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

S.A. No. 127 (VAT) OF 2013-14

(Arising out of order of the learned DCST(Appeal), Bhubaneswar Range, Bhubaneswar in First Appeal Case No. AA. 106111110000076, disposed of on dated 30.03.2013)

Present: Shri R.K. Pattanaik, Chairman,
Smt. S. Mishra, 2nd Judicial Member, and
Shri P.C. Pathy, Accounts Member-I

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

-Versus-

M/s. Zenith Techno Engineers Pvt. Ltd., C/13, BJB Nagar, Bhubaneswar ... Respondent

For the Appellant : Sri M.S. Raman, ASC (CT) &
Sri S.K. Pradhan, ASC (CT)
For the Respondent : Sri A.K. Roy, Advocate

Date of hearing: 26.08.2020 ***** Date of order: 24.09.2020

O R D E R

From the facts emerging, as pointed out by the appellant State, the following issues are pending consideration and adjudication before the Tribunal, which are to be dealt with seriatim:

(i) Whether the decision to levy tax @ 4% by classifying 'Multi Functional Device' and 'Multi Functional Printer' (abbreviated 'MFP') as items of Entry 69(c) of Part-II of Schedule-B of the Odisha Value Added Tax Act, 2004 (in short, 'the Act') is justified?

(ii) Whether the assessment order dated 30.03.2013 passed by the learned Assessing Authority, Bhubaneswar-I Circle, Bhubaneswar (in short, 'AA') is as per and in accordance with law?

(iii) Whether levy of penalty under Section 42(5) of the Act as directed by the AA and upheld by the learned Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (in short, 'FAA') is tenable in law? and

(iv) Whether the AA travelled beyond the Audit Visit Report (in short, 'the AVR') which was ignored by the FAA?

2. In fact, the appellant State preferred the instant appeal under Section 78(1) of the Act and questioned the legality and judicial propriety of the impugned order dated 30.03.2013 promulgated in Appeal No. AA-106111110000076 by the FAA with respect to the period of assessment July, 2009 to August, 2010 vis-a-vis the respondent dealer on the grounds inter alia that the findings on the subject matter in dispute are palpably wrong, erroneous and, therefore, are deserved to be interfered with.

3. As revealed from the record, the respondent dealer was subjected to assessment under Section 42 of the Act by the AA, who, ultimately, held that the 'Digital Multi Functional Printer' is leviable with tax @ 12.5% instead of 4% as was claimed and accordingly, determined the GTO and TTO and assessed the tax at ₹24,99,785.00 and demanded an amount of ₹18,11,071.00 as the differential due along with penalty as twice the amount of tax at ₹36,22,142.00, in sum total ₹54,33,213.00 payable as per the terms and conditions of the demand notice,

which was challenged before the FAA, who, allowed the claim in part and declared the printer as an item exigible to tax @ 4% instead of 12.5% with the conclusion that such item falls under Entry 69(c), Part-II of Schedule-B of the Act, but confirmed the penalty. The appellant State being dissatisfied with the finding on MFP, in particular, filed the present appeal.

Issue No. (i):

4. According to the appellant State, the FAA grossly erred in arriving at a decision that the MFP is an item which falls in Part-II of Schedule-B instead of Part III so as to apply the rate of tax @ 12.5%. It is contended that the FAA, without proper application of mind, earmarked MFP as an item under Entry 69(c), Part-II of Schedule-B as 'Computer and its spare parts and accessories and IT products' being swayed away by the observations made by the West Bengal Taxation Tribunal in case of Ricoh India Ltd and another Vs. ACST, Public Relation Office and others reported in (2008) 14 VST 491 (WBTT), wherein, the commodity 'Multi Functional Digital Copier' was placed in the category of 'Computer peripherals' without considering the different aspects vividly discussed and highlighted upon by the Hon'ble Delhi High Court in Ricoh India Ltd. Vs. Commissioner reported in 2012 SCC OnLine Delhi 2579. It is also contended that the decision of the WBTT ibid could not have been applied by the FAA since it was with reference to HSN (Harmonized System Nomenclature) code. On the contrary, according to the respondent dealer, MFP is nothing but a computer peripheral, which finds mention in Entry 69(c), Part-II of Schedule-B of the Act. While claiming so, it is urged that the MFP is basically an output device of the computer which fits into the class or

