

BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.
S.A.No. 49(V)/2017-18

(Arising out of order of the Id.JCST (Appeal), Bhubaneswar Range,
Bhubaneswar, in Appeal No. AA-106221622000164,
disposed of on dtd.28.02.2017)

Present: Sri S. Mohanty
2nd Judicial Member

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

.... Appellant

-Versus-

M/s. Panda NX Motors,
Bhubaneswar.

... Respondent

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

For the Respondent : Mr. N.R. Swain, Advocate

Date of Hearing: 11.05.2018 *** Date of Order: 14.05.2018

ORDER

This appeal is directed against the order of learned First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (in short, FAA/JCST) in First Appeal Case No. AA-106221622000164 dtd.28.02.2017 in deleting the demand of tax with penalty in the order of assessment passed by Assessing Officer/Sales Tax Officer, Bhubaneswar-IV Circle, Bhubaneswar (in short, AO/STO) for the assessment period from 01.04.2013 to 31.03.2015 u/s.42 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act).

2. Brief fact of the case is; on the basis of Audit Visit Report (AVR) with the allegations of purchase suppression leading to sale suppression, mis-match of ITC and wrong claim of ITC, the AO initiated proceeding u/s.42 of the OVAT Act for the tax period 01.04.2013 to 31.03.2015 of the dealer, who is a trader of automobile spare parts. The dealer was found not maintaining stock register. On physical verification of the dealer's unit, the Audit team found that, the dealer had physical stock of goods worth of Rs.24,53,450/-, but as per the books of account of the dealer, the value of stock was Rs.25,60,000/-. Accordingly, the dealer was found shortage of stock of goods of Rs.1,06,550/-. The dealer admitted the suppression detected, however, had prayed for levy of

tax @5% on the goods worth of Rs.78,500/- and @13.5% on the goods worth of Rs.28,050/-. The AO did not agree with the ratio argued by the dealer and thereafter in consideration of the purchase of the goods, effected by the dealer during tax period he arrived at a conclusion that, out of the suppression amount of goods of Rs.18,113.50 should be levied with tax at 5% and goods of Rs.88,436.50 should be taxed at 13.5%. The total balance tax due was determined at Rs.12,844.59.

So far as allegation of mis-match in ITC is concerned, the dealer could submit details of documents to the satisfaction of the AO. As such, charge of mis-match in ITC was dropped. Accordingly, the AO raised demand of tax of Rs.12,844.59 and in addition to that, penalty u/s.42(5) of the OVAT Act i.e. equal to amount of tax was also imposed. Accordingly, total demand raised to Rs.22,578/-.

3. Being dissatisfied with the demand of tax as raised, the dealer had preferred first appeal. The FAA at the appellate stage deleted the tax due and penalty.

When the matters stood thus, State being aggrieved, has preferred this appeal with the grounds that, the FAA has wrongfully deleted the sale suppression and penalty as imposed by the AA.

4. In the case in hand, it is to be seen that, whether the FAA was correct in his view to hold that, there was no purchase suppression leading to sale suppression and the consequential levy of penalty u/s.42(5) of the OVAT Act is wrong. Bare reading of the impugned order as it reveals, the order of FAA is full of surmises and conjectures. He has relied on some decisions of the Hon'ble Courts which are not applicable to the case in hand. In the assessment proceeding, the AO found stock discrepancy and held that, the dealer was guilty of suppression of stock to the tune of Rs.1,06,550/-. The statement of the dealer before the Audit team available in the LCR revealed, the dealer himself had admitted the fact of suppression, non-maintenance of stock register, and the dealer had prayed for levy of tax on the goods in proportion applicable against the goods. According to the dealer out of the total amount of stock discrepancy goods of Rs.78,500/- should be calculated @5% tax and balance Rs.28,050/- should be calculated at 13.5% tax. On the other hand, it is the AO, who has

taken into consideration of the total sale-purchase of the dealer as per the books of account and in comparison to stock discrepancy, determined goods of Rs.18,113.50 to be taxed @5% and goods of Rs.88,436.50 to be taxed @13.5%. This calculation of AO is based on verification of the documents. Discrepancy in stock admitted by the dealer. The dealer has volunteered to pay the tax. But it is peculiar to take note of the fact that, the FAA has deleted the finding of suppression and treated the tax due as Nil. Thus, it is held that, the finding of the FAA on stock suppression is illegal and not sustainable.

As regards to imposition of penalty as per 42(5) of the OVAT Act, the FAA has deleted penalty saying, there was no stock discrepancy, no tax due and further, basing the ratio in authorities reflected in the impugned order, he has arrived at a conclusion that, the dealer is not required to pay the penalty. The provision he quoted is wrong. The authority he relied is contrary to the finding like there was no tax due on the dealer. So, the findings are whimsical and unsustainable.

Learned Counsel for the dealer argued that, the ratio of the goods taxed @5% and 13.5% as calculated by the AO is wrong. In his cross objection, he has advanced a plea that, the GTO and TTO as calculated by the ACST is wrong. He has not taken the plea for the ratio of goods of two different tax rates. So, this argument has no legs to stand. The discrepancy of tax due as calculated by the AO found to be correct and hereby confirmed. The dealer has not shown any bona-fidencess for unintentional mistake on his part against the stock discrepancy. He is guilty of not maintaining stock register as he has admitted the tax suppression as determined by the AO. In such event, there is no reason to disbelieve her own statement. Resultantly, it only can be said that, the penalty as per Sec.42(5) of the OVAT Act is a must. In **M/s. Jindal Stainless Ltd. Vrs. State of Orissa and Others (2012) 54 VST Page 1** the Hon'ble Court held that :- "we are of the considered view that Section 42(5) of the OVAT Act authorizing imposition of penalty equal to twice the amount of tax assessed under Section 42 rule (3) or (4) of the OVAT Act is constitutionally valid. It is not arbitrary, unreasonable, oppressive, or hit by Article 14 in any way ultra vires the Constitution of India. Keeping in view the authoritative pronouncement it only can be said that there is no scope but to impose penalty.

The appeal is allowed on contest. The impugned order under challenge is set-aside. The order passed by the FAA is restored. Demand of tax be raised accordingly.

Dictated and Corrected by me,

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

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