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

S.A. No. 418 (VAT) of 2016-17
&
S.A. No. 47 (VAT) of 2017-18

(Arising out of order of the learned JCST, Cuttack-I Range,
Cuttack in First Appeal Case No. AA- 106121612000073
disposed of on dated 31.01.2017)

Present: Shri R.K. Pattanaik, Chairman,
Shri A.K. Dalbehera, 1st Judicial Member, and
Shri P.C. Pathy, Accounts Member-I

S.A. No. 418 (VAT) of 2016-17

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

-Versus-

M/s. Panda & Brothers,
Plot No.1093, Mahanadi Vihar,
P.O.- Nayabazar, Cuttack-4 ... Respondent

S.A. No. 47 (VAT) of 2017-18

M/s. Panda & Brothers,
Plot No.1093, Mahanadi Vihar,
P.O.- Nayabazar, Cuttack-4 ... Appellant

-Versus-

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

For the State : Sri M.S. Raman, Additional Standing Counsel (CT)
For the Dealer : Sri B.B. Panda, Advocate

Date of hearing: 12.11.2020 ***** Date of order: 19.01.2021

O R D E R

Since parties are same and arise out of common order of assessment, both the aforesaid appeals are combinedly taken up for disposal in the following manner.

S.A. No. 418 (VAT) of 2016-17:

2. Instant appeal in term of Section 78(1) of the Odisha Value Added Tax Act, 2004 (in short, 'the Act') is at the behest of the State is directed against the impugned order dated 31.01.2017 promulgated in Appeal No. AA-106121612000073 by the learned Joint Commissioner of Sales Tax, Cuttack-I Range, Cuttack (in short 'FAA'), who confirmed the order of assessment dated 29.03.2016 passed under Section 42 of the Act by the learned Sales Tax Officer, Cuttack-I East Circle, Cuttack (in short, 'AA') but is confined to the penalty only. According to the State, the period of assessment relates to 2009-12, but in so far as the penalty imposed, it is at the rate of one time of tax assessed instead of twice in view of Section 42(5) of the OVAT Act since one time penalty was given effect to from 24.09.2015 vide F.D. No. 9848-I-Legis-5/2015-L. A cross-objection is filed by the dealer assessee.

S.A. No. 47 (VAT) of 2017-18:

3. It is an appeal under Section 78(1) of the Act by the dealer assessee against the impugned order dated 31.01.2017 passed by the FAA, who fully confirmed the order of assessment dated 29.03.2016 for the alleged period on the grounds inter alia that the FAA has not considered and examined the records of the proceeding and also findings of the set aside assessment; there is no judicial application of mind and non-consideration of facts and law vis-a-vis ITC; error has been committed by not examining the AVR and findings of the AA with regard to the reduction of input tax for an amount of ₹15,64,023.00 wrongly claimed against exempted turnover; non-consideration of the accounts in order to segregate TDS

from ITC and hence, it is liable to be set aside in the interest of justice. Here also, the State filed a cross-objection and justified the impugned order dated 31.01.2017 except the quantum of penalty levied.

4. An assessment under Section 42 of the Act was initiated against the dealer assessee for the period 01.04.2009 to 31.03.2012 and consequently, additional demand was raised. Against such demand, the dealer assessee filed an appeal and the FAA by order dated 28.02.2015 remanded the matter back for fresh assessment. Accordingly, the AA accomplished reassessment keeping in view the directions of the FAA in Appeal No. 106121412000311. Still dissatisfied, the dealer assessee approached the FAA, who, however, declined to interfere with the order of assessment dated 29.03.2016. The dealer assessee on being unsuccessful moved the Tribunal in S.A. No. 47 (VAT) of 2017-18 and apart from other grounds, contended that impugned order dated 31.01.2017 is untenable in law for the fact that the reassessment was not carried out according to the order dated 28.02.2015 of the FAA. The State, as stated earlier, filed S.A. No. 418 (VAT) of 2016-17 assailing the quantum of penalty simpliciter.

5. As per the remand order dated 28.02.2015, the FAA observed that TDS and ITC have been joined together, while calculating the tax liability by referring to the AVR which indicated that the dealer assessee could be able to produce TDS certificates for ₹26,65,402.00 as against the actual claim of ₹42,29,425.00 and excess ITC of ₹17,63,224.00 was carried forward to the next tax period, inasmuch as, TDS is different from ITC and both are to be independently and separately determined and as ITC is legally admissible to the dealer assessee.

