***BEFORE THE JUDICIAL MEMBER-I:***
***ODISHA SALES TAX TRIBUNAL: CUTTACK.***

***S.A. No. 81(V) of 2018***
(Arising out of the order of the learned JCST (Appeal), Sundargarh Range, Rourkela, in First Appeal Case No. AA V 51 of 2012-13, disposed of on dtd.06.12.2017)

**P r e s e n t: Shri A.K. Dalbehera, O.S.J.S.**
**M.A., LL.M.**
**1st Judicial Member**

M/s. Kaushal Ferro Metals (P) Ltd.,
At:- Badbahal, P.O.- Kundukela,
Dist.- Sundargarh-770019 (Odisha). ... Appellant

**- V e r s u s -**

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

For the Appellant ... Mr. D.K. Agarwal, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

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Date of hearing: 03.02.2021 *** Date of order: 19.02.2021

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***O R D E R***

This appeal is directed against the order dtd.06.12.2017 passed by the learned Joint Commissioner of Sales Tax (Appeal), Sundargarh Range, Rourkela (hereinafter referred to as, the learned JCST) in First Appeal Case No. AA V 51 of 2012-13, wherein he reduced the demand to Rs.4,02,161.00 from Rs.6,07,419.00 raised by the learned Sales Tax Officer, Rourkela II Circle, Panposh (hereinafter referred to as, the learned STO) for the assessment period

01.04.2007 to 31.03.2011 u/s.42(4) of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act).

2. The brief facts of the case are that, the appellant-dealer is engaged in manufacturing and sale of sponge iron. The appellant-dealer trades in iron ore fines and had effected purchase as well as sale both in course of interstate and intrastate trade and commerce. As per the Audit Visit Report (in short, the AVR), the allegations were that the appellant-dealer had availed ITC of Rs.34,326.00 on the intrastate purchase of goods such as iron and steel pipe and fittings, bearing, whytheat cement, gear box, G.C. sheet, Tata Cast LC, Kirloskar 3HP motors, MS pipe, MGM steel meter, refractories and castrables, support roller assly coller etc. as capital goods; that the appellant-dealer had availed ITC of Rs.16,86,917.00 on the intrastate purchase of goods such as oil and lubricants, repair paints (P & M), lab chemicals and consumable electrical equipment and maintenance etc. as consumables; that the appellant-dealer had purchased coal from unregistered dealer of Rs.11,34,031.00 during 2007-08 on which neither VAT nor ET was paid. The audit officials suggested to levy tax @ 4%. On the basis of the AVR, the learned STO disallowed ITC of Rs.1,29,377.00 on purchase of consumables and disallowed ITC of Rs.18,584.00 on purchase of capital goods only. The learned STO upheld the finding of the audit officials on the purchase of coal from unregistered dealer valued at Rs.11,34,031.00 and taxed @ 4%. Therefore, the learned STO determined the GTO at Rs.70,41,85,979.00 taking into account the purchases from unregistered dealer of Rs.11,34,031.00. After deduction of VAT collection of

Rs.2,70,40,879.00 the TTO was determined at Rs.67,71,45,100.00. Tax @ 4% on Rs.67,71,45,100.00 was computed at Rs.2,70,85,804.00. The appellant-dealer allowed ITC of Rs.1,93,49,759.00 to be adjusted against output tax liability. The appellant-dealer having paid tax of Rs.75,46,816.00, the balance tax was computed at Rs.1,89,229.00. For the default two times penalty was imposed which came to Rs.3,78,458.00 u/s.42(5) of the OVAT Act and interest of Rs.39,732.00 was levied which altogether came to Rs.6,07,419.00.

3. Being aggrieved by the order of the learned STO, the appellant-dealer preferred an appeal before the learned JCST who reduced the demand to Rs.4,02,161.00. Being aggrieved by the order of the learned JCST, the appellant-dealer has preferred this second appeal.

4. The appellant-dealer has come up with the second appeal on the grounds that the order is bad in law and unjust on facts, that the appellant-dealer has been assessed u/s.42 of the OVAT Act and being aggrieved with the order of the learned STO preferred an appeal before the learned JCST who without going into the merits of the case disposed of the appeal by giving partial relief; that in the present appeal the only dispute is disallowance of ITC on consumables used in the process of manufacturing of sponge iron which is illegal and uncalled for and that the appellant-dealer has lawfully claimed ITC on consumable used in the process of manufacture as mandate u/s.2(25), 2(26) and 2(27) of the OVAT Act, the appellant-dealer has relied upon the judgment of the Hon'ble Orissa High Court in the case of Reliance