category of 'peripherals'. Let us examine, whether, MFP does fall under Entry 69(c), Part-II of Schedule-B of the Act as a computer peripheral. In fact, the computer systems and peripherals lie under the head of 'IT products' along with other items, such as, computer and its spare parts and accessories under Entry 69(c) ibid. So the question is, whether, MFP is a computer peripheral or not? Admittedly, as per the said decision of WBTT, a similar type of commodity i.e. 'Multi Functional Digital Copier' was held as a computer peripheral. In the decision of Ricoh India Ltd. (supra), it has been held and observed by the Hon'ble Delhi High Court that a Multi Functional Machine can be a computer peripheral, if its principal or sole purpose is to be attached to and function as a computer ancillary; it is to qualify as a computer peripheral, when the dominant purpose is to scan documents, load data, or work as an input or output device to take printouts from the computer; and at the same time, can also be used as a photocopier and, therefore, whether, such a commodity is really a computer peripheral is to be determined by elucidation and examination of facts in each particular case. It is also observed therein that all such aspects can be gone into provided the necessary data or particulars to show and establish the principal features of the goods, whether, it functions as an input or output device, or with any other dominant purpose independent of being connected or attached to a computer system is openly shared by the manufacturer or dealer concerned upon whom the burden of proof lies. There is no dispute to the aforesaid ratio of the Hon'ble Delhi High Court to the effect that a particular commodity before being branded as a computer peripheral shall have to be examined with all such aspects vis-a-vis its features to find out the principal or its

dominant purpose and utility thereof. The learned Counsel for the respondent dealer relied upon a decision of the Hon'ble Apex Court rendered in Xerox India Ltd. Vs. Commissioner of Customs, Mumbai reported in (2010) 5 GSTR 564 (SC) and contended that the MFP has to be treated as a computer peripheral. In the decision (supra), the Hon'ble Apex Court, while elucidating the rules for interpretation vis-a-vis the entries in Schedule and its classification in clear and unequivocal term held and observed that Multi Functional Machines with its principal function shall have to be categorized and classified as printers usable in and with respect to Automatic Data Processing Machines. Furthermore, the learned ASC (CT) urged that by looking at the RC issued to the respondent dealer, as per which it has been allowed to deal with photocopiers which is commonly known as xerox machines, the MFP ought to be considered not as a computer peripheral but a commodity with independent and distinctive usage. It is also claimed that such a commodity should not have been misconstrued as a printer to fall in the category of Entry 69(c), Part-II of Schedule-B chargeable to tax @ 4%. The learned Counsel for the respondent dealer apart from the ruling of the Hon'ble Apex Court in Xerox India Ltd. case, placed reliance on other decisions viz. Ricoh India Ltd. and another Vs. ACST, Public Relation Office and others: (2008) 14 VST 491 (WBTT); M/s. Cannon India Pvt. Ltd. Vs. Assistant Commissioner, Chennai and others in W.P.(C) No. 23573 of 2016 (decided on 31.08.2016) and M/s. Cannon India Pvt. Ltd. Vs. State of Tamil Nadu in Tax Case (Revision) Nos. 94-96 of 2014 (disposed of on 10.112.2014) of Hon'ble Madras High Court so as to contend that the MFP is basically a device which is a computer peripheral. In order to properly appreciate

