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

S.A. No. 48 (VAT) OF 2016-17
&
S.A. No. 26 (ET) OF 2016-17

(Arising out of orders of the learned JCST, Cuttack-II Range, Cuttack in First Appeal Case No. AA –OVAT/47/CUIIJ/2011-12 and AA- OET/CUIIJ/01/2012-13, disposed of on dated 19.02.2016)

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

M/s. Kalinga Engineers Ltd.,
Atharbanki, Paradeep, Jagatsinghpur ... 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, ASC (CT)

Date of hearing: 13.08.2020 ***** Date of order: 11.09.2020

O R D E R

A procedure is to aid and administer the rule of law and not to misdirect or derail it. In fact, a procedural law is always intended to smoothen the justice delivery system and not to make it a rough ride. It is no doubt true that a rule of procedure needs a substantial compliance. When such a law is visited with some kind of a disability, it would have to be applied rigourously. In other words, a procedural law in case of consequential disabilities for failing to follow and observe it must have to be construed strictly and earnestly complied with. In absence of any such penalty or disability being prescribed, unlike its counterpart, such as, the

substantive law, a procedural law is to be complied in substance. It is often said that a rule of procedure is a handmaid of justice and not a mistress. Keeping that in view, a procedural law is to be appreciated and applied.

2. A State is a litigant and it ought to be treated at par with others. No any special treatment an ordinary litigant must receive detrimental to the interest of the State. In applying a rule of procedure, equilibrium is to be maintained vis-a-vis the ordinary litigants and State. Rather, both are to be treated equally without any discrimination, since the intent, purpose and objective is only and only to administer the rule of justice. Any kind of law, be it procedural or substantive, it must take into account the interest of the litigants as a whole. Under a taxation law, the interests of the tax payers are safeguarded, but at the same time, it also caters the demand of the State. In fact, a rule of procedure and law are to be applied even handedly as it cannot be enforced and implemented in a lopsided manner exclusively to benefit the tax payers risking the larger interest of the State.

3. Here, in the present context, the Tribunal, as is sincerely and honestly believed, does need to consider such of the aspects highlighted above and to take a call, if at all, the dealer assessee has really been prejudiced on account of non-compliance of certain procedural rules as contemplated under law. Let the Tribunal examine it and all other contentious issues involved inter se parties considering the grounds raised in respect thereof.

S.A. No. 48 (VAT) of 2016-17:

4. Instant appeal under Section 78(1) of the Odisha Value Added Tax Act, 2004 (in short, 'the Act') is at the behest of the dealer assessee assailing the

impugned order dated 19.02.2016 promulgated in Appeal No. AA –OVAT/47/ CUIIJ/2011-12 by the learned Joint Commissioner of Sales Tax, Cuttack-II Range, Cuttack (in short, 'FAA') directed against the order of assessment dated 10.01.2011 passed under Section 42 of the Act for the period 01.04.2005 to 31.03.2009 by the learned Assistant Commissioner of Sales Tax, Jagatsinghpur Circle, Paradeep (in short, 'AA') on the following grounds, such as, there is no strict compliance of Section 42(2) of the Act; since the assessment was not completed within a period of six months as is required under Section 42(6) of the Act, it is barred by limitation; disallowance of hire charges against gross receipt is improper and unreasonable not being supported by a speaking order; denial to adjust ITC by taking a plea of technicality as to non-compliance of a statutory procedure as envisaged in Section 107 of the Act etc. The aforesaid grounds of challenge are to be looked into and adjudicated upon by the Tribunal in juxtaposition to the defence of the State.

5. As per the State, none of the grounds raised by the dealer assessee is maintainable. It is contended that there has been substantial compliance of the statutory provisions with regard to the assessment proceeding, inasmuch as, adequate opportunity to respond was allowed and also within the stipulated time, it was accomplished. It is also urged that the claim of the dealer assessee that the order of assessment dated 10.01.2011 as ante dated is a reckless charge having no foundation at all and has never been substantiated in material particulars. As regards the hire charges and its disallowance, State contends that it was allowed by the FAA and thus, no cause of action remains for the same. As to the ITC adjustment, it is contended that a procedure is prescribed to get the adjustment

which has not been exhausted by the dealer assessee and rightly the same was rejected and while contending so, the legal proposition 'expressio unius est exlusio ulterius' meaning thereby that if a statute provides a thing to be done in a particular manner, it has to be done in that manner alone and no other way which is not permissible under law is taken shelter of. The aforesaid defence of the State shall have to be critically examined by the Tribunal.

