BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 61 (VAT) of 2017-18

(Arising out of order of the learned JCST, Sambalpur Range, Sambalpur in First Appeal Case No. AA- 21/BGH//VAT/ 2016-17, disposed of on dated 25.02.2017)

Present: **Shri A.K. Das, Chairman**
Shri S.K. Rout, 2nd Judicial Member
&
Shri S.M. Dash, Accounts Member-III

M/s. Shree Deosharwali Oil Industries,
Pushp Kunj, NH-6, Dist. Bargarh ... 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 D. Behura, S.C. (CT) &
Sri M.S. Raman, Addl.SC (CT)

Date of hearing: 22.12.2021 *** Date of order: 18.01.2022

O R D E R

The dealer-appellant has preferred this appeal assailing the order dated 25.02.2017 passed by the learned Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur (hereinafter called as 'first appellate authority') in Appeal Case No. AA- 21/BGH/VAT/2016-17 thereby confirming the order of assessment dated 05.05.2016

passed by the Sales Tax Officer, Bargarh Circle, Bargarh (in short, 'assessing authority') raising tax demand of ₹14,06,346.00 relating to the tax periods 01.04.2012 to 31.03.2014 u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act').

2. The relevant facts for adjudication of the present second appeal are that the dealer-M/s. Shree Deosharwali Oil Industries is a partnership firm carrying on business in manufacturing rice bran oil out of rice bran. It effects purchase of raw materials and capital goods in course of intra-State as well as inter-State trade and commerce and effects sale of finished products. Consequent upon receipt of the Audit Visit Report (AVR) submitted by the STO (Audit), Sambalpur Range, Sambalpur assessment u/s. 42 of the OVAT Act was initiated and statutory notice along with the AVR was duly served on the dealer-assessee. The dealer on receipt of such statutory notice, produced the books of account along with written submission, on verification of which the assessing authority observed that the dealer-appellant during the period under audit effected total purchase of goods worth ₹9,44,32,057.00 out of which purchase of raw materials effected @ 5% was

₹2,30,31,649.00 against which ITC of ₹11,51,582.45 was availed. The dealer also purchased capital goods in course of inter-State trade@ 5% for ₹93,74,558.00 and @ 13.5% for ₹26,01,946.00. Against both these purchases it availed ITC of ₹4,68,728.00 and ₹3,51,263/.The dealer-appellant also purchased consumables from inside the State @ 13.5% for ₹81,540.00, capital goods in course of inter-State trade for ₹43,79,793.00 and raw materials for ₹15,52,571.00 from unregistered dealer. The total ITC availed by the dealer against purchase of raw materials as well as capital goods was ₹19,82,582.00 and there was carry forward ITC of ₹15,11,204.00. The assessing authority further observed that the dealer-appellant availed ITC for ₹3,39,930.00 on capital goods against purchase of cement, white cement, paints, tiles, marbles, stone chips, AC, chair, table, desktop, ply woods, stabilizer, fire extinguisher etc. which was disallowed by it. The dealer effected sale of tax exempted goods worth ₹17,89,995.00 against which the proportionate ITC valued ₹1,28,857.00 on raw materials involved for manufacturing of the tax exempted goods had been reversed. Learned assessing authority calculated the creditable ITC at ₹16,42,652.00 out of which ITC amounting

to ₹15,11,204.00 had been carried forward to the next tax period. Thus, ITC allowed for the assessment periods in question was ₹1,31,448.00 which was adjusted against the output tax of ₹3,11,806.00 and after such adjustment the balance tax payable was determined at ₹1,80,358.00. The dealer had adjusted ITC of ₹1,59,567.00 against the excess CST payable and reversible ITC amounting to ₹1,28,857.00. Thus, the total tax payable was calculated at ₹4,68,782.00 along with penalty of ₹9,37,564.00 and as such, the total tax demand was raised at ₹14,06,346.00.

2(a) The dealer challenging the aforesaid findings of the assessing authority preferred appeal before the first appellate authority, who ultimately dismissed the appeal and confirmed the order of assessment. The present second appeal has been preferred at the instance of the dealer-appellant being aggrieved with the orders of the forums below.

3. The main ground of challenge of the dealer-appellant was that initiation of assessment proceeding was itself bad in law for non-compliance of the mandatory provisions of Section 42 of the OVAT Act. In course of hearing of the appeal, it was vehemently urged by the

dealer-appellant that the forums below disposed of the matter in a very hush-hush manner without adjudicating the preliminary objection raised by it. He strenuously argued that as per Section 41 of the OVAT Act, AVR is to be submitted within seven days of visiting the business premises of the dealer-appellant. But, the AVR was submitted much after the time stipulated in the statute for which the initiation of proceeding was bad in law. Further, the dealer-appellant was also not given 30 days notice to explain the allegations made in the AVR and the assessment proceeding was disposed of in contravention of the provisions contained u/s. 41(4) of the OVAT Act. In this connection, learned Counsel relied upon the decision reported in [2015] 79 VST 425 (Ori.) in case of Patitapaban Bastralaya Vs. Sales Tax Officer.It was further argued that the business premises of the dealer was audited on 10.12.2014 whereas AVR was submitted on 19.10.2015 about one year after completion of the audit. Therefore, the AVR was invalid and initiation of proceedings basing on such AVR was also bad in law. In this connection, learned Counsel for the dealer-assessee relied on the decision reported in [2012] 54 VST 1 (Orissa) in case of Jindal

