BEFORE THE ODISHA SALES TAX TRIBUNAL: CUTTACK
(Full Bench)
S.A. No.42 (VAT) of 2016-17
&
S.A. No.60 (VAT) of 2016-17

(Arising out of order of the learned JCST, Cuttack-I Range,
Cuttack in First Appeal Case No. 106121512000059
disposed of on dated 29.02.2016)

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

S.A. No.42 (VAT) of 2016-17

M/s. G.K. Pulses Manufacturing Pvt. Ltd.,
Mahatab Road, Cuttack ... Appellant

-Versus-

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

S.A. No. 60 (VAT) of 2016-17

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

-Versus-

M/s. G.K. Pulses Manufacturing Pvt. Ltd.,
Mahatab Road, Cuttack ... Respondent

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

Date of hearing: 17.08.2020 ***** Date of order: 15.09.2020

O R D E R

. Instant appeals are directed against the impugned order dated 29.02.2016 promulgated in Appeal No. 106121512000059 by the learned Joint Commissioner of Sales Tax, Cuttack-I Range, Cuttack (in short, 'FAA') partly

confirming the order of assessment dated 01.05.2015 passed by the learned Sales Tax Officer, Cuttack-I Central Circle, Cuttack (in short, 'AA') under Section 42(1) of the Odisha Value Added Tax Act, 2004 (in short, 'the Act') for the assessment period 01.04.2012 to 31.03.2014 vis-a-vis the dealer assessee on the stated ground(s).

S.A. No. 42 (VAT) of 2016-17:

2. This appeal is at the behest of the dealer assessee on the grounds that the points so raised before the FAA were not specifically adverted to and thus, a gross error was committed; since Section 41(4) of the Act was not duly complied with, the proceeding under sub-Section (1) thereof is invalid; and levy of purchase tax as per Section 12 of the Act is an act of clear non-application of mind. In fact, the validity of the proceeding has been questioned for non-compliance of Section 41(4) of the Act. It is urged that as per the aforesaid provision (as it stood prior to 01.10.2015), on completion of tax audit under sub-section (3) thereof, the authorized officer, who conducted the audit, within seven days from the date of completion of audit, was required to submit the Audit Visit Report (in short, 'AVR') to the assessing authority with all the documents evidencing the suppression of purchases or sales or both, erroneous claims of deductions including ITC and evasion of tax, if any, relevant for the purpose of investigation, assessment, or such order purposes but it has not been accomplished within the time specified, hence, the assessment and demand as a consequence is liable to be quashed. On the contrary, the State contend that there has been no infraction of Section 41(4) of the Act for the fact that the audit, soon after it was over, without any amount of delay,

the AVR was prepared and along with the documents forming part of the audit record, was sent to the office of Joint Commissioner of Commercial Taxes, Cuttack-I Range, who is, apparently, the head of the Range and is also an assessing authority under the Act. The contention so raised by the dealer assessee suggests that the delay occasioned, since the AVR was not submitted as soon as and within seven days from the date of completion of audit, as it was received by the Joint Commissioner of Commercial Taxes, Cuttack-I Range, who has not been the assessing authority. According to the State, there was no delay, as the AVR in form VAT-303 along with other documents forming part of audit record was received by the office of the Joint Commissioner of Commercial Taxes, Cuttack-I Range on 31.10.2014 after the audit was completed. With respect to the above, the learned ASC (CT) referring to the record contended that on different dates, the audit was held, later to the issuance of form VAT-301 instructing the dealer assessee to be ready and prepared with the record and books of account for examination by the audit team and while doing so, unfolded the events that took place on and from 15.07.2014 to 30.10.2014 and ultimately, claimed that after final verification, the AVR was prepared in Cuttack-I Central Circle and on 31.10.2014, the same with all documents of the audit record was despatched to the office of Joint Commissioner of Commercial Taxes, Cuttack-I Range, Cuttack, who is the head of the Range, besides being an assessing authority. It is contended that as per Section 2(4) of the Act, the term 'assessing authority' has been defined, which includes a Joint Commissioner of Sales Tax to function and discharge the duties of an assessing authority by issue notification under Section 3 thereof and in the instant case, when