6. The learned Counsel for the dealer assessee contends that there is glaring infraction of the mandatory provision as contained in Section 42(2) of the Act which is also violative of the principles of natural justice. As per Section 42(2) of the Act, when a notice is issued to the dealer under sub-section (1), he shall have to be allowed a time for a period not less than thirty days for production of relevant books of account and documents and in the instant case, it is being alleged that the said provision was followed more in breach than observance. In this regard, the decisions of the Hon'ble Court in Jindal Stainless Ltd. Vs. State of Orissa:(2012) 54 VST 1 (Orissa); Patitapabana Bastralaya Vs. S.T.O and others:2015 (I) ILR Cuttack 283; and Delhi Foot Wear Vs. Sales Tax Officer, Vigilance, Cuttack and others:(2015) 77 VST 146 (Orissa) have been referred to by the learned Counsel for the dealer assessee. According to the learned ASC (CT), the decisions are not fully applicable to the present fact situation, when Jindal Stainless Ltd ibid was rendered in the context of pre-deposit condition for entertaining appeal; and in Patitapabana case (supra), the Hon'ble Court, considering the challenge on contravention of Section 42(2) of the Act directed a fresh assessment by complying natural justice; whereas, with respect to Delhi Foot Wear case ibid, it was on extension as per proviso to

sub-section (6) to Section 42 of the Act and since it was not obtained, the assessment was held as time barred. The case in hand, as revealed from the record, suggests that a notice in Form VAT-306 dated 16.09.2010 was issued on 18.09.2010 with a future date fixed on 18.10.2010 for appearance of the dealer assessee and according to the learned ASC (CT), Section 42(2) as to thirty days compliance has been substantially adhered to. The record reveals that on 18.10.2010, the proceeding suffered an adjournment and posted to 26.10.2010, the date on which the dealer assessee again sought time and it stood scheduled to 10.11.2010, on which date, the books of account were produced for the purpose of verification and the above facts are not in dispute. According to the learned Counsel for the dealer assessee, the notice was served on them on 12.10.2010 and there was less than thirty days time with reference to 18.10.2010. In fact, according to the dealer assessee, the period of thirty days is to commence from the date of service of notice, which is controverted by the State on the ground that such an interpretation of Section 42(2) of the Act would not only nullify its purpose, but may result in absurdity and might even lead to uncertainties as the assessment proceedings would then never be advancing beyond issue of notice in Form VAT-306. As per sub-section (2) of Section 42 of the Act, in the event of a notice issued, minimum of thirty days time shall be allowed to the dealer assessee for production of books of account and documents. In the instant case, the notice dated 16.09.2010 came to be issued on 18.09.2010 with a date fixed to 18.10.2010 for appearance of the dealer assessee to produce the books of account and documents and technically speaking, thirty days time was allowed. It is not that the

notice was issued with a date less than thirty days fixed for production of books of account. That apart, the dealer assessee not only appeared on 18.10.2010, but also obtained adjournments on couple of occasions and finally on 10.11.2010, the books of account were produced. In fact, a reasonable amount of time was available in order to facilitate the dealer assessee in causing production of the books of account. It cannot be said that there was any glaring error or illegality committed in fixing the date not in conformity with Section 42(2) of the Act. The contention of the State to the effect that if thirty days time is allowed to be computed from the date of service of notice, as is urged, it is likely to make the relevant provision unworkable and impractical rather sounds logical. If such an interpretation is resorted to that thirty days period is only to be counted from the date on which the notice was served upon the dealer assessee, it would certainly nullify the spirit of Section 42(2) of the Act. The learned ASC (CT) is rightly justified to claim that any such interpretation vis-a-vis Section 42(2) of the Act that thirty days period starts to run from the date of receipt of notice on the dealer assessee would lead to uncertainties as the assessment proceedings might never be advancing beyond that stage. At present, the Tribunal looking at Section 42(2) of the Act arrives at a definite conclusion that it only needs a substantial compliance. Such a provision does not invite any penalty or disability for being not strictly complied with. It does not, however, mean that there has to have no compliance at all or a faint compliance which is not in the spirit of the law. Truly speaking, thirty days time cannot be counted on and from the date of receipt of notice on the dealer assessee. In the present case, thirty days time was allowed as per the notice in