the distinctive features and utility, the Tribunal is made to understand by the respondent dealer that an MFP is primarily a printer with an electronic scanner attached to it, with both scanner and printer capable of functioning independently as computer input and output devices respectively for the computer to which they are connected to; in addition to the printer part, MFP is also designed to directly receive electronic signals from the scanner and print the scan document in contradistinction to a photocopier which is basically a flat bed optical camera that generates photographic or optical images of documents placed on that which are then copied or reproduced on paper. If the decisions (supra) are sincerely read, understood and appreciated in proper perspective alongside the stand of the respondent dealer in juxtaposition to the claim of the appellant State, it would unerringly suggest that an MFP is a computer peripheral used and utilized as an output device. In fact, there are input and output devices connected to a computer system which are stated to be peripherals. If an electronic commodity is used independently without being connected to a computer system, then, it is not claimed as a computer peripheral. But, if an electronic goods does not have its independent utility but can only be brought into use on being connected to a computer system, either as an input or output device, it has to be categorised as a computer peripheral. In the decisions relied upon by the learned Counsel for the respondent dealer apart from Xerox India Ltd. case, it has been clearly enunciated that multi functional goods are more or less computer peripherals. An MFP is enabled by different functionalities in combination of some or all of the devices, like printer, scanner, photocopier etc. which is usable with connectivity to a computer

system. Having appreciated the rulings on record and by looking at the use and utility of an MFP which is ordinarily connected and attached to a computer system, in the ultimate view of the Tribunal, it has to be categorised as a computer peripheral and nothing else. The learned ASC (CT) contended that the decision of WBTT in Ricoh India Ltd. case is based on a classification with reference to HSN code in contrast to the Schedule-B of the Act. Of course, there is a reference of HSN code under Entry 3 of the Schedule of West Bengal Value Added Tax Act with respect to 'computer systems and peripherals' besides 'electronic diaries' which is absent in Entry 69(c), Part-II of Schedule-B of the Act. But, then, it hardly affects the above view point morefully when HSN code normally stands for a nomenclature with codification developed by the World Customs Organization vis-a-vis the Multi Purpose International Products with a vision to facilitate classification of goods all over the world in a systematic manner. It is also the view of the Tribunal that the electronic commodities which are made taxable under the Act are most unlikely, by any stretch of imagination, to be in derogation to classification of goods approved worldwide and that too when, such classification by HSN code is widely used in taxation purposes in order to earmark the rates of tax applicable to specific products which can also be used in calculations that involved claiming benefits.

5. The learned ASC (CT) laid much emphasis on the expression 'that is to say' occurring in Entry 69 ibid following the words 'IT products' in order to subscribe a view that such an expression is descriptive, enumerative and also exhaustive and since the MFP is not mentioned therein, the same cannot be classified as a computer peripheral for being levied tax @4%. In this regard, the

decisions, such as, Diebold Systems Pvt. Ltd. Vs. CCT: (2006) 144 STC 59 (Kar.); TI &m Sales Ltd. Vs. State of Tamil Nadu:(1983) 52 STC 99 (Mad.); Bhola Prasad Vs. Emperor: AIR 1942 SC 17; State of Bombay Vs. Bombay Education Society: AIR 1954 SC 561; State of Karnataka Vs. Balaji Computers:(2007) 5 VST 120 (SC); State of Tamil Nadu Vs. Pyre Lal Malhotra: (1976) 37 STC 319 (SC); Castrol India Ltd. Vs. CCE: (2005) 3 SCC 30; and Dharampal Satyapal Ltd. Vs. CTO: (2009) 24 VST 193 (Mad.) have been relied upon and referred to by the learned ASC (CT) in order to suggest that as MFP does not find a specific mention in Entry 69 and since the items classified under 'IT products' do not include any such printer and such list being exhaustive and not in any way illustrative, it cannot be categorised as a commodity belonging to Part-II of Schedule-B of the Act. Of course, the list thereunder in Entry 69 in respect of 'IT products' is not only enumerative but also exhaustive, but MFP, as such, for the reasons discussed and deliberated upon, has to be classified as a computer peripheral identifiable under Entry 69.

6. It is further urged that since the expression 'peripherals' finds its place in between 'computer systems' and 'electronic diaries' in Entry 69(c), it is to be construed as restrictive by words accompanied thereto and it is to take its colour from the preceding and succeeding words and that apart, there is no item, like printer/printing machine mentioned therein and all the items specified in the entry principally comprise of devices having storage facility or controls of computer system. It is to be understood that the said expression 'peripherals' is preceded by computer systems and succeeded by 'electronic diaries' which is placed quite disjunctively and in that view of the matter, it would not be proper to draw a

