealer assessee furnished the returns as per Form VAT-201 with a declaration which determined its own tax liability. There is no specific provision in the Act to the effect that before acceptance of return filed under Section 39, intimation is required to be sent to the dealer assessee informing its acceptance. According to the learned Standing Counsel (CT), the Tribunal in S.A. No. 244 (V) of 2013-14 decided on 03.09.2018 applied the aforesaid ruling of the Hon'ble Court and applied the ratio in a case under the Act. Apart from that, two more decisions of the Hon'ble Kerala High

Court reported in (2016) 88 VST 186 (Ker.) and (2016) 89 VST 390 (Ker.) are cited and it is contended that under similar circumstances, self assessment with respect to tax liability is treated as final after scrutiny and only if discrepancy is found or detected, intimation is issued to the assessee. The learned Standing Counsel (CT) further relied on a decision in the case of Sales Tax Bar Association Vs. Government of NCT, Delhi reported in (2013) 61 VST 43 (Delhi) in order to contend that the dealer assessee can be said to have been self assessed as per the Act so as to frame it under Section 43 thereof. As earlier stated, the respondent State even contended that on such a ground a proceeding cannot even be set at naught in view of Section 98 of the Act. Having considered the provisions of the Act in entirety and appreciating it in proper prospective, the Tribunal is of the humble view that the dealer assessee self assessed under Section 39 of the Act by furnishing the returns and as there was no defect apparently pointed out in course of scrutiny with a followed intimation in that respect, it was in order and to have been finally accepted and having concluded so, the proceeding under Section 43 of the Act shall have to be held as maintainable and not vitiated in any manner whatsoever. In any event, for the due participation of the dealer assessee and for having not raised any objection in terms of Rule 50 of the OVAT Rules, 2005, it cannot as well be permitted to challenge the legality of the notice issued for escaped assessment under Section 43 of the Act. Even assuming for the sake of argument that there was a defect in the proceeding, then also, it cannot be invalidated on such a ground in view of Section 98 of the Act.

6. Then, the next point for consideration is, whether, there was sale suppression proved and established against the dealer assessee for the period 2007-08? The Vigilance Unit verified all the documents and finally rested its conclusion on a slip to hold that there is sale suppression on account of shortage of 8159.066 MT. As per the learned Counsel for the dealer assessee, the books of account was verified and no discrepancy, except the avoidable charge, was noticed but unfortunately, the sale suppression was alleged on the strength of a slip which is in relation to a particular stack and not to be the opening stock, as is claimed by the adversary. It is contended that according to the Mining Register, when the closing stock as on 31.03.2007 was 9093.066 MT, which was carried forward to 01.04.2007 as the opening stock, in that case, 8159.066 MT of 5-20 sized iron ore cannot be said to have been sold in 2007-08, inasmuch as, closing stock cannot be more than 934 MT. It is also contended that during that period, permission was granted by the Deputy Director of Mines, Koira to remove and despatch iron ore from different stacks under Letter No.6700 dated 31.03.2007 relatable to 934 MT, which is alleged to be the opening stock as on 01.04.2007. It is claimed that 1750.560 MT of iron ore were despatched on 01.04.2007 obviously out of 9093.066 MT and as pointed out by the learned Counsel for the dealer assessee, such a disposal cannot be out of a stock of 934 MT, morefully when, there was no production on 01.04.2007. There is indeed no clear stand from the side of the respondent State on the alleged claim of the dealer assessee, who challenged the sale suppression a case of factual impossibility and rather, based on mere surmises and conjectures. If such is the claim of the dealer assessee, the fact, which can only

be confirmed on scrutinizing the books of account, it would certainly be incredible that there could be a shortage of 8159.066 MT as against an opening stock of 934 MT. The Tribunal does not have the materials at its disposal to explore, if at all, such a factual wrong on figures does really exist or not, as is claimed by the dealer assessee, which can only be verified from the books of account and other relevant documents. The learned Counsel for the dealer assessee also highlighted the manner in which the sale suppression was figured out without referring to the books of account and vital documents. It is also claimed that there was no reasonable opportunity provided to the dealer assessee in order to defend and explain away sale suppression. If there was sale suppression and the alleged stock of iron ore was disposed of clandestinely, it was obligatory on the part of the Revenue to establish it. In order words, if sale suppression was alleged, it was incumbent upon the State to discharge the onus by showing how and in what manner the iron ores were secretly disposed of by the dealer assessee out of account, the aspect which was not even dealt with by the authorities below. Merely on the basis of a slip and nothing more, which is moreover claimed to be one of lots from the stack allegedly despatched during that time, the AA could not have held it as sale suppression. The AA would have examined the books of account and also the records of assessment under Section 42 of the Act for the period 01.04.2007 to 31.03.2011 in order to find out whether the shortage of 8159.066 MT was really the sale suppression, when it could not have been factually justified, for an opening stock of 934 MT as on 01.04.2007 allegedly reflected in slip No. 110. In this regard, the learned Counsel for the dealer assessee advanced an argument