Stainless Ltd. Vs. State of Orissa and others. It was further argued that the audit assessment was not completed within six months from the date of receipt of the AVR for which the assessment is vitiated under law. The AVR was submitted on 19.10.2015 to the STO, Bargarh and on receipt of which the assessing authority issued notice on 19.11.2015 fixing the date to 28.12.2015 which was served on the dealer on 01.12.2015. The assessing authority completed the assessment u/r. 53 of the OVAT Rules in Form VAT-312 and communicated the same vide Memo No. 3901 dated 30.08.2016 which was served on the appellant on 19.09.2016 after a gap of ten months. Though the alleged order of assessment is purported to have been passed on 05.05.2016, the same was actually not passed on that date and it was ante-dated for which there is delay of ten months in issuing the order of assessment, which has not been explained by the authority. In support of such contention, he relied upon the decisions reported in [2015] 77 VST 146; [2015] 81 VST 86; [1994] 93 STC 206; and [2005] 142 STC 496 (FB). The dealer-appellant further challenged the orders of the forums below on the ground that the fora below committed serious illegality in disallowing the claim of ITC

on capital goods such as cement and steel which were required for installing the plant and machinery and without which the plant and machinery could not have been installed and imposition of penalty in contravention of the provisions contained u/s. 42(5) of the OVAT Act. He strenuously argued that the forums below misinterpreted the provisions contained u/s. 2(8) of the OVAT Act defining 'capital goods' and illegally disallowed the claim of deduction of ITC on the same. Similarly, when there was no malafide intention on the part of the dealer-appellant to evade tax, penalty should not have been imposed only for the claim of ITC on erroneous interpretation of the statute. Learned Counsel for the dealer-appellant in order to substantiate his contentions relied upon the decisions reported in 2015 (II) ILR – CUT- 228 in case of M/s. Chandrika Sao Vs. Sales Tax Officer, Balasore Range and another; judgment dated 25.09.2014 passed by the Hon'ble High Court of Orissa in W.P. (C) No. 2971 of 2009 in case of M/s. Delhi Foot Wear Vs. Sales Tax Officer, Vigilance, Cuttack and others; the decision of the Hon'ble Apex Court reported in [2009] 23 VST 249 (SC) in case of Sree Krishna Electricals Vs. State of Tamil Nadu and another; decision of Hon'ble Kerala High

Court reported in [2021] 87 GSTR 342 (Ker) in case of Chembra Peak Estates Ltd. Vs. State of Kerala; and judgment dated 10.10.2011 passed in ITA No. 626 of 2011 by the Hon'ble High Court of Delhi in case of CIT, Large Tax Payers Unit, New Delhi Vs. M/s. Mahanagar Telephone Nigam Ltd. New Delhi. He submitted to allow the appeal and set aside the impugned orders of the forums below reducing the tax demand to returned figures.

4. Per contra, learned Standing Counsel (CT) representing the State countering the argument advanced by the learned Counsel for the appellant in terms of cross-objection filed by it vehemently urged that there is no infraction of any statutory provision as contended by the learned Counsel for the dealer-appellant. The assessing authority on receipt of the AVR, issued notice giving thirty days time to the dealer-appellant to produce the books of account and explain the allegations made in the AVR. After receipt of the notice, the dealer-appellant also took number of adjournments and thereby got more than thirty days time to have his say in the matter. The allegation of not giving thirty days time for explaining the allegation contained in the AVR is against the materials on record. Similarly, the

audit team also on completion of the audit submitted the AVR to the concerned STO immediately as per the requirement of Section 41(4) of the OVAT Act. The allegation of non sub-submission of AVR in compliance to Section 41(4) of the OVAT Act is baseless and imaginary. The case laws cited by the dealer-appellant have got no application to the facts and circumstances of the present case. He further argued that the assessing authority also on receipt of AVR completed the assessment within the statutory period of six months and on completion of assessment issued a copy of the assessment order to the dealer-appellant immediately. There is no inordinate delay in issuing the assessment order. The allegation of ante-dating the assessment order is baseless and against the materials on record. The dealer-appellant did not lay any foundation to substantiate the allegation of ante-dating assessment order and only in order to escape from the liability of paying tax, raised technical question before the first appellate forum, which is not legally sustainable. The decisions cited by the learned Counsel for the appellant in case of M/s. Chandrika Sao (supra) and the judgment of the Hon'ble Court in case of M/s. Delhi Foot Wear (supra) have no application to the present case. He

further argued that the authorities below were justified in disallowing the ITC in respect of capital goods on purchase of cement, stone chips, marble tiles, fire extinguisher, paint including primer, white cement, plywood, chair, table, air condition, voltage stabilizer, desk-top computer, which were utilized in construction and other purposes to facilitate manufacture and processing of rice bran to produce rice bran oil. He strenuously argued in view of the provisions contained in proviso to Section 20(5)(a) of the OVAT Act, purchase of cement and other materials to install plant and machinery would not come within the definition of 'capital goods' as defined in Section 2(8) of the OVAT Act and, therefore, the fora below were correct in their approach in disallowing the claim of ITC on purchase of the above materials. He further contended that the dealer-appellant wrongly claimed ITC which it was not legally entitled to and the same having been discovered subsequently during course of audit is liable to pay penalty for such erroneous claim. The penalty provision under the OVAT Act is mandatory in nature which cannot be exonerated by exercising discretionary power. In the matter of penalty, the Court has got no discretion except making the dealer-

appellant liable to pay the same. There is no illegality or impropriety in such finding of the learned fora below. Learned Standing Counsel (CT) for the State in course of hearing of the appeal to substantiate his contention cited the decisions reported in 2013 SCC OnLine ITAT 3701 in case of Sophia Study Circle Vs. Income-tax Officer, Ward 2(1), Cuttack; 2018 SCC OnLine Del 9413 in case of the Commissioner of Income Tax-III Vs. M/s. Sudev Industries Ltd.; order dated 17.03.2021 passed in W.P. (C) No. 8847 of 2007 in case of M/s. Promise Foods Vs. Sales Tax Officer; order dated 03.02.2018 passed in S.A. No. 38 (VAT) of 2014-15, S.A. No. 3(C) of 2014-15 & S.A. No. 21 (ET) of 2014-15; judgment of the Hon'ble High Court of Orissa dated 17.09.2008 passed in W.P. (C) No. 10555 of 2008 in case of Jagdamba Polymers Pvt. Ltd. Vs. State of Orissa; decision reported in [2003] 131 STC 276 in case of M/s. Ambe Agro Industries Ltd. & another Vs. State of Bihar and others; (2008) 5 Gauhati Law Reports 450 in case of Kundanmal Sharma Vs. State of Assam and others; order dated 10.10.2012 passed in ARA Nos. 08, 09 & 10 of 2012-13 in case of M/s. Sri Sairameswara Solvents (P) Ltd. & two others Vs. State of Orissa; order dated 08.03.2021 passed in