Industries Ltd. v. Asst. Commissioner of Sales Tax and Others reported in 15 VST, page-228; that the forum below without assigning any reason and even without considering the provisions of law and the judgment relied upon upheld the disallowance of ITC claimed on consumables, which is nothing but express violation of judicial discipline and therefore claim of ITC on consumables ought to be allowed; that the levy of interest is also illegal, uncalled for and liable to be deleted in view of the judgment of J.K. Synthetics v. CTO (1994) 94 STC 422, where the Hon'ble Apex Court held that "So long as the assessee pays tax according to him on the basis of return, there will be no default on his part to meet his statutory obligation u/s.7 of the Act and therefore it would be difficult to hold that the "Tax payable" by him "is not paid" to visit him with the liability to pay interest under Clause (a) of Section 11(B)"; that levy of interest u/s.34(1)(b) of the OVAT Act is illegal without authority of law as the provisions of Section 34(1)(b) comes into play only in the circumstance of default in filing of returns or failure to pay the tax as per return and that the said provision is not attracted in case of tax determined in the assessment order for which levy of interest is absolutely illegal and liable to be deleted and that the imposition of penalty u/s.42(5) of the OVAT Act is also equally illegal and not sustainable under the provisions of law.

On the other hand, the respondent-Revenue has filed cross objection supporting the order of the learned JCST.

5. Heard the learned Counsel for the appellant-dealer and the learned Addl. Standing Counsel for the respondent-Revenue. Perused the materials available on record so also the

orders of both the fora below. I also perused the grounds of appeal so also the plea taken in the cross objection. In this case it is necessary to determine whether electrical spare parts claimed to have used as consumable fall within the definition of input u/s.2(25) of the OVAT Act which has been disallowed by the learned JCST. In my considered view electrical spare parts under no stretch of imagination shall be said to be consumables directly used in the process of manufacture of goods (sponge iron in this case). I rely on the decision of our own Hon'ble High Court as reported in **(2012) 56 VST 68 (Orissa) in the case of National Aluminium Company Ltd. v. Dy. Commissioner of Commercial Taxes, Bhubaneswar III Circle, Khurda**, where the Hon'ble Court have highlighted about the set off as follows-

> "Input" has been defined in Section 2(25) to mean that any goods purchased by a dealer in the course of his business for resale or for use in the execution of works contract, in processing or manufacturing, where such goods directly goes into composition of finished products or packing of goods for sale, and includes consumables directly used in such processing or manufacturing. Section 2(26) defines "input tax" to mean tax collected and payable under this Act in respect of sale to a registered dealer of any taxable goods for use in the course of his business, but does not include tax collected on the sale of goods made to a commission agent purchasing such goods on behalf of such dealer. "Input-tax credit" as defined

under Section 2(27) of the OVAT Act means the setting off of the amount of input tax or part thereof under Section 20 against the output tax, by a registered dealer other than a registered dealer paying turnover tax under Section 16.

On a conjoint reading of Section 2(25), Section 2(26) and Section 2(27) of the OVAT Act, it is amply clear that a registered dealer under the OVAT Act shall be entitled to set off the tax paid on the purchase of goods effected by such dealer either for resale or for use in execution of works contract or for manufacture and processing against the output tax, that is the tax payable on sale of any taxable goods."

6. The learned Counsel for the appellant-dealer has relied upon the decision of **Reliance Industries Ltd. v. Asst. Commissioner of Sales Tax and Others (2008) 15 VST 228 (Orissa)**. In paragraph-37 of the said judgment it is observed that the very expression "consumables" postulates that such articles are destroyed or used upon the processing or manufacturing of goods. In the said judgment the Hon'ble Court was in seisin over the matter to adjudicate as to whether the furnace oil which is used in the process of manufacture of PSF is to be treated as "input" as defined in section 2(25) of the OVAT and the input tax which has been paid on the purchase of furnace oil can be claimed as input tax credit under section 2(27) of the OVAT Act against the tax payable on finished product i.e. PSF. However, the electrical spare parts in the instant case cannot be made comparable to

furnace oil as being used for manufacturing of PSF. Since the word "consumable" has not been defined in the statute, its dictionary meaning may be taken cognizance of to decide whether electrical spare parts would fall within the ambit of Section 2(25) of the OVAT Act defining input. According to Webster Dictionary the word "consumable" means capable of being consumed by fire. The word 'consume' contemplates that the goods purchased should have been exhausted so that its identity must have been completely lost. Thus, in the absence of any clear clinching evidence on record being adduced by the appellant-dealer before the authorities below as to the nature of use in the process or manufacture, there is no scope for claiming such deduction in respect of electrical spare parts as consumables.