that the authorities below have had an imaginary and hypothetical approach, which is rather assumption based, in estimating the sale suppression ignoring the books of account and other documents. It is alleged that the AA was statutorily obliged to consider before reaching at a decision on sale suppression, but having failed to do so, it can be said that he abdicated himself from discharging the duty and responsibility enjoined under law. It is also contended that best judgment is not necessarily to lead enhancement and the assessing authority is required to consider all the acceptable materials besides the books of account and in the instant case, no such procedure was followed, especially when, assessment is quasi-judicial in nature and it must be carried out by observing judicial principles. Considering the above, the Tribunal is of the humble view that accepting the claim of the dealer assessee at it face value, it has to be held that the authorities below ought to have looked into the books of account and all other documents bearing relevance in juxtaposition to slip No. 100 in order to confirm, whether, there was sale suppression, as there is every possibility of it being factually incorrect. For a slip might have been prepared for a specific purpose and whether, it was in derogation to the books of account or not is required to be examined by the authorities below.

7. If there is sale suppression or disposal of iron ore out of account, the dealer assessee may be visited with penalty. On the aspect of penalty, the learned Counsel for the dealer assessee referred to the decision of the Hon'ble Apex Court in the case of Hindustan Steel Ltd. Vs. State of Orissa reported in (1970) 25 STC 211 (SC) and contended that imposition of penalty is depending on many factors and a certain amount of discretion is involved. The decisions, such as, State of MP Vs.

BHEL:(1997) 106 STC 604 (SC); Thiru Arooran Sugars Ltd. Vs. Assistant Commissioner (CT): (2000) 117 STC 457 (SC); State of T.N. Vs. Thangadurai: (1983) 52 STC 279 (SC) and other rulings of different Hon'ble High Courts have also been placed in reliance which are concerning the power and provisions relating to levy of penalty. In the view of the Tribunal, to impose penalty or not, it depends on the proof of sale suppression and also on considering the conduct of the dealer assessee. If the dealer assessee, without any reasonable cause, fails to defend the escaped assessment or under assessment of tax, it shall have to pay penalty, by way of, a sum equal to twice the amount of tax additionally assessed, as is envisaged in Section 43(2) of the Act. No doubt, mens rea plays no part with respect to civil liability, but the conduct of a dealer assessee and the explanation offered with or without a reasonable cause leads the way whether to levy penalty or not. If any of the conditions of Section 43(1) of the Act is established and no reasonable explanation or excuse is shown by the dealer assessee, it shall have no escape from paying penalty as per sub-section (2) thereof. Here, the levy of penalty or otherwise to be determined on establishment of charge of sale suppression against the dealer assessee, which for the foregoing reasons, is needed to be critically examined by the AA.

S.A. Nos. 33(ET) and 99 (ET) of 2013-14:

8. A proceeding under Section 9C of the OET Act was taken up which was apparently for and in respect of audit assessment to which the dealer assessee responded and participated without any grumble. No objection was also raised to the notice served upon the dealer assessee at the time of and stage of assessment.

In absence of any prejudice being shown to have been caused to the dealer assessee and having regard to the totality of the circumstances, the Tribunal also arrives at a logical conclusion that the proceeding is not at all vitiated.

9. Hence, it is ordered.

10. In the result, the appeals stand allowed in part. As a corollary, the impugned orders dated 03.01.2013 in Appeal Nos. AA- AA-210/2011-12 (under OVAT Act) and AA-211/2011-12 (under OET Act) are hereby set aside to the extent indicated above. Consequently, the matter is remitted back with a direction to the AA to consider and undertake reassessment vis-a-vis the respective tax liability of the dealer assessee for the assessment year 2007-08 after providing it a reasonable opportunity of hearing in the light of the findings and observations of the Tribunal thus, ensuring its disposal preferably within a period of three months upon receipt of a copy of the present order. The cross-objections are disposed of accordingly.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(A.K.Dalbehera)
1st Judicial Member

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