

Odisha Value Added Tax Act, 2004 (in short, OVAT Act) by both the fora below.

The appellant, M/s. Rashmi Cement Ltd., a registered dealer having its office at Manguli, Cuttack was engaged in trading of Iron-ore lump and iron-ore fines, effecting inter-state, intra-state and export trade and commerce. Consequent upon a fraud case report dtd.03.07.2009 submitted by the Sales Tax Officer, Enforcement Range, Cuttack, assessment u/s.43 of the OVAT Act relating to the appellant business concern was taken by the STO, Cuttack-II Circle as Assessing Authority (in short, AA). The AA found the dealer indulged in clandestine sale, purchase of the goods causing evasion of tax. He accepted the fraud case report fully, morefully described as follows :

1	Purchase bills were found not have been accounted for relating to purchase of Iron-ore lumps and Iron-ore fines.	15185.540 MT 26590.590 MT	Rs.4,89,94,236.78
2	Discrepancy in physical stock vis-à-vis book stock for the year 06-07, 07-08, 08-09 (Iron-ore lumps and Iron-ore fines).	269425.775 MT & 2948.777 MT	Rs.4,89,94,236.78
3	Suppression of purchase made during the period from January 2009 to March 2009 (Iron-ore lumps)	29425.470 MT, 25465.280 MT & 11754.270 MT.	Rs.19,99,35,060.00
4	Purchase transaction with M/s. K.J.S. Ahluwalia during the period From 24.03.2008 to 6.2.2009 and suppressed purchases of Iron-ore lumps.	43025.02 MT	Rs.12,90,75,060.00
5	Suppression of purchases made from M/s. R.P. Sao from 16.2.2008 to 16.1.2009 (Iron-ore lumps)	53841.790 MT	Rs.16,15,25,370.00
6	Total suppression of purchases detected and established.		Rs.1,34,92,81,439.78

2. Taking the aforesaid amount of Rs.1,34,92,81,439.78 as purchased suppression, the AA

added 5% profit margin to it and thus the total suppression became calculated at Rs.1,41,67,45,511.76. The above amount was treated as TTO and taxed @4% calculated to Rs.5,66,69,820.47. Thereafter, ITC admissible to the dealer was adjusted from out of the tax calculated. Accordingly the total tax due from the dealer was arrived at Rs.5,48,04,781.11. Above it, penalty u/s.43(2) of the OVAT Act, twice of the tax due was imposed. Resultantly, the total demand against the dealer towards tax and penalty raised at Rs.16,44,14,343/-.

3. As against the aforesaid assessment and demand, the dealer knocked the door of the FAA. Learned JCST, Cuttack-II Range, Cuttack as FAA, re-determined the escaped turnover, which was finally calculated at Rs.92,94,592.77. This amount was taxed @4% calculated at Rs.3,71,783.71. Twice of tax due was imposed as penalty u/s.43(2) of the OVAT Act. Thus, the total demand became re-determined and reduced to Rs.11,15,351/-.

4. Even after reduction of the demand before the FAA as mentioned above, the assessee-dealer felt aggrieved, preferred the present appeal. The contentions of the assessee-dealer are:

The very initiation of the assessment u/s.43 of the OVAT Act is not sustainable in the case in hand. The suppression as determined by the authorities below is not in correct appreciation of the evidence and accounts placed before the FAA. It is further contended that, the detection

of suppression of blue dust ore for 13790.197 M.T. was unfounded, since the goods were lying with the purchaser stockyard separately for transportation through Railway. It was supported by Form 'F' as stock transfer to the appellant's factory at Jharigram. Thus, according to the assessee, since there was no suppression, there was no question of imposition of penalty but the AA without verification of the CST return has determined the alleged suppression, which is unlawful.

5. The appeal is heard with cross objection from the side of the Revenue. Revenue has supported the order of the FAA in cross objection.

6. The question raised for decision in this appeal are: (i) Whether the FAA has committed wrong in sustaining the assessment proceeding u/s.43 of the OVAT Act, even though same is not maintainable in the eye of law ? (ii) Whether the FAA has committed wrong in finding the suppression to the tune of Rs.92,94,592.77, as the same is without any basis and (iii) What order ?

7. The main plunk of argument of the learned Counsel for the dealer, Mr.B.B. Panda is, the assessment u/s.43 of the OVAT Act in the case in hand, is not sustainable in law since there was no assessment under any of the provision prior to the escaped assessment and while initiating the escaped assessment the AA has not formed any opinion independent of the suggestion given in the fraud case report. Learned Counsel draws the attention of

the forum to many of the judicial pronouncements, whereby the ratio has been laid down to the effect that, the AA should consider the materials placed before him to form an opinion that, there is necessary for assessment u/s.43 of the OVAT Act, there was certain materials to the satisfaction of the AA that, a part of the turnover has been escaped from assessment. Learned Counsel argued that, the order passed by the AA does not reveal, he has followed the due procedure in the initiation of the assessment u/s.43 of the OVAT Act. The AA had not made any remark that, the returns for the periods were taken into consideration and he has formed an opinion on the basis of the fraud case report that, there was a case of escaped turnover to assess the dealer u/s.43 of the OVAT Act.