Joint Commissioner of Commercial Taxes, Cuttack-I Range happens to be an assessing authority, the AVR with the audit record was submitted to him for the purpose of assessment in terms of Section 42 of the Act and under such circumstances, on the ground that it was not really being sent to the assessing authority and thus, Section 41(4) was not duly complied with does not hold water. On a bare perusal of record of assessment, it is revealed that the dealer assessee was instructed to remain ready for examination of record and books of account after form VAT-301 was issued on 10.06.2014 and the audit continued till 30.10.2014 and in between, the Director of the dealer assessee was examined, who also produced certain documents on 30.10.2014 and finally, on 31.10.2014, the AVR was prepared. The Tribunal does not find any delay in concluding the audit and preparation of the AVR which bears the date of receipt thereon as 31.10.2014 by the office of the Joint Commissioner of Commercial Taxes, Cuttack-I Range, Cuttack. To allege that the AVR was not received by the assessing authority, who was to take up the assessment as per Section 41(4) of the Act, rather, submitted to the Joint Commissioner of Commercial Taxes, Cuttack-I Range, Cuttack and as such, there is violation of Section 41(4) of the Act is totally misconceived. Indeed, the Joint Commissioner of Commercial Taxes, Cuttack-I Range, Cuttack is also an assessing authority to whom the AVR was sent and who could even entrust assessment to any subordinate officers and to claim that such was not received by the assessing authority within the stipulated time and therefore, Section 41(4) was not complied is clearly unsustainable. That apart, at no point of time, any such objection was ever raised by the dealer assessee, in that behalf. If the AVR was

submitted and received by the head of the Range, in what way the dealer assessee was prejudiced, as a result, is beyond one's comprehension. Besides the above, the learned ASC (CT) by referring to an order dated 02.03.2016 of the Hon'ble Court in the case of Kalka Trading Agency Vs. Commissioner of Commercial Taxes in W.P.(C) No. 1132 of 2016 pointed out that the audit is essentially an administrative function and as such, not quasi-judicial in nature and for that matter, no prejudice in any manner would be caused. As per the State, such a provision to submit the AVR within seven days from the date of completion of audit for the purpose of assessment is directory in nature as held in Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. reported in (2003) 2 SCC 111. It is further contended that the dealer assessee, even though, participated in the assessment proceeding, raised no objection, which it could have in view of Rule 49(3) of the Odisha Value Added Tax Rules, 2005. A reference is also made to Section 98 of the Act, while opposing the contention of the dealer assessee, in this regard. It is again urged that an appeal under Section 78 of the Act cannot be expected to encompass such a question, either. Admittedly, as per Section 42(4) of the Act, the AVR is to be submitted within seven days from the date of completion of the audit. According to sub-section (6) of Section 42 of the Act, an assessment shall have to be completed within a period of six months from the date of service of notice under sub-section (1) along with the AVR. A scheme is prescribed in Section 42 of the Act vis-a-vis the audit assessment and the time limit within which it has to be completed. Having regard to the above, the Tribunal holds that on such a ground the validity of the assessment proceeding cannot be permitted to be questioned. By no stretch of

imagination, it can be said that the AVR was not prepared in time. The record clearly reveals the events as to audit inspection and its culmination on 30.10.2014. In fact, the learned Counsel for the dealer assessee referred to a decision of the Hon'ble Court in the case of M/s. Jindal Stainless Ltd. Vs. State of Orissa reported in (2012) 54 VST 1 (Orissa) while contending that if the AVR was not prepared and submitted within time prescribed, the assessment and demand thereof stands invalidated. In the decision (supra), the Hon'ble Court on account of delay of six months in preparing and submitting the AVR and having regard to the spirit of the law concerning the assessment under Section 42 of the Act held and observed that such inordinate delay defeats or frustrates the very scheme of the Act and under such circumstances, declared the AVR as having no validity. However, the said decision is inapplicable to the facts and circumstances of the present case. In absence of any serious prejudice being caused to the dealer assessee and having regard to the totality of the circumstances, the Tribunal is of the considered view that said contention of the dealer assessee is not at all tenable and thus, has to be rejected outrightly.

3. Leviability under Section 12 of the Act is also the subject matter of dispute inter se parties. The learned Counsel for the dealer assessee contends that no tax under Section 12 of the Act would have been levied, when it was revealed to be a branch transfer and in this regard, cited a ruling of the Hon'ble Punjab & Haryana High Court in the case of Goodyear India Ltd. Vs. State of Punjab & Haryana reported in (1983) 53 STC 163 (P&H). It is contended that merely on account of despatch of scheduled goods to a branch situated outside the State