RVWPET Nos. 211, 212 and 213 of 2013 by the Hon'ble High Court of Orissa; (2009) 15 SCC 58 in case of Union of India and others Vs. Krishna Processors and another; 2016 (I) ILR- CUT-50 in case of M/s. Bansapani Iron Ltd. Vs. State of Odisha; order dated 31.05.2018 passed in S.A. No. 115 (VAT) of 2017-18 and S.A. No. 201 (VAT) of 2017-18 in case of M/s. Subhalaxmi Agencies Pvt. Ltd. Vs. State of Odisha; and 2020 (I) OLR – 117 in case of M/s. Reliance Industries Ltd. Vs. Commissioner of Sales Tax, Orissa, Cuttack and others.

5. On the rival contention of the parties, the following questions fall for consideration by this Tribunal :-

(i) Whether there is infraction of mandate of sub-section (2) of Section 42 of the OVAT Act by not allowing minimum period of thirty days for production of books of account and documents on account of which the assessment proceeding is vitiated ?

(ii) Whether there is infraction of mandate of sub-section (4) of Section 41 of the OVAT Act by not submitting the AVR to the assessing authority within seven days from the date of audit on account of which the AVR becomes invalid and consequently the

initiation of assessment proceeding basing on the said AVR is bad in law ?

(iii) Whether in the facts and circumstances of the case an inference can be drawn regarding ante-dating of the assessment order in order to bring the assessment within the period of limitation because of delay in issuing the assessment order ?

(iv) Whether in the facts and circumstances of the case the fora below were correct in their approach in disallowing ITC on purchase of goods like cement, white cement, paints, tiles, marbles, stone chips, AC, chair, table, desktop, ply woods, stabilizer, fire extinguisher etc. holding that these goods are not capital goods used directly in the process of manufacturing ? and

(v) Whether in the facts and circumstances of the case the fora below were correct in their approach in imposing penalty of ₹9,37,564.00 u/s. 42(5) of the OVAT Act?

6. Question Nos. (i) and (ii) being very pivotal amongst other points and answer to these questions will go to the root of the case, the said two questions are taken up

first for adjudication. In the present case, the assessment proceeding was initiated against the dealer-appellant consequent upon submission of AVR by the STO (Audit), Sambalpur Range, Sambalpur and statutory notice along with copy of AVR was served upon the dealer, who in pursuance of such notice, appeared before the assessing authority and participated in the assessment proceeding by producing the books of account along with a written submission explaining the allegations made in the AVR. It appears from the record that notice for audit was issued to the dealer on 25.10.2014 fixing the date of visit to 11.11.2014, which was again rescheduled to 10.12.2014 on the request of one Umesh Kumar Agrawal. The audit was completed on 16.12.2014 and on completion of the audit, the STO (Audit) prepared the AVR on 20.12.2014 which was received by the assessing authority on 27.12.2014. The assessing authority on receipt of the AVR issued notice vide diary No. 4285 dated 27.11.2015 fixing the date of compliance to 28.12.2015. The dealer-appellant received the notice for assessment on 01.12.2015. Under these factual background, the dealer-appellant's contention about non-compliance of mandate of sub-section (2) of Section 42 of the

OVAT Act is to be considered. Before addressing on issue no1, it is profitable to quote the provisions contained in Section 42(2) of the OVAT Act as under :-

> "(2) Where a notice is issued to a dealer under sub-section (1), he shall be allowed time for a period of not less than thirty days for production of relevant books of account and documents."

The provision contained in sub-section (2) of Section 42 of the OVAT Act mandates that when notice is issued to a dealer under sub-section (1), he shall be allowed time period of not less than thirty days for production of relevant books of account. The Hon'ble High Court in case of M/s. Delhi Foot Wear (supra) in para-12 of the judgment observed that the use of expression 'shall' and "not less than thirty days" make it amply clear that the assessing officer is bound to allow minimum thirty days time for production of books of account and documents. It was further observed that the discretion is vested on the assessing officer to allow more than thirty days for production of books of account, but he has no jurisdiction to allow less than thirty days' time. In para-14 of the said judgment, the Hon'ble Court further observed that if the notice issued for assessment is

invalid for any reason, the proceeding initiated in pursuance of such notice would be illegal and invalid. Section 42(2) of the OVAT Act is a mandatory provision not with regard to any procedural law, but with regard to a substantive right. Any infirmity or invalidity in the notice u/s. 42(2) of the OVAT Act goes to the root of jurisdiction of the assessing authority. Issue of notice u/s. 42(2) of the OVAT Act is a condition precedent to the validity of any assessment u/s. 42 of the OVAT Act. Therefore, if the notice issued is invalid, the assessment would be bad in law. Hence, the notice for assessment of tax without allowing the minimum period of thirty days for production of the books of account and documents is invalid in law and consequentially, the order of assessment and demand notice issued are not sustainable in law. Further in case of Patita Paban Bastralaya Vs. STO reported in 2015 (79) VST 425 (Orissa) the Hon'ble Court while dealing with a case under Orissa Entry Tax Act took same view that thirty days notice is mandatory for production of book of accounts.

