

BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.
S.A.No. 144(V)/2016-17

(Arising out of order of the Id.JCST(Appeal), Bhubaneswar Range, Bhubaneswar,
in Appeal No. AA-106221422000206/OVAT/BH-II,
disposed of on dtd.18.04.2016)

Present: Sri S. Mohanty
2nd Judicial Member

M/s. Signature Sales Pvt. Ltd.,
Plot No.657, Saheed Nagar,
Bhubaneswar. ... Appellant

-Versus-

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

For the Appellant : Mr. D.S. Jethi, Advocate

For the Respondent : Mr. S.K. Pradhan, Addl. Standing Counsel (C.T.)

Date of Hearing: 08.05.2018 *** Date of Order: 08.05.2018

ORDER

This tax appeal is preferred by the dealer against a confirming order of the learned First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (in short, FAA/JCST) raising demand of tax and penalty in a proceeding u/s.42 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act).

2. The assessee-dealer in this case engaged in trading of computer spare parts, its peripheral and accessories, telephone sets, electronic goods, EPABX etc. It effects purchases both from inside and outside the State of Odisha. For the tax period 01.04.2011 to 31.03.2013, audit assessment was initiated basing on an audit visit report submitted by Audit team, Bhubaneswar. The allegation in the Audit Visit Report were, the dealer had purchased goods worth of Rs.24,500/- on payment of VAT of Rs.1,225/- vide bill no.2051531 dtd.10.07.2012 but had not entered it in the purchase register. The Assessing Officer rejected the plea of the dealer that the goods under the aforesaid bill were purchases and used in the business premises and was not meant for sale. Thereafter, adding 10% profit margin to it, he calculated tax besides, penalty as per the provision u/s.42(5) of the OVAT Act. Further, he has also imposed

interest and penalty u/s.34(1) and 34(2) for non-filing of return in time. The total demand raised to Rs.1,00,986/-. In appeal, the First appellate authority vide impugned order also did not accept the plea of the dealer that, the goods were purchased for use by the dealer and thereupon he confirmed the assessment of the Assessing Officer.

3. Being dissatisfied and aggrieved by the impugned order, the dealer has preferred this appeal with the contentions like, the Audit Visit Report was not submitted within the stipulated period of 7 days, as such the entire audit proceeding is vitiated as not maintainable. It is further contended that, there was no purchase suppression by the dealer and taking into account of the dealer's plea that, the goods under the particular bill was purchased for use, the suppression and tax due raised thereon should be deleted.

4. The appeal is heard with no cross objection.

5. The following questions are formulated for determination in this appeal :

- (i) Whether the audit assessment is not maintainable as the provision u/s.41 has not been duly complied with by submitting audit visit report within 7 days.
- (ii) Whether the findings of purchase suppression by both the fora below are unfounded and not sustainable.

6. In this appeal, the claim of the dealer is audit team had visited his unit on 25.05.2013 whereas notice of audit assessment was issued on 20/21.08.2014, it was received on 08.09.2014 and as per the notice the date was fixed to 24.09.2014. Learned counsel for the dealer argued that, when the audit visit was made on 25.05.2013, but the audit notice was served on him on 08.09.2014 in that case for gross violation of provision u/s.41(4) of OVAT Act, the entire audit proceeding should be vitiated. He placed his reliance in the matter of **M/s. Jindal Stainless Ltd. Vrs. State of Orissa and Others (2012) 54 VST Page 1**. He also advanced the Circular No.III(I)38/09-13380/CT dt.24.07.2009 of the Commissioner of Commercial Taxes, Cuttack whereby, it is directed by the Commissioner to the authorities to put signature and date on the audit visit report. It is argued that, the audit report in this case does not contain date and it is intentionally omitted just to save the inordinate delay of more than one year.

