

**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. 348(V) of 2013-14

(From the order of the Id. JCST, Ganjam Range,
Berhmapur, in First Appeal Case No. AA. (V) 47/2010-11,
disposed of on 31.12.2013)

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

- V e r s u s -

M/s. Capital Electricals,
Vardavari Street,
Berhampur, Odisha. ... Respondent

S.A. No. 340(V) of 2013-14

(From the order of the Id. JCST, Ganjam Range,
Berhmapur, in First Appeal Case No. AA. (V) 47/2010-11,
disposed of on 31.12.2013)

M/s. Capital Electricals,
Vardavari Street,
Berhampur, Odisha. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2006 to 31.03.2009

For the Revenue ... Mr. M.S. Raman, A.S.C.
For the Dealer ... Mr. R.P. Sahu, Advocate

Date of hearing: 11.09.2019 **** Date of order: 11.09.2019

ORDER

The appeal and cross appeal against the same order of first appellate authority preferred by adversary parties are taken up together to avoid repetition and to avoid conflicting opinion, if any, hence decided by this common order for sake of convenience.

2. In S.A. No.348(V) of 2013-14 Revenue is the appellant, whereas in S.A. No.340(V) of 2013-14 dealer is the appellant. Both have questioned the sustainability of the impugned passed by the first appellate authority in an escaped assessment u/s.43 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act).

3. **Backdrop of the case**

The dealer was subjected to assessment u/s.43 of the OVAT Act on the basis of fraud case report bearing No.14/2008-09 submitted by STO (Enforcement), Berhampur covering the tax period from 01.04.2006 to 31.03.2009 with the allegation of sale suppression and purchase suppression detected from the seized incriminating materials during surprise visit. As per the fraud case report, the dealer had effected total purchase of goods worth of Rs.5,20,48,048.42 including input tax to the tune of Rs.47,08,001.22. It has effected purchases within State for an amount of Rs.4,91,08,225.39 and effected outside State purchase of Rs.29,39,823.03. The dealer has disclosed gross sale turnover of Rs.5,13,33,680.84 including output tax of Rs.48,90,132.80. The total sale was under two tax groups, such as, 12.5% tax group for Rs.4,01,34,867.81 and 4% tax group for Rs.1,11,98,813.03. It was found that, the dealer had pad VAT of Rs.3,59,831.00. The assessing authority took consideration of the discrepancy relating to stock in trade and the purchase suppression as depicted and derived from the

seized documents and then assessed the suppression to the tune of Rs.55,53,078.98. Thereafter, by rejecting the books of account it has enhanced the GTO by two times of the suppression detected i.e. to the tune of Rs.1,11,06,157.96. Accordingly, the GTO was determined at Rs.6,24,39,838.80 and TTO at Rs.5,75,49,706. The balance tax due was calculated adjusting the tax already paid and it was raised at Rs.11,85,886.00, whereas penalty was imposed at Rs.23,71,772.72. Besides, learned STO also imposed penalty u/s.65(2) of the OVAT Act for Rs.1,58,100.00. Thus, the demand towards balance tax with penalty u/s.43(2) and u/s.65(2) of the OVAT Act in total was calculated at Rs.37,15,759.00.

4. In appeal before the first appellate authority, the learned JCST, Ganjam Range, Berhampur on re-calculation of the suppression basing on the incriminating documents found the amount to be Rs.63,60,218.00 instead of Rs.55,53,078.98. However, the first appellate authority added the amount of suppression calculated by him to the GTO without any enhancement, as a result, the tax due became reduced, consequently the penalty also reduced. On the other hand, the first appellate authority upheld the finding of penalty as per sec.65(2) of the OVAT Act as levied by the assessing authority. Thus, the total due became reduced to Rs.19,36,030.00.

5. When the demand became reduced, Revenue being aggrieved, knocked the door of this Tribunal with the contentions like, the determination of suppression by the first appellate authority is erroneous as it has reduced the amount of suppression. It is prayed to restore the calculation of assessing authority. On the other hand, the dealer has preferred appeal with the contentions like, the very initiation of proceeding u/s.43 of the OVAT Act in the case in hand is not maintainable as it is not preceded by assessment under any of the provision u/s.39, 40 or 42 of the OVAT Act. It is further contended

that, the calculation of suppression is erroneous, the dealer was not provided with sufficient opportunity to submit detail documents and to give his explanation against the fraud case report, the penalty as imposed u/s.43(2) of the OVAT Act is not warranted in the facts and circumstances of the case i.e. in absence of malafide on the part of the dealer and further the penalty u/s.65(2) of the OVAT Act is not maintainable in the self-same proceeding of escaped assessment.

6. Revenue has filed Cross Objection against the dealer's appeal contending therein the assessment by the first appellate authority is just and proper.

7. The questions framed for decision in this appeal are,
- (i) whether the determination of suppressed turnover by the first appellate authority in reducing the amount as against the calculation of the assessing authority is erroneous?
 - (ii) whether the proceeding u/s.43 of the OVAT Act is not maintainable as it is allegedly not preceded assessment under any of the provision u/s.39, 40 or 42 of the OVAT Act?
 - (iii) whether the penalty u/s.43(2) of the OVAT Act as levied is not warranted?
 - (iv) whether the penalty u/s.65(2) is not sustainable as it is taken up in the escaped assessment without separate notice to the dealer?
 - (v) what order?