7. Learned Counsel for the dealer-appellant relying on the aforesaid observation of the Hon'ble Court vehemently urged that the assessing authority having failed

to give thirty days minimum time as mandated u/s. 42(2) of the OVAT Act, notice of assessment is invalid in law and consequently, the entire assessment proceeding is also vitiated. He submitted to drop the assessment proceeding on this ground by setting aside the impugned orders passed by the fora below. On examination of the facts of the present case and the materials on record, we are of the unanimous view that there is no infraction of mandate of Section 42(2) of the OVAT act in the present case for which the judgment cited by the learned Counsel for the dealer-appellant does not stand for its rescue. It is pertinent to mention here that in the cited case notice in Form VAT-306 was issued on 30.12.2006 requiring the petitioner to appear in person or through his authorized agent before the assessing officer on 12.01.2007 to produce the books of account for the period from 01.04.2005 to 31.07.2006. The notice in Form VAT-306 itself showed that minimum time as provided under sub-section (2) of Section 42 was not granted to the petitioner. But, in the case in hand, notice of assessment in Form VAT-306 was issued to the dealer vide diary No. 4285 dated 27.11.2015 fixing the date of compliance to 28.12.2015, thereby complying the mandate of sub-section (2) of Section

42 of the OVAT Act. The period of thirty days is to be granted from the date of issuance of notice and not from the date of service on the dealer-appellant. If the argument of the dealer-appellant is accepted that thirty days will be counted from the date of receipt of notice, then in all cases the assessment proceeding would be vitiated for not giving minimum thirty days time. The assessing authority while issuing assessment notice is to fix the date of compliance after thirty days from the date of issuance of notice. The assessing authority cannot know when the notice will be served on the dealer-appellant. It is improbable on the part of an assessing authority to know about the date of service of notice. Therefore, it is impracticable to give thirty days time to the dealer-appellant from the date of service of notice. When notice itself shows that thirty days time was given to the dealer-appellant to produce the books of account, it satisfied the mandate of sub-section (2) of Section 42 of the OVAT Act. There is no infraction of the mandate of the said provision. Moreover, in the present case, the dealer after appearance in pursuance of notice in Form VAT-306 got more than thirty days time to produce the books of account and the time was granted on the prayer of

the dealer-appellant for which he cannot claim that he was not given minimum thirty days time in pursuance of sub-section (2) of Section 42 of the OVAT Act. The dealer has been given sufficient opportunity and time in compliance to the mandate of sub-section (2) of Section 42 of the OVAT Act and no prejudice has been caused to him. Therefore, we are of the view that the case law cited by the dealer-appellant is not applicable to the facts and circumstances of the present case. The assessing authority having not committed any illegality in initiating the assessment proceeding consequent upon receipt of the AVR and in passing of the assessment order thereof complying the mandate of sub-section (2) of Section 42 of the OVAT Act, there is no infraction of Section 42(2) of the OVAT Act as contended by the learned Counsel for the dealer-appellant. Therefore, the said contention of the dealer-appellant must fall to the ground.

8. So far as second issue regarding the submission of AVR to the assessing authority within seven days from the date of completion of audit is concerned, it was urged by the learned Counsel for the dealer-appellant that the audit of the business of the dealer was undertaken on 10.12.2014 and accordingly, the AVR was to be

submitted within seven days from the date of completion of AVR, i.e. on 20.12.2014 as contemplated in Section 41(4) of the OVAT Act but the AVR was submitted on 19.10.2015 after one year of the completion of audit in violation of Section 41(4) of the OVAT Act. Therefore, the AVR is invalid and consequently, initiation of assessment proceeding on the basis of AVR is also invalid. Learned Counsel for the dealer-appellant to substantiate his contention relied upon the decision in the case of Jindal Stainless Ltd. (supra). On the other hand, learned Standing Counsel (CT) for the State submitted that there is no violation of mandate of Section 41(4) of the OVAT Act and initiation of assessment proceeding on the basis of AVR is legal and valid. He further submitted that the completion of audit and submission of report being purely administrative matter, no prejudice can be said to have been caused to the dealer. The dealer cannot escape from the liability of paying tax by raising technical plea like submission of AVR belatedly. The audit was completed as per the provisions contained u/s. 41 of the OVAT Act and the report was submitted immediately to the assessing authority. There is no delay in submission of AVR thereby causing any kind of prejudice to the dealer. He

submitted to reject such contention raised by the learned Counsel for the dealer-appellant.

9. Before addressing on the contention raised by the learned Counsel for the dealer-appellant that the audit report was invalid for non-submission of the same to the assessing authority within seven days from the date of completion of audit. It would be profitable to take note of the provision contained u/s. 41(4) of the OVAT Act which stood before amendment of the said Section w.e.f. 01.10.2015.

> "(4) After completion of tax audit of any dealer under sub-section (3), the officer authorised to conduct such audit shall, within seven days from the date of completion of the audit, submit the audit report, to be called "AUDIT VISIT REPORT", to the assessing authority in the prescribed form along with the statements recorded and documents obtained evidencing suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit and evasion of tax, if any, relevant for the purpose of investigation, assessment or such other purposes."

The Hon'ble High Court of Orissa in the case of Jindal Stainless Ltd. (supra) interpreting the provision of Section 41(4) of the OVAT Act in para-37 of the judgment observed as under :-

> "Question No. (iii) is whether the authorized officer has not submitted audit visit report to the assessing authority within seven days from the date of audit as contemplated under section 41(4) of the OVAT Act and thereby the impugned audit visit report dated March 31, 2008 and audit assessment dated August 20, 2008 would be non est/unsustainable in the eye of law. Normally, it is a mixed question of fact and law. But the documents annexed to the writ petition reveal that there is infraction of the provision and time provided under section 41(4) has not been adhered to. Section 41(4) provides that after completion of tax audit of any dealer under sub-section (3), the officer authorized to conduct such audit shall, within seven days from the date of completion of the audit, submit the audit report to the assessing authority in the prescribed form along with the statements recorded and documents obtained evidencing suppression of purchases or sales, or both, erroneous claims of deductions including input-tax credit and evasion of tax, if any, relevant for the purpose of investigation, assessment or such other purposes."