Form VAT-306 and thereafter, the dealer assessee had ample time and opportunity to produce the books of account. As to the dealer assessee, it is not disclosed, as to in what manner, there has been any prejudice caused to him. The dealer assessee never ever raised its concern and prejudice, if any, on account of the alleged non-compliance of thirty days, rather, whole heartedly participated in the assessment proceeding till the very end. Rather, in the case at hand, the dealer assessee not only received reasonable time with a clear thirty days notice, but also had sufficient opportunity, as the proceeding suffered adjournments twice at its instance, in order to produce the books of account. That apart, the dealer assessee could have raised such an issue during and in course of assessment proceeding, but as it seems chose not to do so, for obvious reasons that there was adequate space to respond. The learned ASC (CT) by referring to Section 98 of the Act contended that even assuming that there was some kind of a failing in complying Section 42(2) of the Act, which is really not, the proceeding even then also cannot be invalidated in view of Section 98 thereof, which prescribes that merely by reason of any mistake, defect, or omission, any of the proceedings, shall not be held as invalid. It is not such a case, where any mistake, defect, or omission is apparent so as to entitle the dealer assessee to challenge the very foundation of the assessment proceeding and, therefore, there is no need to invoke Section 98 of the Act, for that matter. From any angle considered, the Tribunal reaches at an irresistible conclusion that there is substantial compliance of Section 42(2) of the Act and even otherwise, the dealer assessee after being served with a notice on 12.10.2010 cannot be said to have in any way been prejudiced.

7. The next ground of challenge is with regard to Section 42(6) of the Act and again for its non-compliance on the ground that the assessment proceeding was not completed and brought to an end within six months from the date of receipt of notice issued under sub-section (1) thereof. In essence, the dealer assessee is said to have questioned the assessment order alleging it to be ante dated. In this connection, a decision of the Hon'ble Court in Chandrika Sao Vs. STO, Balasore Range, Balasore and another: (2015) 81 VST 86 (Orissa) is placed reliance by the learned Counsel for the dealer assessee, while claiming that the assessment proceeding was not completed within six months as is contemplated in Section 42(6) of the Act and that apparently indicates that the assessment order to be ante dated. In the decision (supra), the order of assessment was communicated to the dealer with a delay of more than four months and having regard to the conduct of the Revenue and its failure to offer a plausible explanation in that respect, the Hon'ble Court held and observed that the assessment order to be ante dated. It depends on the conduct and the explanation offered by the Revenue as to why there was delay in communicating the order to the dealer assessee basing upon which it is to be decided as to if the order in question to be ante dated or not. It is a settled principle of law that any kind of serious negligence or malafide attributed against the assessing authority must have to be substantiated by the dealer assessee, particularly when, it is alleged that the order of assessment has been ante dated so as to make it survive and hit by limitation. In this connection, the learned ASC (CT) relied upon a ruling of the Hon'ble Court in the case of Jagadamba Polymers Pvt. Ltd. Vs. State of Orissa: W.P.(C) No. 10555 of 2008

decided on 17.09.20078, wherein, it is categorically observed that any kind of allegation and scurrilous attack against the assessing authority without any factual foundation must have to be rejected outrightly. As is well known in the legal jurisprudence, any kind of falsity or malafide, if attributed to, the burden of proof lies on the party, who alleges it. The allegations are also to be substantiated on being duly pleaded and supported by material evidence. If the aforesaid decisions of the Hon'ble Court are sincerely read and properly understood and appreciated, it conveys that in all circumstances, while there is delay in communicating assessment order to the dealer assessee, malafide is not readily to be inferred, unless and until, it is substantiated fully. In the present case, admittedly there is delay in communicating the order of assessment dated 10.01.2011, which is not in dispute and has also not been denied by the State. In fact, as per the dealer assessee, the order of assessment and demand notice was issued on 31.03.2011 and served on them on 15.03.2012 (as per Form VAT-501, it is 13.02.2012) and as such, there has been considerable and inordinate delay, which is unexplained by the State and that has defeated and frustrated the very purpose of law as is enumerated in Section 42(6) of the Act. In this regard, the learned ASC (CT) produced a copy of DCR to show that the assessment order was passed on 10.01.2011 and thus, it cannot be branded as ante dated. It is claimed by the State that delay has occasioned in communicating the order, and as such communication involves a ministerial duty and when such responsibility at times fails to be sincerely discharged, assuming it so, it would still not be in all fairness to allege the order to be ante dated, especially, when the copy of the DCR proves it