meaning for the expression 'peripherals' from adjoining words. The expression 'peripherals' shall have to be understood as meaning distinct commodities with reference to the computer systems having no similarity with items, like electronic diaries either. Hence, the argument advanced by the learned ASC (CT) with such an interpretation is again unacceptable. Besides the above, it is also claimed that the rule of ejusdem generis is applicable in order to describe and define the expression 'peripherals' which is sandwiched between the words 'computer systems' and 'electronic devices'. In this connection, the principles of the rule ibid are drawn to the attention of the Tribunal. According to the Interpretation of Statute by Bindra, the principles, such as, the statute contains an enumeration by specific words; the members of the enumeration constitute a class; the class is not exhausted by the enumeration; a general term follows the enumeration; there is a distinct genus which comprises more than one species; and there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires are to predominantly exist in case of ejusdem generis which ordinarily means 'of the same kind or nature'. With reference to Entry 69(c) ibid, the Tribunal, in disagreement to the above standpoint, is of the humble view that the rule of ejusdem generis is not at all applicable for evaluating the meaning of the term 'peripherals' which is found place in between the words 'computer systems' and 'electronic diaries'. In fact, such a rule is applied to define a general subject with reference to a specific which can be explained by an illustration e.g. cars, buses and 'other motorable vehicles' which is generally to be understood as vehicles of similar nature and not to include carriers, like aeroplane, ship etc. In the instant case,

'peripherals' is not a general term or to mean commodities of similar kind, like computer systems, or electronic diaries. So according to the Tribunal, an MFP is ordinarily connected to the computer systems with its separate and distinctive feature but prominently as peripheral and, therefore, having regard to the above, the rule of ejusdem generis shall have no application.

7. It is claimed that the dealer purchased old and used MFPs and copying machines with accessories from outside the State at a concessional rate of 2% on the strength of declaration in Form-C and disposed it of within the State of Odisha charging VAT @ 4%. It is contended by the learned ASC (CT) that such a practice is to be borne in mind regarding purchase and disposal of such used items or goods which are primarily parts or components of computer systems before accepting it as peripherals. The purpose of such an argument is to indicate that the dealer procured such commodities independently and commercially disposed it of and, therefore, the same are not to be considered as peripherals. According to the Tribunal, such an argument is not convincing. A peripheral of a computer system can be purchased independently; such procurement can be independent of computer systems. However, any such procurement does not denude the character of being a peripheral. It remains a peripheral, notwithstanding the purchase or procurement independently made without the computer systems. An illustration is cited by the learned Counsel for the dealer assessee in this regard, like an old and used vehicle, if purchased, never lose its character; a motorable vehicle remains a vehicle even though purchased as an independent commercial item. In the instant

case, though MFP is claimed to be purchasable independently and not with any computer system, it still have to be treated or considered as a peripheral.

8. The learned ASC (CT) by referring to a decision of the Hon'ble Apex Court in the case of Nokia India Pvt. Ltd reported in (2015) 77 VST 427 (SC) advanced an argument to the effect that MFP is not a part of the computer system, or both MFP and computer system are not a composite product and, therefore, the former cannot be treated as latter's peripheral. Again, such an argument is to be discarded. In the decision (supra), it was held by the Hon'ble Apex Court that a battery charger is not a component of mobile phone; it is merely an accessory and not a component of the cell phone; cannot as well be treated as composite part of the mobile phone and thus, is an independent product which can be sold separately and not necessarily it must have to be purchased along with a mobile set. Such an analogy is not comparable with the MFP. No doubt, an MFP can be purchased independently; it is certainly not a composite part or component of the computer system. Some features of the MFP can even work independently; however, the principal and dominant use and utility of MFP is as a peripheral of computer system. In other words, to a considerable extent, an MFP is usable with all its functionalities, as a peripheral of the computer system. Thus, with all respect and humility, the Tribunal is of the humble opinion that said decision of the Hon'ble Apex Court in Nokia India Pvt. Ltd. cannot be subscribed to bulldoze the conclusion that an MFP is essentially a peripheral of a computer system. So, in the Tribunal arrives at an irresistible conclusion that the finding of the FAA with reference to the MFP is absolutely justified and it needs no interference.