Further the Hon'ble High Court of Orissa in W.P. (C) No. 8847 of 2007 in case of M/s. Promise Foods Vs. Sales Tax Officer, while considering the similar issue whether there was any infraction of mandatory requirement of Section 41(4) of the OVAT Act for non-submission of the

AVR within seven days adjourned the matter to 14.07.2021 awaiting the decision of the Larger Bench with regard to correctness of the decision of the Division Bench of the Hon'ble Court in case of Jindal Stainless Ltd. (supra). But the law as it stood today is that the audit team is required to submit the AVR within seven days from the date of completion of audit as mandated u/s. 41(4) of the OVAT Act, which stood before the amendment of the said provision w.e.f. 01.10.2015. In Jindal Stainless Ltd. (supra) the Hon'ble Court observed that the audit report was invalid on the factual background that the audit was undertaken on 01.10.2007 whereas the AVR was 31.03.2008 i.e. six months after the completion of the audit. But in the instant case, as it appears from the audit visit record that notice for audit was issued on 25.10.2014 fixing the date to 11.11.2014, which was subsequently rescheduled to 10.12.2014 on the request of one Umesh Kumar Agrawal. The audit was completed on 16.12.2014 and the report was prepared and signed on 20.12.2014. It further appears from the assessment record that the AVR was uploaded in the VATIS on the same day and was forwarded to the JCCT for necessary action on assessment. The report was again

received in the office of the STO, Bargarh Circle, Bargarh on 27.12.2014. It is clear from the audit assessment record that the AVR was uploaded in the VATIS on 20.12.2014 and was forwarded to the JCCT for necessary action on assessment on the same day. The provision contained in Section 41(4) of the OVAT Act requires that on completion of audit, the AVR should be submitted to the assessing authority. Section 2(4) defines assessing authority means any officer appointed under sub-section (2) of Section 3 who is authorized by the Commissioner to make assessment under this Act. The AVR in the present case was issued to JCCT, who is also an assessing authority in view of the notification issued by the Commissioner of Sales Tax, Orissa vide SRO No. 171/2009 dated 13.03.2009. Therefore, there is no infraction of the mandate of sub-section (4) of Section 41 of the OVAT Act as contended by the learned Counsel for the dealer-appellant. Even we assume that AVR should be submitted to the assessing officer who takes up assessment proceeding within seven days from the date of completion of audit, in the present case AVR was received by the assessing officer on 27.12.2014 within seven days from the date of completion of audit on 20.12.2014.The contention raised by

the learned Counsel for the dealer-appellant is not based on the materials on record. The decision in case of Jindal Stainless Ltd. (supra) was rendered in a different factual background and the facts of the said case are quite different and distinguishable from the facts of the present case. In view of the foregoing reasons, we are of the unanimous view that there is no infraction of mandate of sub-section (4) of Section 41 of the OVAT Act as contended by the learned Counsel for the dealer-appellant. So, the initiation of the assessment proceeding on the basis of the AVR is also just, proper and according to law.

10. The third question raised challenging the orders of the fora below is that the assessment order purported to have been passed on 05.05.2016 was ante-dated in order to cover the limitation and the said order was passed beyond the period of six months for which it is not legally sustainable. In order to appreciate the contention raised by the learned Counsel for the dealer-appellant, we feel it just and proper to narrate the relevant facts in brief. The assessment order, as it appears from the record was passed on 05.05.2016 and the said order was issued to the dealer-appellant vide diary No. 3501 of 30.07.2016 and was

received by the appellant on 19.08.2016. It was argued by the learned Counsel for the dealer-appellant relying on the decisions in case of M/s. Chandrika Sao (supra), judgment of the Hon'ble Apex Court in case of State of Andhra Pradesh Vs. M. Ramakishtaiah & Co., reported in [1994] 93 STC 406 (SC); and the judgment of Hon'ble High Court of Andhra Pradesh in case of Sanka Agencies Vs. Commissioner of Commercial Taxes, Hyderabad, reported in [2005] 142 STC 496 (AP), that there being unreasonable delay in issuing the assessment order inference should be drawn that the assessment order was not passed on 05.05.2016 and it was ante-dated in order to save the limitation. The revenue did not offer any explanation for such inordinate delay in issuing the assessment order. Therefore inference should be drawn that it was antedated. Per contra, learned Standing Counsel (CT) for the revenue countering the argument advanced by the learned Counsel for the dealer-appellant submitted that the decisions cited by him (learned Counsel for the appellant) have no application to the facts and circumstances of the present case. In the cited cases, there was inordinate delay in issuing the assessment order for which adverse inference was drawn regarding ante-dating

the same (assessment order). But, the case in hand, there was no inordinate delay in issuing the assessment order. He relying on the decision of our Hon'ble Court dated 17.03.2021 passed in W.P. (C) No. 8847 of 2007 in case of M/s. Promise Foods (supra) argued that the Hon'ble Court while adjudicating the similar issue declined to draw an inference that the assessment order was deliberately antedated because of delay in despatch of the assessment order. In the said case, the assessment order dated 09.11.2006 was despatched on 19.12.2006 and was actually delivered on the petitioner on 24.05.2007. The Hon'ble Court taking note of delay of one and half months in despatching the assessment order, refused to draw adverse inference against the revenue. The Hon'ble Court in case of Jagdamba Polymers Pvt. Ltd. Vs. State of Orissa & others (supra) considering the similar issue observed that there has to be very strong and convincing evidence to establish the allegations of malafides specifically alleged in the petition as the same cannot merely be presumed. The presumption is in favour of the bonafides of the order unless contradicted by acceptable material. He submitted that only because of some days of delay, no adverse inference should be drawn

regarding antedating of the assessment order and such contention must be thrown out at the threshold.

11. The provisions contained in sub-section (6) of Section 42 of the OVAT Act provide that notwithstanding anything contained to the contrary in any provision under this Act, an assessment under this section shall be completed within a period of six months from the date of service of notice issued under sub-section (1) along with the AVR. In the present case, the AVR was received by the dealer-appellant on 01.12.2015 and the assessment order was passed on 05.05.2016 within a period of six months as envisaged u/s. 42(6) of the OVAT Act. After the assessment order was passed, the same was despatched to the dealer-appellant on 30.07.2016 vide diary No. 3501 and the dealer received the same on 19.08.2016 as appears from the AD available on record. The dealer-appellant's claim that he had received the assessment order on 19.09.2016 is not based on material on record. The envelop filed by the dealer-appellant to show that the assessment order was issued on 14.09.2016 vide diary No. 5152 is not correct. The envelop filed by the dealer-assessee contains diary No. 5152 dated 14.09.2016, but the assessment record does not show any