otherwise. A copy of the original form of Register of Demand and Collection is brought to the notice of the Tribunal claiming that Column Nos. 8, 9, 10, and 11 have not been filled up, in so far as the present case is concerned, which indicates that the order of assessment was not ready and was never pronounced on 10.1.2011 and in order to obviate limitation, as the proceeding was to be completed within six months according to Section 42(6) of the Act, it was ante dated. A copy of the DCR as submitted by the learned ASC (CT) would rather show that the assessment order was passed on 10.01.2011, which is not in dispute, when it is compared with the original copy of the form of DCR produced by the other side. Accepting the copy of the DCR at its face value, when no serious objection is raised by the learned Counsel for the dealer assessee as to its contents, the Tribunal is of the conclusion that there is due compliance of Section 42(6) of the Act. Essentially, the assessment proceeding is to be completed within six months from the date of receipt of notice issued under Section 42(1) of the Act, but that does not mean, it is to encompass the period consumed on account of communicating the order of assessment which could happen under certain circumstances. The Tribunal is of further conclusion that having regard to the ratio laid down by the Hon'ble Court in the decisions ibid, malafide against the assessing authority is not readily to be alleged, when the order of assessment failed to be communicated to the dealer assessee within a reasonable time. It is also the law that any such delay does not automatically lead to a conclusion that the order of assessment to be ante dated. At the cost of repetition, it is held that the assessment proceeding, prima facie, appears to have been completed and concluded within six months from the date of receipt of

notice by the dealer assessee and delay in communicating the order of assessment cannot infer any malafide and that apart, it is also inconsequential appreciating the statutory provision, such as, Section 42(6) of the Act in its proper perspective. Thus, the contention of the learned Counsel for the dealer assessee on that score must have to fail.

8. It is rightly contended by the learned ASC (CT) that an amount of ₹10,000.00 was allowed towards hire charges in favour of the dealer assessee as is apparent from the impugned order dated 19.02.2016, though, originally it was disallowed. In other words, considering the claim of the dealer assessee and being conscious of the law laid down by the Hon'ble Apex Court in Gannon & Dunkerley's case, the FAA allowed such deduction. When it has already been attended to and the deduction as claimed was allowed, it needs no further adjudication.

9. Now, the issue in hand is on the adjustment of ITC as claimed by the dealer assessee. The learned Counsel for the dealer assessee vehemently urged that the closing stock and the statement in respect thereof was to be considered by the AA and the ITC ought to have been allowed and adjusted against the output tax, but the same has been denied on a technical ground. It is opposed by the learned ASC (CT) that since the statutory compliance was not made as the dealer assessee was required to submit Form VAT-607, rightly, it was declined. According to the dealer assessee, the ITC to the tune of ₹26,82,397.00 was supported by material evidence, but unfortunately, it was not taken into account on the ground that a particular procedure is prescribed to get it adjusted against the output tax.

There is no denial to the fact that such a claim was raised by the dealer assessee and a procedure is in place in view of Section 107 of the Act read with Rule 123 of the OVAT Rules, 2005, which could not be complied. According to the aforesaid provisions, a dealer assessee is to furnish a statement vis-a-vis the opening stock of raw materials, finished goods etc. within a period of seven months from the appointed day and in the instant case, no such information was shared by the dealer assessee and on that ground the ITC was disallowed by the authorities below. At this juncture, the learned Counsel for the dealer assessee contends that to decline and disallow ITC on such a technical ground tantamount to forfeiture which is not contemplated in the Act and also results in unjust enrichment, which can never be comprehended. The learned ASC (CT) by taking refuge of the decision of the Hon'ble Court in Jindal Stainless case ibid contends that since the procedure for ITC by way of adjustment against output tax has not been followed by the dealer assessee, the authorities below could not have allowed it. No doubt, the law is, as per the ratio of the said case, a particular process is to be followed as per the statutory requirement and that must be accomplished in that manner and not otherwise, but considering the claim of the dealer assessee on ITC, the Tribunal is of the humble opinion that such a legal proposition is clearly distinguishable. A procedure laid down in a law must be followed with all sincerity and without any breach, but it must not stand on the way in advancing the cause of justice. As initially discussed, a procedural law must not be applied technically as it is always considered to be a handmaid of justice. According to the Tribunal, if tax is not paid, exemption of which is claimed or a particular concessional rate is demanded by an

