

**BEFORE THE SINGLE BENCH: ODISHA SALES TAX
TRIBUNAL, CUTTACK.
S.A.No. 273(V)/2016-17**

(Arising out of order of the ld. JCST (Appeal), Cuttack-I Range,
Cuttack in Appeal Case No. 106121512000077,
disposed of on dtd.18.07.2016)

**Present: Smt. Sweta Mishra
2nd Judicial Member**

M/s. KID's Fashion,
T.K. Bagicha, Buxibazar,
Dist. Cuttack.

.... Appellant

-Versus-

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

.... Respondent

For the Appellant : Mr. B.B. Das, Advocate
For the Respondent : Mr. S.K. Pradhan, A.S.C. (C.T.)

(Assessment Period : 01.04.2011 to 31.03.2013)

Date of Hearing: 19.04.2021 *** Date of Order: 28.04.2021

ORDER

This appeal is directed against the order of the learned First Appellate Authority/ Joint Commissioner of Sales Tax (Appeal), Cuttack-I Range, Cuttack (in short, FAA/DCST) in First Appeal Case No. 106121512000077 dtd.18.07.2016 in reducing the assessment order passed by the learned Sales Tax Officer/ Assessing Authority, Cuttack-I City Circle, Cuttack (in short, STO/AA) for the assessment period from 01.04.2011 to 31.03.2013 u/s. 43(1) of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act).

2. The facts of this case can be briefly stated thus :

In the instant case, the proprietor of the business called M/s. Kid's Fashion, Tinikonia Bagicha, Cuttack (also called dealer or appellant) was assessed for the tax period 01.04.2011 to 31.03.2013 u/s.43 of the OVAT Act following a tax evasion report. This resulted in demand of Rs.168351/- including penalty of Rs.1,12,234.12.

The assessment was made to above amount of tax and penalty, basing on entire sale suppression of Rs.1100/- and entire purchase suppression of Rs.1023255/- which were pointed out in the tax evasion report following detection of physical stock found on the day of visit which could not be supported by relevant purchase invoices. The order reflected that the dealer did not produce any purchase invoices in respect of the purchase suppressions reported and assessed but that he stated that the report did not take into account purchase invoices produced by him which were older than six months counting from the date of shop visit. The shop visit took place on dt.18.02.2013. The report has been submitted on dt.29.06.2013. The assessment order based on the tax evasion report has been passed on dt.20.11.2013.

The dealer having gone in appeal against the assessment order, the order was set-aside and the learned STO was directed to re-assess the dealer in light of appeal order dtd.20.09.2014. The proprietor has been re-assessed in an order dtd.06.06.2015 which resulted in demand of Rs.76855/- including penalty of Rs.51236.40.

3. Being aggrieved with the order of re-assessment of the learned Assessing Authority, the dealer-appellant

preferred first appeal before the learned First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Cuttack-I Range, Cuttack (in short, FAA/JCST), who in turn, allowed the appeal in part and the tax demand was reduced to Rs.52,105/-.

4. Being further aggrieved, the dealer knocked the door of this Tribunal by way of filing second appeal with the contention that, both the fora below have acted arbitrarily and illegally passed the orders, which is otherwise erroneous, unjustified and against the principles of natural justice.

5. Cross objection has been filed by the State-respondent in this case.

6. Learned Advocate appearing on behalf of the dealer has vehemently argued that, the order of the learned FAA appears to be unjust and improper. The order of the learned FAA is highly arbitrary, unjust and thus liable to be quashed. The forums below have failed to quantify and justify actual quantity of purchase suppression, as reported by Investigation team on the date of their visit, without taking into account the previous year purchase invoices. It is pertinent to say that, the stock available on the day of visit were not purchased exclusively in the year 2012-13 and 2011-12, but some portion of the accumulated difference of stock obviously carry forward of previous stocks of 2010-11 and earlier years. The purchase invoices of the previous period should have been taken into account to arrive at actual suppression. The learned FAA is not justified to restrict to accept purchase invoices of precedent to the extent of Rs.150000/- and disallowed balance purchase invoices of previous periods 2010-11 and earlier years and jumped to

conclude appeal hearing and pass order treating sale suppression to the extent of Rs.3,47,364/- and directed to pay OVAT for Rs.52,105/- including penalty of Rs.34,736.40 without any just reason. The forums below should have taken into account the entire purchase invoices for the period 2010-11 and earlier years, there would have been no suppression of purchase as alleged. The learned FAA is not justified in imposing penalty of Rs.34736.40 which is double the tax demanded. Further law is well settled that, the power to impose penalty should not be exercised as a routine manner. It is to be exercised with proper judicial discretion. The learned Advocate for the dealer has relied on the following judicial decisions in support of his case :

(1) In M/s. Tex Marketing Agencies, Bhubaneswar, this Tribunal passed order on dt.23.07.2018 in S.A.No.112(ET)/2017-18 that, the dealer is liable to pay tax and interest as determined by the authority, whereas he is not liable to pay the penalty as levied. The impugned order is modified accordingly.

(2) The law is settled that penalty cannot be levied on estimated turnover as decided in case of Parvati Bhavan Sweets –vrs.- State of Tamil Nadu (2009) 22 VST 368 (Mad) Page 203.

(3) Penalty cannot be levied in case where sales were reflected in the books of accounts as held in Shree Krishna Electricals – vrs.- State of Tamil Nadu and Another (2009) 23 VST 249 (SC) Page 191.

The learned Advocate for the dealer has prayed before this Tribunal to allow the appeal filed by the dealer and to set aside the order of the learned FAA.

7. On the other hand, during the course of hearing learned Addl. Standing Counsel, Mr. Pradhan for the State argued that, the grounds raised in the appeal petition are misconceived and liable to be dismissed in toto. The order of the learned FAA appears to be just and proper. Since the learned Assessing Officer and First Appellate Authority has completed the assessment/appeal based on the provision of law, the same cannot be treated as defective in the absence of any documentary evidence. The investigation staff thoroughly verified the stock, the non-acceptance of the books of accounts maintained by the dealer by the learned Assessing Officer and learned FAA is justified. The learned Assessing Officer and learned FAA has imposed penalty u/s.43(5) as they were satisfied regarding existence of reasonable cause for imposition of penalty. There is no reasonable merit in the second appeal filed by the dealer-appellant, which is not sustainable in the eyes of law. So, he has prayed to dismiss the appeal filed by the dealer and to confirm the order of the learned FAA.

8. Heard the learned Advocate, Mr. B.B. Das appearing on behalf of the dealer and learned Addl. Standing Counsel, Mr. S.K. Pradhan on behalf of the State. Gone through the grounds of appeal, the impugned orders of appeal and assessment, cross objection filed by the State-respondent and arguments of both the sides at the time of hearing. In view of the facts and circumstances of the case and after analysing the points raised in this appeal, I am of the considered view

that, this is a fit case where the matter should be remanded back to the learned FAA to re-compute the tax liability of the dealer as per provision of law giving the dealer a reasonable opportunity of being heard. Accordingly, it is ordered.

9. The appeal filed by the dealer is allowed on contest. The order of the learned First Appellate Authority is hereby set-aside. The matter is remanded back to the learned FAA to re-compute the tax liability of the dealer as per provision of law after making proper verification within a period of three months from the date of receipt of this order and the dealer should be given a reasonable opportunity of being heard. The cross objection filed by the State-respondent is disposed of accordingly.

Dictated and Corrected by me,

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

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