does not make it liable to tax under Section 12 of the Act, inasmuch as, a 'despatch' is no synonymous with 'disposal', which is, in fact, contemplated therein. Also referring to Article 269 of the Constitution of India, 1950 and Section 6-A of the Central Sales Tax Act, 1956 (in short, 'CST Act'), it is urged that issue on Section 12 of the Act is accordingly to be decided. Under Section 6-A of the CST Act, a branch transfer is exempted from taxability. Taking an analogy, as is made to understand by the Tribunal, the learned Counsel for the dealer assessee is claiming an exemption in view of branch transfer of the scheduled goods and its despatch outside the State. The learned ASC (CT) for the State strongly opposed said contention and claimed that the scheduled goods sent outside the State otherwise than by way of sale, as in the present case, moong dal after being purchased from the cultivators/persons who are not registered under the Act were despatched, does come within the sweep of Section 12 of the Act. As regards the procurement of raw materials utilized in the manufacture of scheduled goods, there is ample evidence on record to suggest that it was so collected from unregistered sources and after the goods were made therefrom had been despatched out of the State. A reference may be had to the information shared by the Director of the dealer assessee in that behalf being a part of record, which is not really objected to by the learned Counsel for the dealer assessee. Thus, it has to be held that there was procurement of raw materials for manufacture of scheduled goods from unregistered dealers. In such an event, on the disposal of the scheduled goods made from the raw materials procured from unregistered sources, it would be liable to tax under Section 12 of the Act, which envisages that every dealer who

purchases or receives any taxable goods from a registered dealer on which no tax has been paid, or from any person other than a registered dealer shall be liable to pay tax on the purchase price or prevailing market price of such goods, if after such purchase or receipt, the goods are not sold within the State or in course of inter-State trade or commerce or export, but are disposed of otherwise; or consumed or used in manufacture of goods declared to be exempted from tax under the Act; or after their use or consumption in the manufacture of goods, such goods are disposed of otherwise than by way of sale in the State or in course of inter-State trade or commerce or export; or used or consumed otherwise and such tax shall be levied at the same rate at which tax under Section 11 would have been levied. In the instant case, when raw materials were procured from unregistered dealers, as is prima facie established, the dealer assessee is, therefore, liable to pay the tax subject as per Section 12(ii)(c) of the Act. No one is in denial that scheduled goods manufactured out of the raw materials so collected from the unregistered sources have been despatched out of the State to one of the branches of the dealer assessee. At this juncture, the learned Counsel for the dealer assessee placed reliance on the decision in Goodyear India Ltd. ibid and raised a point that since it was merely a despatch of scheduled goods outside a branch of the dealer, there can be no tax leviable under Section 12 of the Act, if it is examined in juxtaposition to Section 6-A of the CST Act. The Tribunal critically examined the aforesaid decision of the Hon'ble Punjab & Haryana High Court. The decision (supra) was, in fact, overruled in Des Raj case reported 58 STC 398, but subsequently, stood approved by the Hon'ble Apex court in M/s. Goodyear India

Ltd. Vs. State of Haryana reported in AIR 1990 SC 781. If the said decisions are sincerely read and properly appreciated, it would appear that on the despatch of scheduled goods manufactured out of raw materials purchased from unregistered dealers as introduced by a notification was under challenge and in that context, the Hon'ble Punjab & Haryana High Court held that on a despatch, which is not a disposal, purchase tax cannot be levied, as it is in contrast to Section 9 of the Haryana General Sales Tax Act. If the decision of the Hon'ble Apex Court ibid is appreciated in its proper perspective, it would further suggest that the ruling of the Hon'ble Punjab & Haryana High Court in that case was approved on the ground that despatch of scheduled goods and imposition of tax thereof by way of a subordinate legislation is in contrary to the spirit of Section 9 of the Haryana General Sales Tax Act and that apart, the State cannot have any such competence to introduce a tax in respect of stock/branch transfers/consignment sales, which is a subject lying within the domain of the Government of India. The notification, as such, was held ultra vires and was invalidated by the Hon'ble Apex Court in Goodyear India Ltd. ibid. In view of the above, it cannot, thus, be said that even a branch transfer of scheduled goods by the dealer assessee is to escape from the tax net leviable under Section 12 of the Act. The purpose of despatching of the scheduled goods out of the State even to a branch of the dealer assessee does invite imposition of tax since such it is ultimately to result in disposal thereof. In the event of disposal of the scheduled goods, purchase tax is leviable and in the instant case, the goods manufactured from raw material procured from unregistered sources had been despatched for the purpose of its disposal other than by way of

sale inside the State or in course of inter-State trade or commerce or export. There can as well be no analogy made applicable by taking refuge to Section 6-A of the CST Act, which is solely concerned with despatch of scheduled goods to another branch and not a sale or disposal since the proprietorship is retained by the dealer till it is sold. So, the conclusion of the Tribunal is that the contention of learned Counsel for the dealer assessee that the scheduled goods could not be levied with purchase tax for being a despatch out of the State by citing ruling of the Hon'ble Punjab & Haryana High Court is totally misconceived.

