BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A.No.44 of 2007-08

(Arising out of the order of the ACST, Balangir Range, Balangir, in First Appeal Case No. AA-117(BPI) 2003-04, disposed of on dtd.04.12.2006)

Present: Smt. Suchismita Misra, Chairman,
Sri Subrata Mohanty, 1st Judicial Member
&
Sri R.K. Pattnaik, Accounts Member-III

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

- V e r s u s -

M/s. Shree Jagannath Supply Co., At/P.O.- Janla, Khurda. ... Respondent

For the assessment period: 01.11.2008 to 31.07.2012

For the Appellant : Mr. S.K. Pradhan, Advocate
For the Respondent : Mr. M. Agrawal, Advocate

Date of Hearing: 04.06.2019 ******** Date of Order: 12.06.2019

O R D E R

The assessee-dealer M/s. Shree Jagannath Supply Co., Janla, Khurda a registered dealer faced audit assessment u/s.9C of the Orissa Entry Tax Act, 1999 (hereinafter referred to as, the OET Act covering tax period 01.11.2008 to 31.07.2012 on the basis of audit visit report. The allegations as brought in by audit visit report are, incorrect determination of purchase value leading to suppression and non-payment due entry tax.

The dealer had failed to satisfy the audit team about the payment of Entry Tax paid on interstate purchases including payment of excise duty, service charges, custom duty, utilization fees and lease rent of the tankers used in transportation. The assessing authority on due confrontation of the AVR to the dealer and thereafter on verification of the

registers and relevant documents on production by the dealer, determined the tax liability of the dealer. In the meanwhile, the dealer was found to have deposited tax of Rs.27,89,328.00 but while calculating the tax liability in the assessment, the assessing authority did not take account of the aforesaid deposit as made after receipt of the audit visit notice. Consequently, the assessing authority first determined the tax liability, then imposed penalty u/s.9C(5) i.e. twice of the tax and accordingly the total liability towards tax and penalty was calculated at Rs.87,57,165.00. Thereafter, he adjusted the deposited amount of Rs.27,89,328.00 mentioned above. Finally, the balance amount of Rs.59,67,837.00 was raised against the dealer.

Being aggrieved, the dealer knocked the door of first appellate authority who in turn treated the dealer's payment/deposit made after receipt of the audit visit report as a deposit u/s.33(5) of the OVAT Act read with Rule 34 of the OET Rules. Further, in consideration of other provisions like Rule 11(6) of the OET Rules, whereby statutory duty is caste upon the audit team to explain the provisions of the Acts and Rules to the dealer on such tax audit, the first appellate authority adjusted the tax deposited of Rs.27,89,328.00 mentioned above from the tax assessed and then, calculated the balance tax due and penalty. While calculating as such, he imposed interest of Rs.5,44,954.00 for delay payment of the tax as per voluntary disclosure of sec.33(5) of the OVAT Act. Ultimately, he re-determined the tax due, penalty and interest in total at Rs.9,34,138.00.

2. On this backdrop, Revenue being aggrieved preferred this second appeal challenging the sustainability of the order of first appellate authority that, the first appellate authority has adopted wrong mode of calculation. It is prayed for restoration of the order of assessing authority by setting aside the order of first appellate authority.

The dealer contested the case by filing cross objection.

In the cross objection the dealer has contended that, the penalty is to be imposed only on tax due. The case in hand does not fall under any of the circumstance contemplated u/s.9C like suppression of

purchase and sale, erroneous claim of deduction, evasion of tax or contravention of any of the provision of this Act is available, so that penalty cannot be imposed. Voluntary disclosure u/s.33(5) of the OVAT Act has been rightly considered by the first appellate authority. So, the calculation of the tax due by the first appellate authority is correct, whereas, imposition of interest by first appellate authority is bad as there was no proper opportunity of being heard was extended to the dealer against the imposition of interest and the imposition of interest itself is an enhancement without any notice to the dealer. It is also contended that, since in the case in hand, the imposition of tax on application of sec.2(j) of the OET Act, the question and the application of sec.2(j) to the goods purchased by the dealer is still in fluid stage as it is subjudiced before the Hon'ble Court, the dealer having no ulterior motive if paid the tax, the imposition of penalty is not attracted in the case in hand.

3. From the rival contentions, the questions framed for decision in this appeal and cross objection are,

(i) what should be the mode of calculation of the tax due, penalty and interest in an audit assessment?