The learned Counsel for the dealer assessee contended that the audit visit objection was not properly understood and time and again, mistakes appeared to have been committed. While contending so, the provision of Sections 20(1) and 21(1) of the Act have been highlighted upon by the learned Counsel for the dealer assessee. It is also contended that the AVR demonstrated ITC amounting to ₹59,76,228.73 and total output VAT collected and shown at ₹94,55,867.60 and after adjustment of entire ITC, an amount of ₹34,79,638.87 was arrived at and moreover, ₹10,11,406.00 along with ₹26,65,402.00 (TDS certificates) on being deducted therefrom, it would appear that excess payment of ₹1,97,169.13 was made as against ITC of ₹2,94,567.00 which was carried over to the next tax period and thus, under the above circumstances, the findings of the authorities below cannot be sustained. It is also alleged that the directions of the FAA in remand appeal was not scrupulously followed by the AA. That apart, the learned Counsel for the dealer assessee would contend that there was no justification to levy penalty by referring to a ruling of the Hon'ble Apex Court in the case of Chandrakant Uttam Chodankar Vs. Dayananda Rayu Mandrakar reported in (2005) 2 SCC 188. It is claimed that the returns have not been properly scrutinized by the AA in compliance of Rule 40(2) of the OVAT Rules, 2005 as Section 38 of the Act envisages such scrutiny to verify its correctness. It is alleged that the books of accounts ought to have been verified instead of solely relying upon the returns as the law is well settled that a dealer is liable to be taxed duly imposed by law and not on admission by citing a decision of the Hon'ble Court in SREI International Finance Ltd. Vs. State of Odisha reported in (2008) 16 VST 193 (Orissa). So, in sum

and substance, the additional demand is questioned so also the penalty levied by the authorities below. The State in cross appeal justified the findings of the authorities below as the AA in obedience to the directions in remand made the reassessment. It is further contended that the dealer assessee did not submit TDS certificates for an amount of ₹15,64,023.00 which is evident from the order dated 28.02.2015 and when it was read along with the record and vis-a-vis the returns filed for the tax period, wherein, ₹2,94,567.00 is shown to have been carried forward would certainly lead to show that the dealer assessee clubbed both and carried it forward to the subsequent tax period, the fact which stood further confirmed by considering the return for the period 01.07.2012 to 30.09.2012, where, ITC is stated to be ₹18,70,651.00. As regards the penalty, it is contended by the State that by looking at Section 42(5) of the Act, it is inevitable and mandatory and the OVAT (Amendment) Act, 2015 which came into force w.e.f. 01.10.2015 could not have been applied to the case in hand which is concerning tax period 01.04.2009 to 31.03.2012. In other words, according to the State, the penalty should have been twice the amount of tax assessed under Section 42(5) of the Act and in that respect, the authorities below committed the wrong which needs rectification.

6. As per Section 20 of the Act, for the purpose of calculating net tax payable by a registered dealer for any tax period, the ITC as determined shall be allowed to such dealer against the tax paid or payable in respect of all sales or purchases taxable under the Act other than the goods specified in Schedules C and D. Section 21(1) of the Act deals with ITC exceeding tax liability. According to the

dealer assessee, as per the AVR, it has paid VAT of ₹10,11,406.00 after adjustment of ITC and TDS claimed and as such, there was no scope to carry over ITC and hence, the authorities below without really examining the books of accounts and other documents and entirely depending on the returns filed fell into serious error in accepting the fact that ₹17,63,224.00 of ITC was carried forward. In this connection, the learned Counsel for the dealer assessee refers to Section 98 of the Act contending that an assessment cannot be invalidated for any mistake or defect in the returns filed. In the facts and circumstances of the case, according to the Tribunal, Section 98 of the Act does not fit in to the case of the dealer assessee. Section 95 of the Act is also referred to while claiming that the returns filed by the dealer assessee were needed to be scrutinized properly by the AA. So far as Section 95 of the Act is concerned, it deals with burden of proof regarding the claims made on the subjects as enumerated in clauses (a) to (k). In the considered view of the Tribunal, the above provisions would only suggest that the dealer assessee was required to file returns correctly and all the claims made therein including on ITC were to be substantiated by it. The question is, whether, the AA committed any wrong in carrying out the assessment according to the directions of the FAA dated 28.02.2015?

7. As to the claim on ITC by the dealer assessee, a calculation has been made by the AA. According to the AA, ITC claimed on account of trading stands at ₹14,56,992.00 and by virtue of works contract at ₹45,22,387.00. According to the AA, ITC on works contract has been wrongly claimed by the dealer assessee, as there is no output tax involved. The nature of works contract has been vividly

discussed by the AA, who reached at a decision that the goods purchased for execution of works contract were used as containers or packing of goods as the entire turnover falls in the category of service tax, inasmuch as, no output tax was collected on such turnover. In other words, it was held that the dealer assessee wrongly included ₹45,22,387.00 and claimed it as ITC when there was no output tax involved considering the nature of works contract executed by the dealer assessee. The FAA also examined the ambit of Section 65(23) of the Service Tax and likewise, reached at a conclusion that the works contract being cargo handling service, the dealer assessee was not entitled to claim ITC to the tune of ₹45,22,387.00. Regarding TDS, the dealer assessee could able to furnish certificates to the extent of ₹26,65,402.00 and the differential amount of ₹15,64,023.00 was allegedly adjusted by way of a revised return for the period 01.07.2012 to 30.09.2012 as was claimed by the dealer assessee. According to the AA, the revised return was submitted beyond the stipulated period, while referring to Section 33(4) of the Act. In the considered view of the Tribunal, the AA in compliance of the directions in remand appeal not only segregated TDS from ITC but also held that an amount of ₹45,22,387.00 towards ITC was wrongly claimed by the dealer assessee. In fact, ITC only on trading to an amount of ₹11,64,456.00 was allowed and TDS for ₹26,65,402.00 and the AA finally determined the tax due as ₹7,42,208.00 after adjustment of payments made. The above conclusion has been reached at by examining the books of accounts and all other documents in juxtaposition to the returns filed by the dealer assessee and therefore, the Tribunal does not find any reason to interfere with it.