7. The term 'manufacture' defined u/s.2(28) of the OVAT Act means any activity that brings out a change in an article or articles as result of some process, treatment, labour and results in transformation into a new and different article so understood in commercial parlance having a distinct name, character and use but does not include such activity of manufacture as may be notified. It is revealed from the order of the learned JCST that electrical spare parts being not shown to have been directly used for manufacture of sponge iron by the appellant-dealer no ITC thereof ought to have been claimed by the appellant-dealer. Thus, the electrical spare parts without any explanation as to whether it has been directly used in the process or manufacture, the claim of the appellant-dealer for entitlement of ITC has been rightly denied. The expression 'such processing or manufacturing' referred to

in Section 2(25) of the OVAT Act does not comprehend electrical spare part as consumable in the process of manufacture of sponge iron. Thus, the disallowance of ITC is proper and does not need any interference.

8. Now it is pertinent to discuss whether on the facts and in the circumstances of the case the imposition of penalty by invoking Section 42(5) is justified and whether the quantum of penalty can be reduced in view of the amendment in Section 42(5) by virtue of the OVAT (Amendment) Act, 2015 ? From the materials available on record it can be safely said that the appellant-dealer knowing fully well that electrical spare parts would not be treated of being used as consumable it has availed ITC. The appellant-dealer has failed to demonstrate that electrical spare parts were used directly by the appellant-dealer as consumable in manufacturing of sponge iron. Therefore, the authorities below imposed penalty u/s.42(5) of the OVAT Act which is concomitant to the tax assessed. During the period of assessment under question Section 42(5) of the OVAT Act stood as follows:-

> "Without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under sub-section (3) or sub-section (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-sections."

9. The return filed by the appellant-dealer is considered as self assessed. Section 2(47) of the OVAT Act defines the term "self-assessment". Therefore, the first

assessment is to be by the appellant-dealer and the subsequent assessments, if any (e.g. assessments u/s.40, 41, 42, 43 or 44) will be by the authorities under the Act. As a necessary corollary certain dealers are selected on tax audit and the audit team undertakes tax audit as per Section 41 of the OVAT Act read with Rule 41 of the OVAT Rules. As per Section 42(1) of the OVAT Act the assessing authority is competent to take up assessment in the event the audit visit report submitted under the OVAT Act contains:

(i) detection of suppression of purchases or sales or both;

(ii) erroneous claims of deductions including ITC;

(iii) evasion of tax; or

(iv) contravention of any provision of the Act.

Since the learned STO in the instant case found that there was erroneous claim of ITC in respect of electrical spare parts he disallowed the same and invoked the provisions u/s.42(5) of the OVAT Act. The learned STO therefore imposed penalty u/s.42(5) of the Act consequent upon determination of tax liability based on material evidence produced by the appellant-dealer during the course of assessment. Since in the determination of tax liability the learned STO arrived at the figures as “tax assessed”, the penalty being concomitant factor, imposed the same. Interpreting the mandate of imposition of penalty in case of tax delinquency leading to civil consequence, the Hon’ble Apex Court in the case of Union of India v. Dharmendra Textile Processors, (2008) 18 VST 180 (SC) laid down as follows:

> "27. …The object behind the enactment of Section 271(1)(c) read with the explanations indicates that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276C of the Income-tax Act."

10. The Hon'ble High Court of Orissa in Jai Jaganath Marble v. Commissioner of Commercial Taxes (2011) 39 VST 312 (Ori.) = 2010 (II) ILR CUT 226 have held as follows:-

> "11. In this respect, reliance was placed by the Revenue on the decision of the Hon'ble Supreme Court in the case of Union of India Vrs. Dharamendra Textile Processors, (2008) 18 VST 180 (SC) wherein the Hon'ble Supreme Court while considering Section 11AC of the Central Excise Act, 1944 (levy of penalty) determined that the application of the aforesaid Section would depend upon the existence or otherwise of all the conditions stated in the Section. Once the Section is found to be applicable in a case, the concerned authority would have, no discretion in quantifying the amount and penalty must be imposed as stipulated under sub-section(2) of Section 11A of the Central Excise Act. This view has been re-affirmed by the Hon'ble Supreme Court in the case of Union of India Vrs. Rajasthan Spinning & Weaving Mills, (2010) 1 GSTR 66."