Per contra, learned Addl. Standing Counsel Mr. Pradhan argued that, the Audit Visit Report was made on 25.05.2013. However, the verification was completed only on 22.03.2014. Once the audit was completed the AVR was submitted on 23.04.2014 i.e. within 7 days is required under the provision u/s.41(4) of the OVAT Act. So, there is no delay in submission of the audit visit report. Further, he argued that, submission of Audit Visit Report is always an inter-departmental matter. Unless and until assessment proceeding is initiated, the dealer has no say on the inter-departmental communications. Provision u/s.41(4) as prevalent on the day of visit was, the officer authorized to conduct tax audit u/s.41(3) shall, within 7 days from the date of completion of audit, submitted the audit report to be called "Audit Visit Report" to the AO in the prescribed form along with the statement recorded and documents obtained evidencing suppression of purchase and sale. Learned Addl. Standing Counsel argued that, the record as it reveals, the audit team took time for preparation of the report and when the provision mandates, the audit reports should be submitted within 7 days from completion of the audit, then, it cannot be said that there was any delay caused in this case. He put emphasis on the interpretation of the term "completion of audit" as mentioned in the section. Adverting to the case in hand, here it is found that, audit team has reported about a single instance of purchase suppression against a single bill. It was detected on 25.05.2013 during visit to the dealer's unit. I failed to appreciate the reason advanced by the Revenue that, why and how such a long period from 25.05.2013 to 22.03.2014 found required for preparation of the AVR. It reveals, the audit team had not prepared the report in time and they only could manage to put dates on record to show that the verification was completed only on 22.03.2014 and the Audit Visit Report was submitted on 26.03.2016. It is also found that, the AVR does not contain the date and signature of the officer. If that be, whether such latches/irregularity can vitiate the entire assessment proceeding. The provision is silent what should be the time period for completion of audit. In the case in hand, it seems the report was not prepared for about 10 months. In **Pal Construction Vrs. Assessing Authority in W.P.(C) No.16957/2009** vide Order dtd.22.10.2004, the Division Bench of the Hon'ble Court which includes the Hon'ble Judge, who was the author of Jindal Steel

Ltd. (supra) has taken note of the judgment has referred the matter to larger Bench framing the following questions :

“Whether non-submission of the Audit Visit Report to the Assessing Authority within 7 days from the date of completion of audit as contemplated u/s.41(4) of the OVAT Act raised the audit visit report invalid and assessment made on the basis of such audit visit report is illegal ?

It may be noted here that, while referring the matter to the larger Bench in the latter decision, the Hon’ble Court has not expressed their views on the application of the earlier view taken in Jindal Stainless Steel (supra). In that event, we are constrained to accept the earlier view, which is not overruled till date. Here we can say there was inordinate delay in preparation of Audit Visit Report.

7. Here in this case, the allegation is, the dealer had not accounted for purchase of certain goods like optical fibre switches of Rs.24,500/- purchased from Reddington India Ltd., Highway Complex, Balipatna, Cuttack. It was purchased in the name of dealer’s unit putting the TIN No. on the bill. Basing the seized bill, learned Addl. Standing Counsel argued that, since it was purchased in the name of the dealer giving the TIN No. in the bill it can safely be said that, it was purchased for sale purpose and the dealer was guilty of purchase suppression leading to sale suppression. Per contra, argument of the dealer is, it was purchased to use in the business premises and it was never a purchase for sale. The dealer had not claimed any ITC on it and for the reason the theory of audit team should not be accepted. The dealer had taken the same stand before the AA as well as before the FAA. The AA discarded the stand saying that, the dealer had not taken the stand at the first instance before the audit team. The statement of the dealer before the audit team reveals, the dealer has mentioned it as unintentional mistake. The statement is not a clear admission of purchase suppression as well as not a clear plea of purchase for personal use. A single suppression was detected covering the entire tax period of the dealer in question i.e. from 01.04.2011 to 31.03.2013. The dealer has not claimed ITC on this purchase. If the whole factors are taken into account, the plea of the dealer does not seem to be improbable. The dealer was not found guilty of purchase suppression of any items he was dealing by that period, save

and except the only item and according to him it was fixed in his business premises for his use. He neither entered it in the register nor has claimed ITC against that purchase. In the totality of the facts, the dealer's plea is accepted as quite probable. Hence, it is held that, the purchase suppression as determined by both the fora below is not sustainable.

Keeping in view the discussion above, it is held that, the dealer is not liable to pay the tax and penalty for the purchase/sale suppression of Rs.24,500/-. Accordingly, it is ordered.

The tax appeal is allowed on contest. The impugned order is modified to the extent of deletion of purchase suppression and penalty thereon. However, the interest and penalty for delay filing of returns is confirmed.

Dictated and Corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

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