4. One more aspect is under consideration of the Tribunal which is respecting the penalty and according to the learned Counsel for the dealer assessee, it was absolutely unwarranted as against the background of facts that collection of tax for a whole turnover instead of particular tax period at the time when one cannot predict, whether, the manufactured scheduled goods are to be sold inside or outside the State and what would be the quantity of disposal of goods outside the State and for that matter, the assessing authority was needed to invoke Section 38 of the Act at the time of scrutiny of returns in order to facilitate to rectify any such anomaly. Indeed, as per the assessment order dated 01.05.2015, the ratio of production of finished goods from the raw material is about 74% of the raw materials consumed, but according to the learned Counsel for the dealer assessee, the calculation of tax on purchase is 100%, which is against such a finding of fact. Of course, said question was required to be examined by the AA as to the extent of scheduled goods disposed of outside the State and whether, it was in respect of the entire turnover or earmarked to particular tax period in view of the

fact that one was indeterminate as to how much of goods were to be sold outside as also inside the State. At the time of scrutiny of returns, any error or omission in respect thereof could have been rectified as is permissible under Section 38 of the Act.

S.A. No. 60 (VAT) of 2016-17:

5. Briefly, the State has preferred the appeal under Section 78 of the Act vis-a-vis the impugned order of the FAA which is with respect to imposition of penalty and its quantum as the penalty was reduced to one time instead of twice the amount of tax assessed as leviable under Section 42(5) of the Act on the ground that it is ex facie illegal. The AA had levied penalty under Section 42(5) of the Act twice the amount of tax assessed, but it was reduced to one time of tax by taking shelter to Odisha Value Added Tax (Amendment) Act, 2015 w.e.f. 01.10.2015, which is strongly objected to by the Revenue on the ground that such reduction in quantum of penalty applying the amended Act could not have been resorted to by the FAA since such change in law cannot have a retrospective effect, particularly, when the transactions in hand pertain to the tax period are related to an anterior date i.e. prior to Odisha Act 7 of 2015. Admittedly, the aforesaid amendment was brought into force w.e.f. 01.10.2015, which is later to the tax period in question. The learned Counsel for the dealer assessee contended that in view of the amendment ibid, the FAA did not commit any wrong and rightly, considered imposing a penalty one time of the assessed tax, if at all such imposition or levy of penalty is considered to be legal and justified. The learned ASC (CT) cited the decisions, such as, Bansapani Iron Ltd. Vs. State of Orissa: 2016 (I) Cuttack 50; Reliance Industries

Ltd. Vs. Commissioner of Sales Tax: 2020 (I) OLR 117; Shree Bhagwati Steel Rolling Mills Vs. CCE: (2016) 3 SCC 643; and many more to contend that the FAA did commit a serious wrong to apply the amended Act and in reducing penalty to an amount equal to the amount of tax assessed under sub-section (5) of Section 42 of the Act. The sum and substance of the argument from the side of the State is that for a tax period prior to the amended Act, the penalty should have been twice the amount of tax assessed, as the amendment to Section 42(5) of the Act cannot be applied retrospectively. It is also contended that a law which is brought into force by way of amendment or changes made therein by whatever means, using expressions 'delete', 'omit', 'repeal' etc. must have to be prospective in nature, unless and until, a contrary intention is clear and apparent. Let us examine the said aspect. A substantive law is always considered prospective in its application. A procedural law, on the other hand, is usually applied retrospectively. But, such application of substantive as well as procedural laws can otherwise be made applicable with a contrary intention expressed. By necessary implication, a law can be applied prospectively or retrospectively which depends on the intention of the legislature. In this regard, it would be profitable to make a mention of a ruling of the Hon'ble Apex Court in the case of Commissioner of Income Tax Vs. Vatika Township Pvt. Ltd. reported in 2014 AIR SCW 5674, wherein, while considering the effect of proviso to Section 113 of the Income Tax Act, which was inserted by Finance Act, 2002, it was held and observed that a legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a Court of law; there is a technique required to draft a legislation as well as to