The provision contained in Section 42(1) contemplates action for assessment in the events circumscribed therein. Upon examination of the matter, when the assessing authority goes to assess the tax, the amount is required to be visited with penalty as provided under Section

42(5). The principle of law as stated in Union of India Vrs. Dharmendra Textile Processors, (2008) 18 VST 180 (SC) that in case of tax delinquency mens rea is not necessary factor for consideration in order to impose penalty would apply to the present facts and circumstances of the case. The position of law has also been clarified in Jai Jaganath Marble v. Commissioner of Commercial Taxes (2011) 39 VST 312 (Ori.) = 2010 (II) ILR CUT 226.

The Hon'ble Supreme Court in Union of India Vrs. Dharmendra Textile Processors (2008) 18 VST 180 (SC) extracted passage from Corpus Juris Secundum, Vol. 85, at page 580, paragraph 1023 which is as follows:

> "A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

11. The constitutional validity of Sec.42(5) of the OVAT Act was challenged by M/s. Jindal Stainless Ltd. which was answered by the Hon'ble High Court of Orissa vide W.P.(C) No.15962 of 2010 as quoted below:-

> "The matter may be looked into from different angle. Section 42 of the OVAT Act deals with "Audit Assessment". As stated above, imposition of penalty is dependent upon the quantum of tax assessed in audit assessment under Section 42 of OVAT Act. If such a penal provision is not provided then fraudulent dealers would seriously venture to evade tax and whenever they will be caught hold of they will simply pay the tax and escape. Therefore, the provision for imposing penalty twice the amount of tax assessed, under Section 42 of the OVAT Act has been made so that a dealer-assessee would refrain himself from taking any step to avoid

> payment of legitimate tax. If, however, any dealer indulges himself in any fraudulent activities to evade tax, then in addition to tax assessed he would pay penalty which is twice the amount of tax assessed and therefore, it cannot be said that the provision in this regard is arbitrary and unreasonable.
>
> Against the assessment of tax and penalty there is a provision for appeal. In appeal, if the amount of tax assessed under Section 42 of the OVAT Act is reduced, the quantum of penalty will also be reduced automatically.
>
> In view of the above, 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(3) or (4) of the OVAT Act is constitutionally valid. It is not arbitrary, unreasonable, oppressive, or hit by Article 14 or in any way ultra vires the Constitution of India."

12. From the aforesaid discussion it is clear that, the provision of penalty u/s.42(5) of the OVAT Act is of the nature of civil liability. Once a quantum of tax is assessed against an assessee under sub-section (3) or (4), penalty equal to twice the amount of tax assessed has to be imposed automatically. There is no requirement to examine the existence of mens rea or malafide intention. Hence, the stand taken by the appellant-dealer as regards the mens rea is baseless. The imposition of penalty u/s.42(5) of the OVAT Act has no element of criminality. It is consequential to assessment u/s.42 whenever more tax is assessed than what is returned. This is a pure civil liability. Hence, mens rea or criminal intention is absent in provisions u/s.42(5) of the Act. The suppression of tax amounts to evasion of tax. The appellant-dealer had deliberately suppressed the tax and the same came to light only after conducting tax audit. Had the audit not

been undertaken, the appellant-dealer would have evaded tax. As the appellant-dealer had suppressed the tax, penalty twice the amount of tax has been rightly imposed upon the appellant-dealer. Hence, the order of assessment is reasonable and the order of the learned JCST needs no interference. The learned STO had assessed the appellant-dealer basing on the findings of the AVR where the irregularities were established. The Audit officials found erroneous claim of ITC. The learned STO rightly calculated the tax and imposed penalty on the appellant-dealer which was upheld/confirmed by the learned JCST.

13. On perusal of the record it is seen that the respondent-Revenue could not establish anything against the ground of levy of interest. In the written note of submission also the respondent-Revenue has not denied anything as regards the stand of levy of interest taken by the appellant-dealer. In the grounds of appeal the appellant-dealer has contended that levy of interest is absolutely illegal and liable to be deleted. The learned Addl. Standing Counsel for the respondent-Revenue did not submit anything against the above ground taken by the appellant-dealer. Hence, I come to a positive conclusion that when the penalty is imposed, levy of interest is not warranted. Hence it is necessary to delete the interest levied. The other grounds taken in the present appeal have no merit at all as narrated supra. In view of such discussion it is necessary to remand the case to the learned STO for necessary computation by deleting interest but it is undesirable to interfere with the rest part of the impugned order.

14. In the result, the appeal is allowed in part and the impugned order is modified to the extent indicated above. The matter is remitted back to the learned STO for necessary computation by deleting the interest levied. The cross objection is disposed of accordingly.

Dictated & corrected by me,

Sd/-
(A.K. Dalbehera)
1st Judicial Member

Sd/-
(A.K. Dalbehera)
1st Judicial Member