Issue No.(ii):

9. In this regard, according to the learned ASC (CT), the assessment of the FAA is erroneous and, therefore, the assessment which was originally made by the AA should be confirmed. In what respect the assessment by the FAA is wrong or erroneous is not clearly spelt out or explained away by the State. It is also not made discernable from the record as to in what manner the FAA went wrong in making the assessment. Any such contention must have to be supported by material particular. As it appears, the FAA considered and appreciated all such materials and then, finally made the assessment. It is contended by the learned Counsel for the dealer assessee that the State has not pursued the said objection very seriously. The principal issue, as per the dealer assessee, is with regard to the rate of tax on the MFP vis-a-vis its classification under Part II, Schedule-B or Part III of the Act. In absence of any clear and specific details being provided by the State, the Tribunal is left with no option, but to accept the assessment made by the FAA.

Issue No.(iii):

10. Now, the question pertains to penalty. In this regard, the respondent dealer has raised a cross-objection. The learned ASC (CT) cited a decision of the Hon'ble Court in the case of Commissioner of Income Tax Vs. Gangaram Chapolia reported in (1976) 103 ITR 613 (Orissa), wherein, it is held that the expression 'without sufficient cause' as appearing in Section 12(5) of the OST Act does not carry an import of mens rea, or that the burden of proof is on the State to establish absence of sufficient cause. The decision of the Hon'ble Apex Court in Dharmendra Textile Processors reported in (2008) 18 VST 180 (SC) is also referred to. Besides, the

judgment in Hindustan Steel Ltd. Vs. State of Orissa reported in (1970) 25 STC 211 (SC) is put to reliance. In the Hindustan Steel Ltd., it is held by the Hon'ble Apex Court that for a bonafide mistake or error or a venial breach, penalty is not to be levied for the sake of imposing it. In Dharmendra Textile Processor's case, the aforesaid decision was referred to and the Hon'ble Apex Court observed that a civil liability is visited with a consequence which is not penal and there can be no mens rea attributed. The good number of decisions cited by the learned ASC (CT) has been meticulously gone through by the Tribunal. The recently expressed view of the Tribunal is that there is no mens rea attributable to a liability which carries civil consequence. It has quite often been concluded by the Tribunal that in criminal prosecution mens rea plays a vital role exception being to certain economic offences etc. But with respect to the civil liability, predominantly, mens rea is found to be absent, unless and until a contrary intention expressed. Even if, it is to be held that in a civil liability, no mens rea is searched for, then also, as per the view of the Tribunal, which has been expressed on couple of earlier occasions, the conduct of the dealer is to be looked into before imposing penalty. In fact, a proceeding before imposing penalty under the Act is to ascertain the circumstances under which there is default in tax payment and if the conduct is found not to be bonafide, penalty is to be levied. The decision of the Hon'ble Apex Court in Dharmendra Textile Processor does not disapprove such a view that the conduct of the dealer is to be ignored altogether, while considering the aspect of imposing penalty. If a dealer under a bonafide impression considers an MFP as a printer and peripheral of a computer system, which is not accepted finally, does not mean that

the assessing authority is still duty bound to impose penalty. If the assessing authority is left with no such discretion and simply to levy penalty on account of default, the very purpose of providing the dealer an opportunity of hearing which is principally to ascertain the circumstances under which the default occasioned would become an empty formality. The learned ASC (CT) further cited many rulings on the point of mandatory nature in imposing penalty under Section 42(5) of the Act with reference to the expression 'shall' contained therein. It is the view of the Tribunal that the conditions of Section 42(5) are to be fulfilled; there is no need to consider mens rea, whether to be present or not vis-a-vis the default of the dealer in paying the tax; but the conduct of the dealer shall have to be taken cognizance of to find out and ascertain, if at all, it to be bonafide or not and once a decision is arrived at that the conduct is not bonafide, there is no escape from levying penalty; the expression 'shall' as appearing in Section 42(5) is certainly mandatory in nature, but the same is confined to the quantum of penalty, where the assessing authority does not have any discretion to exercise. The other decisions cited by the learned ASC (CT) are not discussed in detail, since the conclusion of the Tribunal is that depending on the conduct of a dealer, it is for the assessing authority to decide and to take a call, whether to impose penalty. At this juncture, a decision cited by the learned counsel for the respondent dealer deserves a mention which is of the Hon'ble Apex Court in the case of Union of India Vs. Rajasthan Spinning & Weaving Mills reported in (2010) 1 GSTR 66 (SC) as it has been referred to persuade the Tribunal to attribute mens rea before invoking Section 42(5) of the Act. But, in the considered view of the Tribunal, said decision was in the context of Section 11AC of