such date, rather the assessment record shows the date of despatch of assessment order was 30.07.2016 vide diary No. 3501. The AD returned by the postal department being a public document showing the receipt of the assessment order on 19.08.2016 by the dealer-appellant cannot be disbelieved in the absence of any contrary material. Now the question arises, whether because of delay of two and half months in despatch of the assessment order an inference can be drawn as the same has been antedated and can in view of the decisions relied upon by the dealer in case of M/s. Chandrika Sao (supra), judgment of the Hon'ble Apex Court in case of M. Ramakishtaiah & Co. (supra) and the judgment of Hon'ble High Court of Andhra Pradesh in case of Sanka Agencies (supra), an inference regarding antedating of the assessment order be drawn. The Hon'ble Court in Jagdamba Polymers Pvt. Ltd. (supra) while considering the similar issue in para-11 of the judgment observed that there has to be strong and convincing evidence to establish the allegations of malafides specifically alleged in the petition as the same cannot merely be presumed. The presumption is in favour of the bonafides of the order unless contradicted by acceptable material. In para-16 of the said judgment, the

Hon'ble Court further observed that "In the instance case no factual foundation has been laid to substantiate the scandalous allegation of mala fide against the assessing authority that he passed the assessment order ante dated. More so, the petitioner has not impleaded the officer by name. In view thereof, as the pleadings fall short of taking note of such an issue, we are not inclined to entertain such baseless pleas."

12. In the present case, no factual foundation has been laid alleging mala fide intention of the assessing authority in antedating the assessment order and no material was produced to show that the assessment order was antedated. The dealer-appellant raised the contention of antedating the assessment order only basing on the aforementioned judgment of the Hon'ble Apex Court and the Hon'ble High Court in which their lordship drew adverse inference because of delay in despatch of the order. In case of M. Ramakishtaiah & Co. (supra), there was inordinate delay of 11 months in issuance of assessment order and in case of M/s. Chandrika Sao (supra), there was delay of four months. Similarly in case of Sanka Agencies (supra), there was delay of more than five months in issuance of the

assessment order. There was no explanation from the side of the revenue as to what caused such inordinate delay in issuance of the assessment order. In such factual background, the Hon'ble Court drew adverse inference regarding antedating of assessment order. In the present case, there is delay of only two and half months in issuance of the assessment order which is purely clerical in nature. The assessing authority sends the record to the issue section for despatch of the assessment order to the dealer-appellant and he does not play any role in such despatch. Therefore, it cannot be inferred that the assessing authority antedated the assessment order with malafide intention only because of clerical delay in despatching the assessment order. Moreover, no factual foundation was laid to prove such allegation against the assessing authority. Similarly, our Hon'ble Court also in M/s. Promise Foods (supra) declined to draw adverse inference taking note of one month and ten days delay in despatch of the assessment order which was served on the petitioner after six months of the assessment order. On going through the judgments cited by the learned Counsel for the dealer-appellant, we also find that neither the Hon'ble Apex Court nor our Hon'ble Court

have said that in all cases of delay of any length, adverse inference should be drawn regarding antedating of the assessment order. The Hon'ble Courts in the factual scenario of those cases drew adverse inference and the facts of the said cases are quite different and distinguishable from the fact of the present case. There was nothing on record to substantiate the allegation that the assessment order dated 05.05.2016 was antedated by the assessing authority in order to cover the limitation. In view of the discussions made above, we are of the considered view that the assessment order passed on 05.05.2016 was not antedated as contended by the learned Counsel for the dealer-appellant.

13. The next important contention raised by the learned counsel for the dealer-appellant under question No. (iv) whether the fora below were correct in their approach in disallowing the ITC in respect of purchase of goods like cement, white cement, paints, tiles, marbles, stone chips, AC, chair, table, desktop, ply woods, stabilizer, fire extinguisher etc.. Learned Counsel for the dealer-appellant relying on the decision of the Hon'ble Gujarat High Court in case of State of Gujarat Vs. Pipavav Defense and Offshore Engineering Company Ltd., reported in [2017] 105 VST 60

(Guj), argued that the goods like cement, stone chips, marbles, tiles, AC, stabilizer, etc. having been used to set up the manufacturing Unit including the installation of plant and machinery, those goods would come within the definition of 'capital goods' as per Section 2(8) of the OVAT Act and accordingly, the dealer is eligible for ITC for purchase of those goods. Learned Standing Counsel (CT) representing the State supporting the impugned orders of the fora below urged that the fora below rightly disallowed the claim of ITC on goods like cement, stone chips, marbles, tiles, etc. which are not capital goods as defined u/s. 2(8) of the OVAT Act. He drew the attention of this Tribunal to the provision contained in proviso to sub-section (5)(a) of Section 20 of the OVAT Act, which provides that no ITC shall be allowed on such capital goods used for the purposes and in the circumstances as specified in Schedule D. It was argued that Sl. No. 6 of Schedule D provides that capital or other expenditure on land, civil structure or construction, cement, stone chips etc. purchased for civil structure or construction cannot be treated as capital goods for the purpose of claiming ITC. He submitted to reject such contention of the learned counsel for the dealer-appellant. It appears from the

audit visit record that the audit team referring to Section 2(8) of the OVAT Act suggested to disallow the claim of ITC of ₹3,39,930.00 on purchase of goods like cement, stone chips, marbles, tiles, fire extinguisher, paint, primer, white cement, chair, table, AC, stabilizer and desktop (computer) as those are not plants, machinery and equipments used directly in the process of manufacturing. The dealer-appellant on receipt of the notice of assessment proceeding, filed his written submission explaining the allegation of wrong claim of ITC on purchase of goods like cement, chips, etc. In para-8 it was explained that the capital goods as referred to by audit in the AVR are such goods which have been used by the petitioner in laying the foundation for erection of plant and the plant floor for the process of manufacturing to be carried out. It was asserted that cement and chips were used for construction of the foundation on which plant was erected. Marbles and tiles were used to clad the floor. Primer and paints were used for paining the plant and machinery. Fire extinguisher is mandatory requirement of all manufacturing units for safety. Table and chair were provided for testing laboratory. AC with stabilizer was required to maintain the temperature