8. Now, the next question is, whether, penalty against the dealer assessee is justified? In this connection, the learned Counsel for the dealer assessee cited rulings reported in (1997) 106 STC 180 (SC), (2009) 23 VST 249 (SC), (2011) 44 VST 74 (Madras), (2011) 46 VST 297 (Madras) and (2017) 103 VST 165 (Gujarat) while contending that penalty should not have been levied. On the contrary, learned Additional Standing Counsel (CT) contended that imposition of penalty under Section 42(5) is a must and mandatory which shall be twice the amount of tax assessed under sub-section (3) or (4) thereof. As earlier discussed, the quantum of penalty was also questioned with reference to Section 42(5) of the Act vis-a-vis OVAT (Amendment) Act, 2015 which came into force from 01.10.2015. From the side of the State, many citations, details of which are not elaborately discussed, have been placed on record for consideration of the Tribunal relying upon which it is contended that levy of penalty is mandatory in view of the word 'shall' contained in Section 42(5) of the Act. In fact, the Hon'ble Apex Court in one of its earliest decisions in the case of Hindustan Steels Ltd. Vs. State of Orissa reported in AIR 1970 SC 253 held and observed that penalty does not arise merely upon the proof of default and hence, not to be imposed, unless the party acted deliberately in defiance of law or has been guilty of contumacious or dishonest conduct or acted in conscious disregard of its statutory obligations, while referring to Section 9(1) and 25(1)(a) of the Orissa Sales Tax Act, 1947. In the considered view of the Tribunal, the said principles vis-a-vis the penalty stand squarely applicable to the case in hand. That apart, Section 42(5) clearly envisages the conditions on fulfilment of which penalty is to be imposed as per sub-section (5) thereof. In fact,

only upon suppression of sales or purchases or both, erroneous claims of deductions including ITC, evasion of tax, or contravention of any provision of the Act affecting the tax liability of a dealer, penalty is attracted. In the instant case, the turnover is fully disclosed by the dealer assessee, but then, certain error creeped in with regard to calculation of ITC which ultimately resulted in excluding an amount of ₹45,22,387.00 in respect of works contract executed by the dealer assessee. Under such circumstances, the Tribunal is of the humble opinion that it would be unjustified to levy penalty against the dealer assessee invoking Section 42(5) of the Act. As to the argument of the State that the word 'shall' as appearing in Section 42(5) of the Act to be mandatory in nature, the Tribunal is of the further opinion that it is nothing to do with the discretion involved, whether to impose penalty or not, but confined only to the quantum of penalty which under no circumstances shall be less than twice the amount of tax assessed. If there is a bonafide mistake, error in calculation, as in the present case the dealer assessee erroneously clubbed ITC and TDS and in similar nature of cases, no penalty should be levied. In the remand order dated 28.02.2015, the FAA while considering the ITC and TDS entitlements reached at a subjective satisfaction that it was wrongly done and is admitted to be a bonafide mistake on the part of the dealer assessee and accordingly, directed the AA to bifurcate TDS from ITC and to correct it by examining the books of accounts and other documents. For such a bonafide mistake, as was observed by the FAA, while remitting back the matter for reassessment, the Tribunal is of the ultimate conclusion that imposition of penalty vis-a-vis the dealer assessee would not be justified. In view of the above finding of

the Tribunal, there is no need felt for discussing whether the authorities below erroneously determined the quantum of penalty with reference to OVAT (Amendment) Act, 2015.

9. Hence, it is ordered.

10. In the result, S.A. No. 418 (VAT) of 2016-17 stands dismissed. As to S.A. No. 47(VAT) of 2017-18, it is hereby allowed in part to the extent of penalty. The cross-objections are accordingly disposed of. As a logical sequitur, the impugned order dated 31.01.2017 in Appeal No. AA- 106121612000073 for the period of assessment 01.04.2009 to 31.03.2012 vis-a-vis the dealer assessee is hereby set aside to the above extent. As a consequence, the AA is directed to recompute the tax liability of the dealer assessee as per the observations of the Tribunal, preferably, within a period of three months from the date of receipt of a copy of the above order.

Dictated & Corrected by me

(R.K. Pattanaik)
Chairman

(R.K. Pattanaik)
Chairman

I agree,

(A.K.Dalbehera)
1st Judicial Member

I agree,

(P.C. Pathy)
Accounts Member-I