(ii) whether the first appellate authority has committed wrong in accepting the voluntary disclosure and deposit by the dealer before the audit assessment into the calculation ahead of imposition of penalty;

(iii) whether the first appellate authority is wrong in imposing interest;

(iv) whether a proper opportunity of being heard was not provided to the dealer while imposing interest;

(v) whether in the case in hand penalty is unwarranted;

4. **Findings**

Question No.(1) & (ii)

The question No.(i) and (ii) are interlinked so taken up together. What is the time period of making voluntary discloser relatable to section 33(5) of OVAT act and what should be the mode of calculation of tax, penalty and interest

in such a case of voluntary discloser and payment of tax, if the time period is up to receipt of tax audit notice or during audit visit or up to receipt of assessment notice or at any stage till demand is raised as per audit assessment. Learned Addl. Standing Counsel strongly relied on the provision u/s.33(5) read with Rule 34 of the OVAT Rules. It is argued that, once the dealer has received the notice of tax audit then, there cannot be any voluntary disclosure as per the proviso appended to sec.33(5) of the OVAT Act.

Per contra, learned Counsel for the dealer argued that, the proviso does not say about any restriction on payment of tax. Moreover, the payment of tax if made before audit assessment then, in the assessment while calculating the tax due the tax already paid should be deducted first and, thereafter it is only on the balance tax payable by the dealer, penalty and/or interest should be levied.

5. To appreciate the argument from both sides, it is pertinent to take note of the relevant provisions under both the acts like OET Act and OVAT Act. Sec.7 of the OET Act contemplates the return and revised return. Sec.33 of the OVAT Act on the other hand similarly contemplates periodical return and revised return. Rule 34 of the OET Rules says, application of provision of the OVAT Act and Rules '*mutatis mutandis*' in the case of assessment under OET Act.

> "***7. Return and return defaults.***-
> (1) xxx xxx xxx
> (2) (a) If any dealer, having furnished a return under sub-section (1), discovers any omission or error in the return so furnished, he may file a revised return before the date on which the return for the next tax period becomes due.
> *(b)* Revised returns may also be furnished by the registered dealer under this Act if revised returns are furnished under VAT Act and the rules made thereunder:
> ***Provided that*** revised return may not be filed under this Act if the revised return furnished under VAT Act does not relate to the transaction of scheduled goods.
> (3) xxx xxx xxx
> (4) xxx xxx xxx
> (5) xxx xxx xxx
> (6) xxx xxx xxx

(7)	xxx	xxx	xxx
(8)	xxx	xxx	xxx
(9)	xxx	xxx	xxx
(10)	xxx	xxx	xxx
(11)	xxx	xxx	xxx"

Section 33 of OVAT Act:

"(1) Every registered dealer shall furnish returns in such forms, for such period, by such dates and to such authority, as may be prescribed:

Provided that the commissioner may, subject to such conditions and restrictions as may be prescribed, exempt any such dealer or class of dealers from furnishing such returns or require any such dealer to furnish-

(a) returns for such different periods; or

(b) separate return for each or any branch or place of business inside the State, where such registered dealer has more than one branch or place of business in the State.

(2) If the Commissioner has reason to believe that the gross turnover of any dealer is likely to exceed or has exceeded the taxable limit as specified in sub-section (4) of Section 10, he may, by notice served in the prescribed manner, require such dealer to furnish return as if he were a registered dealer, but no tax shall be payable by him unless his gross turnover exceeds the taxable limit provided under the said sub-section.

(3) A registered dealer, whose certificate of registration is cancelled by the registering authority under Section 31, shall furnish a final return in such form as may be prescribed, within thirty days from the date of order of such cancellation.

(4) If any dealer, having furnished returns under sub-section (1) of sub-section (2), -

(a) discovers any omission or error in any return so furnished, or

(b) where there is requirement for adjustment of the sale price or tax or both, as the case may be, in relation to sale of any goods, makes such adjustment by way of issue of credit note or debit note, as the case may be,

he may file a revised return within three months following the tax period to which the original relates.

(5) If any dealer, after furnishing a return under sub-section (1) or sub-section (2), discovers that a higher amount of tax was due than the amount of tax admitted by him in the

original return for any reason, he may voluntarily disclose the same by filing a revised return for the purpose and pay the higher amount of tax as due at any time, in the manner provided under Section 50:

Provided that no such voluntary disclosure shall be accepted where the disclosure is made or intended to be made after receipt of the notice for tax audit under this Act, or as a result of such audit.