in the plant and desktop (computer) was used for testing of the output to maintain proper quality. Those goods purchased by the dealer-appellant did not fall under any of the category or classes of goods as provided under Schedule D so as to be not eligible for ITC. On reading of the impugned orders of the fora below, we find that both the fora below did not accept such contention of the learned Counsel for the dealer-appellant and referring the provisions contained in Section 2(8) of the OVAT Act held that those goods were not capital goods on purchase of which the dealer-appellant was entitled to claim ITC. Before examining the legality and propriety of such finding of the fora below, we feel it just and proper to refer to the provisions contained in Section 2(8) of the OVAT Act and the proviso to Section 20(5)(a) of the OVAT Act and Schedule D of the OVAT Act. Section 2(8) of the OVAT Act defines “capital goods” which means plants, machinery and equipments used directly in the process of manufacturing and shall include the components and spare parts thereof, but shall not include such plant, machinery and equipments which are used for the purposes and in the circumstances specified in Schedule ‘D’. The provision contained u/s. 20(5)(a) of the OVAT Act

clearly speaks that ITC on capital goods shall be allowed from the date of first sale of taxable goods produced or manufactured after the commencement of such commercial production and shall be adjusted against the output tax over a period not exceeding three years. Proviso to sub-section (5)(a) of Section 20 further provides that no ITC shall be allowed on such capital goods used for the purposes and in the circumstances as specified in Schedule D. In the present case, the dispute is with regard to the capital goods. It is urged by the dealer-appellant that cement, chips etc. purchased by it is capital goods, whereas learned Standing Counsel (CT) object to such claim referring to Section 2(8) of the OVAT Act. On bare perusal of Section 2(8) of the OVAT Act, we find that it does not include cement, chips etc. claimed by the dealer-appellant as capital goods. But in case of Pipavav Defense & Offshore Engineering Co. Ltd. (supra), their Lordships of Hon'ble Gujarat High Court referring to the judgments of the Hon'ble Supreme Court in case of Commissioner of Central Excise Vs. Jawahar Mills Ltd., reported in [2002] 125 STC 264 (SC) and Commissioner of Central Excise Vs. Rajasthan Spinning and Weaving Mills

Ltd., reported in [2010] 3 GSTR 467 (SC), in paras- 11.5, 11.6 and 12 of the judgment observed as follows :-

> "11.5 Following the law laid down by the honourable Supreme Court in the case of Jawahar Mills Ltd. [2002] 125 264 (SC); [2001] 6 SCC 274 and Rajasthan Spinning and Weaving Mills Limited [2010] 3 GSTR 467 (SC); [2010] 12 SCC 186 to the facts of the case on hand and as cement, sand, steel, grit, concrete, etc., are required to be used in manufacturing of "capital goods", viz. dry dock and fit out berth, which is an integral part of the final product of the dealer are without the dry dock and fit out berth, it is not possible for the dealer to carry on his business which is of ship building/manufacture and repairs of ship and that the dry dock and fit out berth are specialized in nature which are required to be constructed specially and specifically for the purpose of business of the dealer, i.e., ship building/manufacture and repairs of ship, applying the "user test" it is to be held that on purchase of cement, sand, steel, grit, concrete etc., which are used in dry dock and fit out berth (capital goods), dealer shall be entitled to input-tax credit. Any other interpretation would defeat the object and purpose of granting input-tax credit and would defeat the grant of input-tax credit as per section 11 of the VAT Act.
>
> 11.6 Now, so far as the submission on behalf of the State that one is required to read the

provision of the statute as it is and therefore, considering the wordings used in section 11(3) of the VAT Act, i.e. "... on his purchase of taxable goods which are intended for the purpose of goods which are intended for the purpose of use as 'capital goods' meant for use in manufacture of taxable goods only on purchase of those capital goods only which are meant for use in manufacture of taxable goods, the dealer shall be entitled to the input-tax credit is concerned, at the outset it is required to be noted that in light of the decisions of the aforesaid two decisions of the honourable Supreme Court in the case of Jawahar Mills Ltd. [2002] 125 264 (SC); [2001] 6 SCC 274 and Rajasthan Spinning and Weaving Mills Limited [2010] 3 GSTR 467 (SC); [2010] 12 SCC 186 and applying the "user test", the aforesaid is not required to be accepted. Even otherwise as per the cardinal principle of law a particular provision in the statute is required to be read purposely and therefore, on purposive interpretation of the aforesaid provision and applying "user test", it is to be held that on purchase of cement, sand, steel, grit, concrete, etc., which is used in the manufacture of capital goods meant for use in manufacture of taxable goods, the dealer shall be entitled to the input-tax credit under section 11(3)(vii) of the VAT Act. Even the aforesaid submission is required to be viewed from another angle as inasmuch as so far as the dry dock which as observed hereinabove can be said to be "plant" and consequently

"capital goods" is concerned, it is practically and physically not possible to construct without the aid of steel, cement, sand, grit, concrete, etc. It is also not possible to purchase the dry dock individually and put the same in use in manufacture of taxable goods. Therefore also, the cement, sand, steel, grit, concrete, etc., are required to be treated as "capital goods" meant for use in manufacture of taxable goods and therefore, on purchase of those goods which are used in manufacture of "capital goods" as capital goods meant for use in manufacture of taxable goods, the dealer shall be entitled to the input-tax credit, otherwise the dealer shall not be allowed/granted the input-tax credit either on the dry dock and fit out berth. That would defeat the grant of input-tax credit under section 11(3)(vii) of the VAT Act. Therefore, on purposive interpretation of the said provision also, the submission on behalf of the State that only on purchase of taxable goods which are intended for the purpose of use as capital goods meant for use in the manufacture of taxable goods alone, the Dealer shall be entitled to the input-tax credit, cannot be accepted.