understand the same, as the former is about legislative drafting, whereas, the later is respecting interpretation of statute; and considering various rules guiding interpretation of legislation, one established rule is that unless a contrary intention appears expressly or impliedly, a legislation is presumed not to be intended to have a retrospective operation, the idea behind such a rule is that a current law should govern the current activities and cannot, thus, be applied to the events of the past, which is based on the principle of fairness, a legal rule which was introduced in a judgment legal classical on the point in L'Office Cherifien des Phosphate Vs. Yamashita Shinnihon Steamship Co. Ltd. It is apposite to make a mention that in the decision (supra), the Hon'ble Apex Court further held and observed that when a benefit is conferred by a legislation, the rule against a retrospective construction is quite different; if a legislation confers a benefit on some person(s) without inflicting a corresponding detriment on some other person or public generally and where to confer such benefit appears to have been the legislator's object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect and such is precisely the justification to treat procedural provisions as retrospective. The aforesaid decision of the Hon'ble Apex Court is referred to in one of its later judgment in the case of Commissioner of Income Tax Vs. Essar Teleholdings Ltd. in Civil Appeal No. 2165 of 2012 decided on 31.01.2018. Hence, a rule of beneficial construction based on principle of fairness is stated to be the ratio laid down by the Hon'ble Apex Court in Vatika Township Pvt. Ltd. case ibid. The Tribunal sums it up by concluding that if a law is beneficial and it is unlikely to affect any other person

or public at large is to be applied retrospectively. Such a construction is equally applicable to taxation laws. If a disability is created under a law, it cannot be applied from an anterior date since that would substantially prejudice the litigants, who have acted under the legislation earlier prevailed. But, in a situation where a benefit is granted as to the rigour of law and in that respect, a law or amendment is introduced, the same can be applied retrospectively, only if the object of such a law is simply to benefit the litigant and not to affect someone else's right. Having said that, in so far as the present case is concerned, for a penalty under Section 42(5) (pre-amended) which was twice the amount of tax assessed was reduced to an amount equal to the amount of tax as assessed under sub-section (3) or (4) thereof, it has to be held that such a change in law by omission vide Odisha Value Added Tax (Amendment) Act, 2015 w.e.f. 01.10.2015 is to be applied with retrospectivity in view of the ratio enunciated by the Hon'ble Apex Court ibid. Having concluded so, the Tribunal arrives at a decision that the FAA did not commit any wrong and rightly invoked Section 42(5) of the Act and levied a penalty to an amount equal to the amount of the tax assessed. On the discretion of the assessing authority vis-a-vis the levy of penalty, a good number of citations are referred to by the learned ASC (CT) so as to contend that imposition of penalty under Section 42(5) is mandatory in nature considering the term 'shall' employed therein. The cited rulings are not reproduced which form part of the written note of submission and considering the same, the contention of the learned ASC (CT) as it appears to be that the levy of penalty under Section 42(5) of the Act since contains no element of mens rea, once the default is established, the assessing authority

shall have no option left but to impose it. According to the Tribunal, in case of criminal liability, intention or mens rea is the rule and absence of it is an exception, whereas, in civil liability, the reverse is the phenomenon. In other words, it depends on the intent and purport of the law to demand existence or otherwise of guilty intent or mens rea irrespective of whether it is a criminal or civil liability. In the case of Section 42(5) of the Act, no doubt element of mens rea is absent, but whether to impose the penalty or not is dependent on the conduct of the assessee. If an assessee under a bonafide impression or on account of an error or mistake without any malafide defaulted in paying tax, by such conduct, it would not be justified to impose penalty and under such circumstances, a discretion remains with the assessing authority. In the case at hand, having regard to the circumstances under which purchase tax was not paid which is in relation to the taxable goods used and utilized in manufacture of finished products and having regard to the claim of the dealer assessee that considering the uncertainty in disposal of the quantity of goods inside or outside the State and extent thereof and an opportunity was there to allow rectification of any such error or omission in the return in view of Section 38 of the Act, there was indeed a necessity to ponder, if at all, penalty under Section 42(5) of the Act was to be levied. Thus, the inevitable conclusion of the Tribunal is that even though wilful concealment is not an essential ingredient of Section 42(5) of the Act, but since a scheme of thing is prescribed therein, the assessing authority on the face of the contentions of the dealer assessee as discussed herein before ought to have considered, whether, to levy a penalty or otherwise.

6. Hence, it is ordered.

7. In the result, S.A. No. 42 (VAT) of 2016-16 stands allowed in part, whereas, S.A. No. 60 (VAT) of 2016-17 is dismissed. As a logical sequitur, the impugned order dated 29.02.2016 promulgated in Appeal No. 106121512000059 is hereby confirmed to the extent indicated. For the reasons discussed herein above, the AA is directed to reconsider and examine, whether, in the peculiar facts and circumstances of the case, imposition of penalty under Section 42(5) of the Act would be justified and such exercise is to be expedited and completed preferably within a period of three months from the date of receipt of a copy of the present order after providing a reasonable opportunity to the dealer assessee and keeping in view the findings and observations of the Tribunal, as aforesaid. The cross-objection filed in S.A. No. 42 (VAT) of 2016-17 is disposed of accordingly.

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