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

S.A. No.374 (VAT) of 2016-17
&
S.A. No.194 (ET) of 2016-17

(Arising out of orders of the learned JCST, Balasore Range, Balasore in First Appeal Case Nos. AA. 45/BA – 2016-17 (VAT) and AA. 46/BA – 2016-17 (ET) disposed of on dated 20.01.2017)

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

M/s. Ganesh Enterprises,
At/PO- Panishapada, Amarda Road,
Balasore- 756 030 ... Appellant

-Versus-

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

For the Appellant : Sri B.B. Panda, Advocate
For the Respondent : Sri M.S. Raman, Additional S.C. (CT)

Date of hearing: 13.07.2020 ***** Date of order: 12.08.2020

O R D E R

As eloquently said- 'Little else is requisite to carry a State to the highest degree of opulence from the lowest barbarism but peace, easy taxes and a tolerable administration of justice; all the rest being brought about by natural course of things'- are indeed the great words of Adam Smith, a Scottish economist, moral philosopher, a pioneer of political economy, often regarded as the Father of

Economics, who is also the author of Wealth of Nations, which is considered to be his magnum opus and the first modern work of economics. As we know, following the footsteps of such eminent thinkers, the laws in present form have come into existence having been shaped over a period of time. We, as the constituent members of the justice delivery system are in great need to understand, realise and appreciate the laws in place in its proper perspective, while dealing with it.

S.A. No. 374 (VAT) of 2016-17:

2. Instant appeal by the dealer under Section 78 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') is directed against the impugned order dated 20.01.2017 in Appeal No. AA- 45/BA- 2016-17 (VAT) promulgated by the learned Joint Commissioner of Sales Tax, Balasore Range, Balasore (in short, 'FAA') for the assessment period 01.04.2014 to 30.09.2015 confirming the order of assessment dated 12.09.2016 passed by the learned Sales Tax Officer, Balasore Circle, Balasore (in short, 'AA') raising extra demand of ₹23,12,673.00 including penalty of ₹15,41,782.00.

S.A. No. 194 (ET) of 2016-17:

Whereas, the present appeal under Section 17(1) of the Odisha Entry Tax Act, 1999 (in short, 'OET Act') is at the behest of the dealer assailing the impugned order dated 20.01.2017 in Appeal No. AA- 46/BA – 2016-17 (ET) for the same period passed by the FAA confirming the order of assessment dated

12.09.2016 whereby extra demand of ₹4,07,994.00 inclusive of penalty of ₹2,71,996.00 was raised.

Both the appeals since involve same parties and common questions of law have been clubbed together for disposal by the following order.

3. In fact, the appellant is a proprietorship concern having its principal place of business at Balasore and engaged in trading of betel nut, etc. seems to have questioned the jurisdiction to an action for escaped assessment against the alleged period which is one among other issues raised including the acceptance of the Tax Evasion Report (in short, 'TER') forthwith without indulging in the statutory enquiry as contemplated in law, etc.

4. Bereft of unnecessary details, the following are the short facts of the case. According to the TER, as is revealed from the record, on 29.09.2015 at about 4.15 AM, the STO, AU, Jarka intercepted a vehicle bearing registration No. OR-01-J-7560 which was loaded with betel nuts at Chandikhol and on its inspection, it was ascertained that there was discrepancy in the quantity of goods, which, as per the invoices produced by the driver concerned was 48 quintals as against the actual weight of 43.2 quintals, consequent upon which, the vehicle was detained and handed over to STO (Vigilance), Cuttack Division, Cuttack for further verification and in the meantime, a representative of the dealer appeared in response to a summons issued under Section 74 of the OVAT Act and in course of examination of the documents, such as, purchase and sale registers etc. it was revealed that the

invoices had not been accounted for in the books of account and thereafter, on the conclusion that the invoices (Nos. 57 & 58 dated 28.09.2015) to be forged or parallel, in exercise of the powers under Section 74(5) of the OVAT Act, the alleged vehicle was allowed to be released in favour of the dealer on payment of tax and penalty amounting to ₹2,70,864.00 and later on, the record was received by the STO (Vigilance), Balasore Division, Balasore, who further issued notice in Form VAT-401 directing the dealer to produce the books of account. Finally, after examination of the papers/documents produced by the dealer, the TER was submitted with a finding that concerning 28 more invoices collected from mobile units, the alleged transactions not to have been accounted for, which apparently amounted to suppression of sales and resultantly an escaped assessment for the alleged period. On the same ground, the dealer was also directed to pay the additional entry tax with penalty for the self-same period. The appellant dealer strongly controverted the action of the authority, firstly, opposing the jurisdiction for escaped assessment and then, for confirming the findings of the TER without due enquiry, examination of records and by not following due process of law.