8. **Question No.(i)**

So far as the determination of suppression on the basis of fraud case report as alleged, the plea of the dealer is, sufficient opportunity was not provided to the dealer to meet the quarries arised

out of the incriminating seized documents. For the sake of argument, if it is accepted but not construed that, the dealer had not provided with sufficient opportunity by the assessing authority, the plea became infructuous since the dealer failed to explain the incriminating documents before the first appellate authority which is broadly termed as an extended forum of assessment. If the order of assessing authority and the impugned order by the first appellate authority are compared, it can safely be said that, the first appellate authority has gone into the details of the allegations regarding sale suppression and purchase suppression on each count and has calculated the suppression. It is pertinent to mention here that, the calculation by the assessing authority is found to be wrong as it has reiterated for the calculation in the light of fraud case report only, whereas, it is found that the first appellate authority being conscious to the facts and figures depicted in the incriminating materials has calculated the suppression and as per the documents the actual suppressed amount was calculated at Rs.63,60,218.00 i.e. higher than the amount in the fraud case report or the amount calculated by the assessing authority.

It is a fact that, the assessing authority has enhanced the suppression by two times when rejecting the books of account and in application of his best judgment assessment. Conversely, the first appellate authority has treated that, the amount actually derived from the incriminating documents is to be treated as suppression in the case in hand. No doubt, in the case of an escaped assessment, the authority can apply the best judgment principle and enhanced the suppressed turnover but that enhancement must be supported by any reasonable and probable basis. It cannot depend upon the sweet whim of the assessing authority. Here, in this case, the enhancement by the assessing authority is not backed by any reasonings, such as the assessing authority has not considered the period of assessment,

in relation to the volume of turnover of the dealer over the period, the nature of the trade undertaken by the dealer, the period relates to which the incriminating materials seized and other factors. So, it is believed that, the enhancement is based on surmises and conjectures which is not tenable in law. On the other hand, the detection of suppression which is actually on the basis of incriminating documents as determined by the first appellate authority is beyond question and it is based on documentary evidence.

It is peculiar to take note that, when, in one hand, the Revenue has asked for enhancement of the suppression but at the same time the Revenue has contended that, the findings of the first appellate authority is just and proper i.e. in the cross objection to the appeal of the dealer. Moreover, the grounds in appeal by the Revenue are mechanical without any details how and why the calculation by the first appellate authority is to be discarded. The grounds of appeal of the dealer also found to be suffered from same defect. The question of fact which has been decided on scrutiny of the documents in one hand and the order of the assessing authority on the other hand placed before the first appellate authority cannot be questioned without any cogent rebuttal evidence. Hence, in this case it is held that, the suppression amount as determined by the first appellate authority is correct.

9. **Question No.(ii)**

The maintainability of the proceeding u/s.43 of the OVAT Act is questioned by the dealer with a plea that, the proceeding was not preceded by any assessment u/s.39, 40 or 42 of the OVAT Act. The learned Addl. Standing Counsel, Mr. Raman strenuously argued that, the dealer is supposed to be treated as self-assessed as per sec.39 of the OVAT Act. It is noteworthy to mention here that, this question is not new before us and this Tribunal has decided this

question on many occasions while deciding the similar appeals. The self-assessment and acceptance of the same is necessarily presumed in absence of any communication questioning the regular return filed by the dealer time to time. In this regard, we can take cue from the Full Bench decision of this Tribunal in the case of Kripal Springs India Ltd. bearing S.A. No. 216(V)/2012-13 decided vide order dtd. 06.12.2018. Thus, avoiding further discussion on this issue it can safely be said that, the proceeding u/s.43 of the OVAT Act in hand is maintainable.

10. **Question No.(iii)**

Coming to the question of penalty, here in this case the dealer is guilty of purchase suppression and sale suppression. Being a wrong doer attempted to evade the payment of tax by suppression of turnover, the dealer cannot take the plea of “no *mens rea*” or “bonafide belief” in his favour. Thus, it can be said that, the penalty u/s.43(2) of the OVAT Act is rightly levied in this case by both the fora below.

11. **Question No.(iv)**

So far as penalty u/s.65(2) of the OVAT Act as it is imposed in the escapement proceeding itself, it is believed that, the authority should have initiated this proceeding separately and only after giving a notice of being heard to that effect, penalty if any to which the dealer found liable should have been imposed. Here, it is a case of violation of principle of natural justice to the dealer. Thus, it is held that, in an escaped assessment proceeding u/s.43 of the OVAT Act clubbing up the proceeding u/s.65 of the OVAT Act and imposing penalty u/s.65(2) of the OVAT Act is found to be erroneous in this case. Accordingly, the impugned order is interceptable to the extent of penalty u/s.65 of the OVAT Act which needs to be deleted.

12. As per the discussion hereinabove, here in this case, it is held that the suppression determined by the first appellate authority is confirmed, penalty u/s.43(2) of the OVAT Act is confirmed, penalty u/s.65(2) of the OVAT Act is deleted.

Accordingly, it is ordered.

The appeal by the dealer is allowed in part. The impugned order is modified to the extent of deletion of penalty for the amount of Rs.1,58,100.00 levied u/s.65(2) of the OVAT Act is deleted, whereas, the appeal by the Revenue is dismissed as of no merit. The demand be raised accordingly on fresh calculation. The Cross Objection is disposed of accordingly.

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