the Central Excise Act. On a harmonious reading of all the decisions ibid and as to the applicability of Section 42(5) of the Act, it has to be concluded that in the case at hand, mens rea plays no role and only the conduct of the respondent dealer is to be looked at to decide, whether, to levy penalty or not. Thus, the Tribunal is to determine, if the assessment of FAA is in any way incomprehensible before proceeding to decide, whether, the penalty is to be imposed or not depending on the conduct of the respondent dealer. As is made to appear from the impugned order dated 30.03.2013, the respondent dealer furnished an assessment which was, however, not accepted by the FAA. According to the FAA, cost of consumable for printer of ₹5,63,590.00, freight separately paid and included in invoices for ₹3,65,299.00 and ₹22,753.00 respectively were not included in order to arrive at the actual purchase price. It is also revealed that the respondent dealer failed to take into account the wages payable for ₹68,103.00, according to which, the direct expenses should have been ₹8,20,703.00 instead of ₹7,52,600.00. The learned Counsel for the respondent dealer did not seriously question the assessment so made by the FAA. Rather, the challenge is in relation to the penalty which has been imposed by the AA and also upheld by the FAA. So, the Tribunal holds that the assessment made by the FAA is not incorrect. The learned Counsel for the respondent dealer contended that the conduct is no malafide since certain expenses on consumables, freight charges etc. were erroneously excluded. In this connection, the learned Counsel for the respondent dealer cited the decisions, such as, Commissioner of Income Tax Vs. Reliance Petroproducts Pvt. Ltd: (2010) 322 ITR 158 (SC) and Sree Krishna Electricals Vs. State of Tamil Nadu & another: (2009) 23

VST 249 (SC). In the decisions (supra), in sum and substance, it is observed by the Hon'ble Apex Court that merely because the assessee had claimed the expenditure, which claim was not accepted, or was not acceptable to the Revenue, that by itself would not attract penalty; and in so far as the question of penalty is concerned, the items which were not included but found to be incorporated in the books of account and such are made part and parcel of the dealer's turnover disallowing the exemption, penalty cannot be imposed. Essentially, in case of making incorrect claim without any concealment of particulars, as per the decision in Reliance Petroproducts Pvt. Ltd. ibid, no penalty should be imposed. In the case of Sree Krishna Chemicals (supra), exemption was disallowed and certain items were included in the turnover which were found incorporated in the books of account and in that context, the Hon'ble Apex Court observed that penalty should not have been levied. In the present case, it is not in relation to demanding exemption which was declined, or certain expenditure was claimed that stood rejected. Rather, in the fact situation, the respondent dealer found not to have included certain costs, while determining the actual price of purchase. In the considered view of the Tribunal, both the decisions cited by the learned Counsel for the respondent dealer are inapplicable. It is not a case where expenditure shown and borne out of books of account which was not accepted by the assessing authorities or an exemption so claimed by the respondent dealer based on an erroneous impression, which was declined and was included in the turnover of the dealer. Rather, it is found that the respondent dealer for reasons best known to it did not include certain costs which ultimately resulted in reduction of actual

purchase price. What was the basis and why such costs were excluded while determining the actual purchase price has not been satisfactorily explained by the respondent dealer. Under such circumstances and having regard to the fact that the actual purchase price was shown at a lower side by excluding certain costs and in absence of any plausible explanation being offered by the dealer, the Tribunal finds no justification to take a contrary view than the one expressed by the authorities below.