5. Form the record, it is revealed that 28 additional invoices were brought to the notice of the representative of the dealer and after being confronted, an inference was drawn or so to say, opinion expressed by the Vigilance Unit of Balasore to the effect that the alleged transactions, after perusing the books of account, had not been accounted for during the alleged period and

arrived at a logical conclusion that the additional tax liability must be enforced along with penalty.

6. The learned Counsel for the appellant strongly contended that how there can be an escaped assessment especially when the return for the 3rd quarter 2015 was yet to be furnished. It is also contended that there can be no substantial difference in the weight of the goods on account on weighment at the spot by referring to a copy of the registration certificate in respect of the alleged vehicle, which suggested that the maximum loading capacity cannot exceed 25.75 quintals having regard to the weight of the goods carrier in juxtaposition to the unladen weight, the fact, which was completely lost sight of by the authorities below. It is again contended that there was no concrete finding with regard to the invoices dated 28.09.2015 whether to be forged or parallel in the light of the weights of the goods as ascertained from the weighment of vehicle in question. The foremost contention of the appellant's Counsel is that the TER was unduly accepted and for considering the incriminating materials without being properly confronted to and examining the 3rd parties vis-a-vis 28 invoices allegedly produced by the Vigilance Unit. A decision of the Hon'ble Court in the case Jayanarayan Kedarnath and another Vs. STO, Cuttack I West Circle reported in (1988) 68 STC 25 (Orissa) is referred to by the learned Counsel of the appellant to strengthen the contention that proper enquiries ought to have been made with regard to the alleged 28 invoices confronted to the representative of the dealer. As regards, escaped

assessment awaiting return for the 3rd quarter of 2015, an authority of the Hon'ble Apex Court reported in (1963) 14 STC 976 (SC) in the case of Ghanshyamdas Vs. Regional Assistant Commissioner of Sales Tax, Nagpur and others has been put forth from the side of the appellant. Regarding the alleged adverse materials of 28 invoices and its production and confrontation to the appellant, a decision of the Hon'ble Apex Court in the case of Chuharmal Vs. Commissioner of Income Tax: (1988) 172 ITR 250 (SC) is cited. For the test of reasonableness in accepting incriminating materials, one more citation of the Hon'ble Apex Court is submitted by the appellant i.e. in the case of Kishanlal Agarwalla Vs. Collector of Land Customs: AIR 1967 SC 80. To scrutiny the materials adverse to the interest of the dealer in respect of which 3rd parties are allegedly involved, the learned Counsel for the appellant placed reliance on a decision of the Hon'ble Apex Court in the case of Krishna Chand Chela Ram Vs. CIT reported in 125 ITR 713 (SC). Finally, a decision of the Hon'ble Court rendered in the case of Steel Authority of India Ltd. Vs. Sales Tax Officer, Rourkela I Circle and others reported in (1994) 94 STC 105 (Orissa) is cited and it is contended that the materials so collected by the Vigilance Unit and confronted to the dealer's representative might only lead to a strong suspicion, but it cannot take place of legal proof, unless and until corroborated materially. On the other hand, a decision of the Hon'ble Apex Court is submitted at the Bar by Revenue i.e. Commissioner of Sales Tax, U.P. Vs. Mohan Brickfield, Agra reported in (2006) 12 SCC 203 to persuade the Tribunal that rightly the authorities

below raised the additional tax and imposed the penalty on both the counts for non-production of accounts at the time of inspection and initial verification, inasmuch as, such failing in production at the inception, but production at a later point of time during assessment, in absence of plausible explanation therefor, adverse inference was to be drawn against the dealer. Under the aforesaid background, the formal question is, whether, having regard to the above facts and circumstances of the case, the findings of the authorities below can really be sustained?