12. In view of the above and for the reasons stated above, even question No.1 in both the tax appeals, i.e., whether the learned Tribunal has erred in holding that input-tax credit under section 11(3)(vii) of the Gujarat Value Added Tax Act, 2003 is available for purchase of cement, sand, steel, grit, concrete, etc., that are used for manufacture of capital goods or not,

is held to be in favour of the assessee-dealer and against the Revenue."

14. The law expounded in Pipavav Defense & Offshore Engineering Co. Ltd. (supra) is squarely applicable to the facts and circumstances of the present case. If the cement, stone chips, etc. have been used in installation of plant and machinery for production of taxable goods, then the dealer-appellant is entitled to ITC on purchase of such goods, i.e. cement, stone chips, etc. which come within the definition of "capital goods" as defined u/s. 2(8) of the OVAT Act. **The assessing authority for this purpose is required to examine the books of account of the dealer-appellant to find out if the dealer-appellant has reflected in the books of account that he purchased cement, stone chips, marbles, tiles etc. for the purpose of laying foundation on which plant was erected. If it is so, then the same are to be considered as "capital goods" as defined u/s. 2(8) of the OVAT Act and accordingly, the dealer is entitled to claim ITC on the same. But, so far as fire extinguisher, paint, primer, plywood, chair, table, AC, stabilizer, desktop are concerned, those are not used for installation of plant and machinery and therefore**

would not come within the definition of capital goods. Learned assessing authority rightly disallowed the claim of ITC on these goods. As regards the contention of the learned Standing Counsel (CT) for the State that in view of Sl. No. 6 of Schedule D the dealer-appellant is not entitled to ITC on purchase of cement, stone chips, marbles, tiles etc., we are of the view that Sl. No.6 of Schedule D of the OVAT Act does not exclude the cement, stone chips, marbles, tiles etc. used in installation of plant and machinery from the purview of capital goods so as to disentitle the claim of ITC as per sub-section (5) of Section 20. Sl. No. 6 of Schedule D only says capital or other expenditure on land, civil structure or construction and it does not say about the construction for laying foundation to erect plant and machinery. So, by applying the user theory, the expenditure incurred by the dealer-appellant in laying foundation to erect the plant and machinery would come within the definition of "capital goods" and accordingly, the dealer-appellant is entitled to claim ITC on the same. In view of the judgment of the Hon'ble Gujarat High Court in the case of Pipavav Defense & Offshore Engineering Co. Ltd. (supra), the issue whether cement, stone chips, etc. are capital goods or

not is answered in favour of the dealer-appellant and against the revenue.

It is pertinent to mention here that in the present case the dealer-appellant produced taxable goods as well as tax exempted goods. Therefore, in view of the judgment of the Hon'ble Apex Court in case of State of Kerala Vs. M.K. Agro Tech Pvt. Ltd., reported in [2018] 52 GSTR 215 (SC), the dealer is entitled to proportionate rebate of input-tax credit as calculated by the assessing authority taking into consideration the provision contained in Rule 12(3) of the OVAT Rules.

15. The last point that emerges for determination before this Tribunal is whether in the facts and circumstances of the present case the fora below were correct in their approach in levying penalty u/s. 42(5) of the OVAT Act. Before addressing this issue, we consider it proper to refer to the provisions contained in Sections 42(1) and 42(5) of the OVAT Act.

> "42. Audit assessment-
>
> (1) Where the tax audit conducted under sub-section (3) of Section 41 results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions including input

tax credit, evasion of tax or contravention of any provision of this Act affecting the tax liability of the dealer, the assessing authority may, notwithstanding the fact that the dealer may have been assessed under Section 39 or Section 40, serve on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report, requiring him to appear in person or through his authorized representative on a date and place specified therein and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.

xx xx xx

"(5) 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."

16. The aforesaid provisions make it amply clear where the tax audit conducted results in detection of suppression of purchases or sales or both, erroneous claim of deductions including ITC, evasion of tax or contravention

of any provision of this Act affecting the tax liability of the dealer, the assessing authority shall assess the dealer after service of notice in the prescribed form. Sub-section (5) of Section 42 provides for imposition of penalty twice the amount of tax assessed under sub-section (3) or sub-section (4) which was amended w.e.f. 01.10.2015 providing for imposition of penalty equal to the amount of tax assessed. As this assessment relates to the period prior to 01.10.2015, the pre-amended provision contained under sub-section (5) of Section 42 of the OVAT Act is applicable. Now, question arises whether the authorities below were correct in their approach in imposing penalty in the facts and circumstances of the case. In the present case, the dealer was assessed on the basis of AVR because of erroneous claim of ITC on purchase of cement, stone chips etc.. This claim of ITC by the dealer-appellant is not with any intention to evade tax, but because of interpretation of the provision contained u/s. 2(8) of the OVAT Act. The erroneous claim of ITC being purely due to interpretation of the statute, it would not be just and proper to impose penalty on the dealer-assessee as directed by the fora below. In case of CIT-Large Tax Payers Unit Vs. M/s. Mahanagar Telephone Nigam

Ltd. (supra), their Lordships of Hon'ble High Court of Delhi taking note of the judgment of the Hon'ble Apex Court in case of Union of India Vs. Dharmendra Textile Processors, reported in 2008 (306) ITR 277 (SC), in para-16 observed that it is quite clear on a reading of the observations made in Rajasthan Spinning (supra) that, it is not as if, penalty would get attracted once the revenue seeks to make an addition. For penalty to get attracted, the conditions stipulated in the concerned provision are required to be fulfilled. In the present case, there being no allegation of inaccurate filing of return, suppression of any purchases or sales and the claim of ITC being on account of erroneous interpretation of statute, it would not be justified to impose penalty on the dealer-appellant. The order of the assessing authority imposing penalty is unsustainable in the eye of law.

17. For the foregoing reasons and discussions made above, we allow the second appeal filed by the dealer-appellant in part and the impugned orders of both the forums below are hereby set aside. The matter is remitted back to the assessing authority to recompute the tax liability of the dealer-appellant keeping in view the observations

made herein above within three months from the date of receipt of this order. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member

I agree,

Sd/-
(S.M. Dash)
Accounts Member-III