Issue No.(iv):

11. Here the contention is that the AA travelled beyond the AVR since there was no objection raised with regard to the rate of tax vis-a-vis the MFP. The said aspect was considered by the AA during the assessment proceeding notwithstanding the fact that it was not pointed out in the AVR. In this connection, the learned ASC (CT) contended that the AA did not commit any wrong or error and rightly picked up the question regarding the rate of tax applicable to the MFP which was not considered during the audit inspection. It is further contended that the assessing authority is having the jurisdiction to consider such a question in view of Section 42(4) of the Act which envisages examination of all such materials available and to hold enquiry as deemed necessary for the purpose of assessing the tax due. As a counter, the learned Counsel for the respondent dealer placed reliance on a decision of the Hon'ble Court in the case of Bhushan Power & Steel Ltd. Vs. State of Orissa and others reported in (2012) 47 VST 466 (Orissa) and it is urged that the ratio laid down therein is clearly applicable to the case in hand. In the decision (supra), the Hon'ble Court held that the assessing authority travelled

beyond the scope of the AVR for having considered a fraud report and that too without adequate opportunity being provided to the dealer. The learned ASC (CT) contends that said decision of the Hon'ble Court is under challenge before the Hon'ble Apex Court and has been tagged along with Vedanta Aluminium Ltd. Vs. State of Orissa in SLP (C) No. 4962 of 2012 for hearing. The learned Counsel for the respondent dealer claimed that the Hon'ble Apex Court, however, has not put any restraint on the applicability of the decision of Hon'ble Court rendered in Bhushan Power & Steel Ltd. case. The learned ASC (CT) strongly urged that the AA since was having the authority to examine all the materials available on record and even to cause an inquiry did not commit any serious wrong in considering the rate of tax vis-a-vis the MFP even though it was not raised and objected to during the audit inspection. Section 42 of the Act deals with audit assessment and in so far as sub-section (4) thereof is concerned, the assessing authority is to consider the books of account and other documents and examine all the materials as available which is obviously to include the AVR and after causing such other inquiry as considered necessary is to assess the tax due. In the instant case, there is no denial to the fact that the rate of tax assessed @ 4% was not disputed during the audit inspection which was questioned in the assessment proceeding. As earlier discussed, according to the learned ASC (CT), such a question could have been gone into by the AA and rightly the jurisdiction was exercised in that respect in consonance with Section 42(4) of the Act. However, as per the learned Counsel for the respondent dealer such exercise of jurisdiction is an illegality and can, therefore, be said that the AA did travel beyond the AVR. In Bhushan Power & Steel Ltd. case, the Hon'ble

Court took an exception for utilizing a fraud report and in that context, held and observed that the assessing authority was not right in considering the same without even providing an opportunity of hearing to the dealer which violated the principles of natural justice. In the case at hand, no such material extraneous in nature is appeared to have been utilized by the AA during the assessment proceeding. The audit inspection did not find any fault with regard to rate of tax fixed at 4% with respect to the MFP. Now, the question is, whether the AA was justified in raising that point in course of assessment, when no objection was raised in audit? In the considered view of the Tribunal, the decision in Bhushan Power & Steel Ltd. was rendered by the Hon'ble Court in the peculiar facts and circumstances of the case, where a fraud report was utilized by the assessing authority in the audit assessment. If Section 42 of the Act is properly read and understood, it would suggest that all such materials which are before the assessing authority are to be looked into which is inclusive of matters which escaped the notice or attention of the audit team, but before considering it, reasonable opportunity of hearing should be provided to the dealer. In the instant case, it cannot be said that the respondent dealer was not provided any such opportunity or was not having any occasion to challenge the objection raised by the AA regarding the rate of tax with respect to MFP. Having said that, the Tribunal, thus, arrives at a logical conclusion that the AA did not travel beyond AVR and committed no any jurisdictional wrong, so to say.

12. Hence, it is ordered.

13. In the result, the appeal stands dismissed. The cross-objection is also dismissed and disposed of accordingly. As a logical sequitur, the impugned order dated 30.03.2013 promulgated in Appeal No. 106111110000076 is hereby confirmed.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(Smt. S. Mishra)
2nd Judicial Member

I agree, Sd/-
(P.C. Pathy)
Accounts Member-I