7. With respect to the jurisdiction for escaped assessment under Section 43(1) of the OVAT Act as raised by the appellant, it is, in the considered view of the Tribunal, is not at all tenable, more particularly when, by the time the assessment was subjected to, 3rd quarter of 2015 had already been over. That apart, the period does not only relate to said quarter of 2015, rather, it corresponds to the duration between 01.04.2014 to 30.09.2015. Besides that, in view of the language of Section 43(1), which of course, suffered an amendment w.e.f. 01.10.2015, the assessing authority appears to have the jurisdiction to initiate an action for escaped assessment upon the receipt of information indicating either the whole or any part of the turnover of the dealer vis-a-vis the tax period escaped assessment or under assessment etc. and consequently, to serve a notice and after providing a reasonable opportunity of being heard to the dealer and making such enquiry as he deems necessary, proceed to the best of his judgment the amount of

tax due. Prior to 01.10.2015, such assessment either for escaped turnover or turnover under assessed, etc. the action was to be preceded by assessments made under Sections 39, 40, 42 or 44 and on the basis of additional information received by the assessing authority. Considering the above aspects of law and the fact that the assessment period relates to 01.04.2014 to 30.09.2015 and that, the 3rd quarter of 2015 had expired by the time the escaped assessment was set in motion, in the humble opinion of the Tribunal, exercising jurisdiction under Section 43(1) of the OVAT Act was not at all ousted.

8. Admittedly, pursuant to the notice under Section 74 of the OVAT Act, at the time of release of the alleged vehicle, the appellant had to pay the tax and penalty of ₹2,70,864.00 on a conclusion being that invoices dated 28.09.2015 were either to be forged or parallel. But later on, as it appears, the assessment for the escaped turnover and the proceeding under Section 43(1) of the OVAT Act was initiated primarily on the strength of TER. In fact, as is normally understood, inferences are drawn or prima facie, opinions expressed by the Vigilance Unit acting upon which action either for escaped assessment or under assessment, whatever, are initiated. But the findings thereon must have to be on the conclusions independently reached at by the assessing authority without being influenced by such inferences or opinions, as the case may be. At this juncture, it may be appropriate to discuss the defence of the appellant and the materials produced by it before the authority concerned. In fact, the appellant alleged that

questionable transactions with respect to 28 invoices so produced and confronted to it should not have been accepted when there was an information shared with the local police vide SD Entry No. 464 dated 29.09.2015 regarding illicit business being carried by one Subhash Kumar Mohanty utilizing duplicate bills and vehicles and the denial of the fact that the invoices not being related to them and hence, unaccounted for in the books of account. The authorities, however, entertained serious doubts in respect thereof and outrightly rejected it as mere afterthoughts. The interception of the vehicle is dated 29.09.2015 and the SD entry is made apparently on the same date and subsequently, the appellant collected details of the alleged vehicle from RTO, Cuttack in order to correlate the involvement of said Subhash Kumar Mohanty. More or less, the stand of the appellant is and has been that said 28 invoices do not belong to its business concern and denied the allegations advanced by the Vigilance Unit, notwithstanding the fact that its representative was examined in terms of Section 92(1) of the OVAT Act admitting the fact that the bills were raised by them disclosing that it was the practice earlier in issuing single invoice for multiple sale transactions on account of stiff market competition. The TER singularly based its conclusion referring to the recorded statement of the appellant's representative dated 01.10.2015 and citing the fact that tax and penalty for an amount of ₹2,70,864.00 had been paid and deposited with respect to the alleged invoices dated 28.09.2015 since found to be forged or parallel and formed an opinion by dismissing all the materials produced by the