assessee which depends on certain declarations to be furnished, at a later point of time, it is entertained and even benefits are extended to and applying it analogically to the present factual situation, it can well be said that technicality should not stand as a bar against the dealer assessee, who is claiming for ITC and its adjustment against the output tax. In so far as the case of the dealer assessee is concerned, it is not that he claims for any exemption or concessional rate of tax, rather, demands for adjustment of ITC, which means, it is merely for the State to acknowledge the same or otherwise considering the materials produced in respect thereof. If a tax is paid and subsequently claimed to be adjusted by an assessee, notwithstanding its failure in applying according to the procedure prescribed, it should be allowed leaving aside the technicality involved. Any denial on such technical consideration that a particular procedure was not duly followed or observed can also lead to unjust enrichment. No doubt, the dealer assessee failed to apply for ITC as per Section 107 of the Act and could not even produce Forms VAT-607 and 608, but that must not stand as a stumbling block in the matter of adjustment of ITC. So, in the ultimate conclusion, the Tribunal reaches at a decision that the dealer assessee should be entitled to ITC on consideration of the relevant materials by the AA notwithstanding fact that it was not earlier claimed.

S.A. No. 26 (ET) of 2016-17:

10. The appeal under Section 17 of the Odisha Entry Tax Act, 1999 (in short, 'the OET Act') by the dealer assessee is directed against the impugned order dated 19.02.2016 promulgated in Appeal No. AA- OET/CUIIJ/01/2012-13 by the FAA for the same assessment period, who reduced the assessment raised by the AA

vide order of assessment dated 10.01.2011 on the grounds so raised in S.A. No. 48 (VAT) of 2016-17 besides challenging imposition of tax with respect to a crane @ 2% with the reason that it is not a scheduled goods thereunder. The Tribunal, on majority of the grounds raised by the dealer assessee, such as, on compliance of Section 42(2) and (6) of the Act, ITC adjustment, etc. has already rendered its decision in S.A. No. 48 (VAT) of 20-16-17 and hence, it is not repeated for the sake of brevity. With respect to levy of tax on the crane for not being a scheduled goods under the OET Act, it was not earlier raised by the dealer assessee before the fora below. The learned Counsel for the dealer assessee contends that such a question may be considered despite not being agitated before. A decision of the Hon'ble Court in State of Orissa and others Vs. D.K. Construction and others: (2017) 100 VST 24 (Orissa) is cited by the learned Counsel for the dealer assessee, which relates to a ratio that a question of fact or law can even be raised before the Tribunal. In fact, the Tribunal is a Court of fact and law and any such question can still be raised by the dealer assessee. If a particular item is not a scheduled goods, but duty was levied thereon, even if such was not previously challenged, can be entertained by the Tribunal. A crane is a scheduled goods or not and does it fall in Part-I or II of the Schedule of the OET Act is to be determined by referring to the materials on record. As per Entry 9, Part-II of the Schedule, machinery and equipments are scheduled goods and if at all a crane falls in such category or not is to be ascertained, which in the considered opinion of the Tribunal, should be left to be decided by the AA by referring to the materials on record. No other issues really remain for adjudication of the Tribunal.

11. Hence, it is ordered.

12. In the result, S.A. No. 48 (VAT) of 2016-17 and S.A. No. 26 (ET) of 2016-17 stand partly allowed. As a necessary corollary, the impugned orders dated 19.02.2016 are hereby set aside to the extent indicated above. Consequently, the AA is directed to examine the issues on ITC and exigibility of tax vis-a-vis the machinery equipment (crane) by providing an opportunity of hearing to the dealer assessee and referring to the materials to be produced in that respect and to complete the entire exercise preferably within a period of three months from the date of receipt 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/-
(Smt. S. Mishra)
2nd Judicial Member

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