Gone through the LCR. The assessment order by the AA was passed on dtd.23.07.2009. The order was a brief one, but the AA has categorically mentioned that, there was reason to believe that, there was under-assessment and escapement of assessment and for that reason, assessment u/s.43 of the OVAT Act should be initiated. The reason given as such may how cryptic it was, but the perusal of the same does not prompt to believe that, the AA has not gone through the fraud case report but mechanically invoked the provision u/s.43 of the OVAT Act. It is not necessary that, in the first order should carry, the details which only can be reflected in the final order. There must be some kind of opinion based on material indicating the application of

mind by the AA independent of the information before him to initiate assessment u/s.43 of the OVAT Act. Here, we do not find any jurisdictional error committed by the AA in initiating the proceeding. The fact like, assessment for period 2006/2007/2008 are not different from the assessment period from 01.04.2006 to 31.03.2009. Consequently, we hold that, it is not a case of mechanical initiation of the assessment, but an opinion with application of mind conscious to the fraud case report.

9. The next contention from the learned Counsel for the dealer is, when the AA has taken the period of assessment up to 31.03.2009 basing on a fraud case report dtd.03.07.2009, it is not conceivable to believe that, there was any kind of self-assessment or even deemed self-assessment u/s.39 of the OVAT Act for the month of February, 2009. The outer limit for furnishing return for the month of 2009 was 21st March, 2009. Surprise visit by vigilance wing was made on dtd. 6.4.2009. So, as the time for filing of return was not over for the month of February, 2009 on the date of surprise visit then, any discrepancy, if noticed, in the transaction of February, 2009, cannot be treated as escaped turnover.

10. As against the submission above, learned Addl. Standing Counsel Mr. Raman argued that, fraud case report was submitted on 03.07.2009 i.e. much after the date of visit as well as the stipulated date of filing of return for the month of February, 2009 and it is necessarily construed

that, by the date of submission of fraud case report and more particularly, by the date the assessment was initiated, there was necessarily self-assessment u/s.39 of the OVAT Act period ending on 31.03.2009 covering the month of February, 2009. There is no dispute on the principle of law as submitted by the dealer that, the assessment u/s.43 of the OVAT Act must have preceded by any Sections 39, 40 or 42 of the OVAT Act as required under law prevailing by then. But the fact remains, here in this case, the self-assessment up to the period ending on 31.03.2009, can be successfully presumed. So, it cannot be said that, the period of assessment covered u/s.43 is absurd.

From above, it is held that, the proceeding u/s.43 of the OVAT Act as initiated is valid and lawful.

11. So far as the question of suppression as detected and determined by the FAA to the tune of Rs.92,94,592.77 against goods of Rs.13790.197 M.T. relating to the period February, 2009, the plea of the dealer is, it was the goods kept in separate stockyard for branch transfer and the same was transferred to separate branch of the dealer at Jharigram being supported by declaration Form 'F'. So, there was no reason to treat the same as suppressed turnover. It is apt to mention here that, the AA had accepted an amount of purchase suppression leading to sale suppression to the tune of Rs.1,41,67,45,511.76, whereas the FAA by an in-depth analysis found the allegations of suppression brought in was established to the tune of

Rs.92,94,592.77 i.e. against the materials covered under three numbers of bills of blue dust ore of quantity 13697.080 MT. The dealer had taken an inconsistent plea of branch transfer and CST sale against the said quantity of goods. In the hearing of the appeal the dealer has furnished copies of declaration Form 'C' and invoices relate to MIDEST INTEGRATED STEEL Barbil and argued that the alleged suppression relates to interstate sale. In either case, whether it is branch transfer against Form 'F' or inter-state sale against Form 'C', it must have disclosed in the CST return of the dealer. If this transaction is disclosed in the CST return and accepted by the Department, then there is no reason to tax the said quantity of goods under OST Act. In absence of the CST return or proof of acceptance of the CST return containing the due disclosure of the aforesaid transaction therein, it cannot be definitely concluded that, the goods were subjected to branch transfer or inter-state sale. It is pertinent to mention here that, this was not the plea of the dealer before the FAA. If that be, it cannot be said that the FAA is wrong in his findings on suppressed turnover. But at the same on scrutiny of the impugned order it is not made clear how the quantity of suppression was determined. The findings is ambiguous. The relevant portion of the order reads as follows:

“Similarly, the appellant furnished another three bills of blue dust and total quantity of purchase during the month Feb, 2009 calculated about 13697.080 M.T. The

suppression amount calculated on the basis of purchase price @Rs.674/- per M.T. calculated at Rs.92,94,592.77 as the goods were purchase during the month of February, the same cannot be treated as storing loss as claimed by the appellant. The turnover of suppression on account of closing stock of 13790.197 M.T. of blue dust iron ores is determined taking into account the aforesaid four numbers of purchase invoices

The above findings do not reflect a clear picture of the determination of suppressed turnover. Keeping view the discrepancy and ambiguity above we are constrained to arrive at a conclusion that, the matter may be remitted back to the AA for further enquiry on the limited question i.e. whether the alleged suppression determined by the FAA mentioned above was disclosed and duly accepted by the authority in the CST return/assessment. If the result of the enquiry is affirmative, then the dealer cannot be held liable for any tax or penalty on the alleged escaped turnover, conversely, if the answer is negative, there is no need to interfere with the order of the FAA so far as the tax due and penalty as imposed in the impugned order. Accordingly, it is ordered.

The matter is remitted back to the AA for enquiry into the fact that, the alleged suppression of the goods under three bills of blue dust of 13697.080 M.T in the month of February, 2009 was actually covered under CST return as branch transfer or CST sale. If the answer is found negative

in both cases, then the demand as raised in the impugned order be re-affirmed and raised against the dealer. The appeal is allowed accordingly and the impugned order is set-aside with the contention as aforesaid.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
Judicial Member-II

Sd/-
(S. Mohanty)
Judicial Member-II

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

Sd/-
(P.C. Pathy)
Accounts Member-I