dealer regarding the illicit dealings by an outsider and to the effect that the dealer was rather to be involved in clandestine business and thus, raised the additional demand on the aforesaid counts. Even leaving aside all the mitigating circumstances and materials so produced by the appellant dealer, in the humble opinion of the Tribunal, the assessing authority was required to conduct a detailed inquiry vis-a-vis 28 invoices before arriving at a decision that the same related to the business concern of the dealer and none else and thus, not to have been accounted for in the alleged period. The FAA referred to a decision in the case of Kanak Cement Pvt. Ltd. Vs. STO, AU, Rajgangpur reported in (1997) 105 STC 112 (Orissa) which authorized the assessing authority to utilize the incriminating materials which were collected behind the back of the dealer and not to disclose its source. There is no denial to the fact that the ratio lays down the law that source of the incriminating materials is to be kept secret but all of it is to be confronted to the dealer and that apart, an elaborate exercise is to be carried out to confirm and conclude that it related to the dealer alone. In other words, the enquiry which is contemplated under Section 43(1) of the OVAT Act is not a mere formality and not to straightaway accept the inferences or opinions drawn or expressed in the TER. Rather, the assessing authority is duty bound not only to provide the dealer an opportunity of hearing but is also statutorily obliged to hold an enquiry as deemed necessary (a duty which is never absolved) the real objective behind it is to elicit and unearth the genuineness of the allegations made against the dealer

concerning its dubious or illicit business deals. In the TER and also during the assessment proceeding except said 28 invoices being confronted to, no other material evidence seems to have been collected in order to suggest that the alleged transactions were directed against the dealer. No doubt, the source of the invoices or the information regarding 28 bills was not to be disclosed or openly shared with the dealer, but on the anvil of the denial by the proprietress of the dealer that the alleged transactions do not belong to them, the assessing authority was obliged to conduct a full proof enquiry in order to ascertain the correctness of the adverse materials. The 3rd parties were needed to be summoned in order to find out and ascertain, whether, they had actually transacted with the dealer appellant or not and that apart, other vital documents to confirm the purchases, movement of goods and matters in relation to the account or the financial transactions between the parties ought to have been collected during the vigilance inspection and if not, then, at the time of assessment by an enquiry as contemplated in law. Simply, on the strength of 28 invoices being shown or confronted to the representative of the dealer and by placing reliance on his statement recorded under Section 92 of the OVAT Act and referring to the TER without an elaborate enquiry being conducted, to saddle the tax liability on the dealer, in the ultimate conclusion of the Tribunal, would be fraught with tremendous amount of risk. According to the Tribunal, if alleged 28 invoices were held to be forged or parallel as against the claim of the dealer denying the

transactions in question claiming that an outsider to be involved, under such circumstances, the State had the burden of proof to discharge and to establish it otherwise. The TER, as it appears, merely draws upon inferences on the conduct of the dealer and referring to certain materials that fully remained unexplained but the assessing authority could not have accepted it without subjecting the same to an enquiry examining the 3rd parties so involved in the said transactions and collecting other materials vis-a-vis the sales, purchases, transportation/movement of goods, banking and other financial transactions purportedly held so. In fact, a lot of circumspection is required to fix tax liability and raise additional demand on the dealer which must depend on substantial proof. In the instant case, following the authority of the Hon'ble Court in Steel Authority of India Ltd. case (ibid), in absence of substantial proof as to the authenticity of 28 invoices and the alleged transactions inter se parties, it may be said that such evidence may only lead to a strong suspicion and nothing more, and, howsoever grave the doubtful be, it cannot substitute legal proof which is always necessarily required for the purpose of fixing the tax liability. It can, thus, be held that the AA was also not right in raising additional entry tax and imposing penalty against the dealer due to want of conclusive proof with respect to the alleged transactions. Therefore, the inevitable conclusion of the Tribunal is, on the basis of the TER and whatever materials on record, it would not and never be wise enough to hold the dealer culpable vis-a-vis the dubious transactions alleged, rather, it would be appropriate in demanding a

fresh enquiry in to the matter which may and most likely to serve the best interest of justice.

9. Hence, it is ordered.

10. In the result, the appeals stand allowed. As a logical sequitur, the impugned orders dated 20.01.2017 promulgated in First Appeal Case Nos. AA. 45/BA – 2016-07 (VAT) and 46/BA – 2016-17 (ET) are hereby set aside. Consequently, the matter is remitted back with a direction to the AA to hold fresh enquiry as contemplated with regard to escaped assessment under the OVAT Act and to consider reassessment under the OET Act for the period under assessment vis-a-vis the transactions in question in accordance with law by providing due opportunity to the appellant dealer with a sole purpose to ascertain its truthfulness or otherwise and to ensure entire exercise to be completed preferably within a period of three months from the date of receipt of a copy of the present order.

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