(6) Every dealer required to file return under sub-section (1) shall pay the full amount of tax payable according to the return or the differential tax payable according to the revised return furnished, if any, in the manner provided under Section 50.

(7) Every return under this section shall be signed and verified-

(a) in case of an individual, by the individual himself, and where the individual is absent, by any person duly authorized by him in this behalf;
(b) in the case of a Hindu Undivided Family, by the Karta;
(c) in the case of a company or local authority, by the principal officer thereof;
(d) in the case of a firm, by any partner thereof not being a minor;
(e) in the case of any other association, by any person competent to act in that behalf.

Explanation.-

For the purpose of clause (c) of sub-sectin (7), the expression ***"PRINCIPAL OFFICER"*** shall have the meaning assigned to it under clause (35) of Section 2 of the Income Tax Act, 1961 (43 of 1961).

(8) Any return signed by a person who is not authorized under sub-section (7) shall not be treated as a return for the purpose of this Act:

Provided that any amount deposited on the basis of such return shall not be refunded except where it is established under the provisions of this Act to be otherwise not payable."

Rule 34. Implementation.-

"For any other matters not specified under these rules but required for the carrying out the purposes of the Act and these rules, the provision under VAT Act and the rules made thereunder shall, mutatis mutandis, apply."

6. We failed to understand why Rule 34 of OET rule will be applicable here for the reason that, there is specific provision under OET

Act for filing of the revised return. When the provision u/s.7 is self-contained about the filing of return and revised return, then absolutely there is no scope of application of the Rule 34 to a dispute regarding filing of revised return under the OET Act. The provisions of filing of return and revised return under both the Acts mentioned above, clearly mandates that, the dealer can file periodical return under the OET Act as per provision u/s.7 of the OET Act. It can also file revised return within a period of three months u/s.7(2)(a) and (b) of the OET Act. Similarly, on the other side, the return and revised return under the OVAT Act how to be filed is contemplated u/s.33 of the OVAT Act.

7. The provision of filing revised return u/s.33(4) of the OVAT Act relates to returns u/s.33(1) & (2). The situations under which the revised return can be filed are categorized under clause (a) and (b) to sub-section (4) of Sec.33 of the OVAT Act. Sub-section (5) to sec.33 is another provision. The stage of sub-section (5) comes only after furnishing return under sub-section (1) & (2) and the scope is limited to the extent like, when it is discovered by the dealer that, higher amount of tax was due then, the amount of tax was admitted by him in the original return for any reason, he may make a voluntary disclosure of the same by filing revised return. So, the scope and ambit under sub-section (5) is different from the scope and ambit of sub-section (4). The time limitation of revised return under sub-section (4) is three months following the tax period to which original return relates, whereas, the time limitation for filing of revised return under sub-section (5) is extended up to the receipt of the notice of "tax audit under this Act or" as a result of such audit. The proviso appended to sub-section (5) contemplates two different time limit, one is 'up to the period of receipt of notice of tax audit' and another is 'as a result of such tax audit'. The term 'or as a result of such tax audit' engrafted in the proviso has been omitted in view of the amendment of the provision w.e.f. 1.10.2015. Such omission itself indicates that, the legislature has intended to scuttle the time limit for making such disclosure and it has wanted to confine the time limit up to the receipt of notice of the tax audit.

The present case in hand relates to a period prior to the amendment when there was scope.

8. The prescribed format under E25, E27 and E30 of the OET Rules relatable to form under VAT-301/303 and VAT-306 and VAT-312 in relation to OVAT Rules. Section 33(5) of the OVAT Act of the proviso mentioned above is reproduced as below-

Section 33 of the OVAT Act-

"***33. Periodical returns and payment of tax.-***

(1) xxx xxx xxx
(2) xxx xxx xxx
(3) xxx xxx xxx
(4) xxx xxx xxx
(5) If any dealer, after furnishing a return under sub-section (1) or sub-section (2), discovers that a higher amount of tax was due than the amount of tax admitted by him in the original return for any reason, he may voluntarily disclose the same by filing a revised return for the purpose and pay the higher amount of tax as due at any time, in the manner provided under Section 50:

Provided that no such voluntary disclosure shall be accepted where the disclosure is made or intended to be made after receipt of the notice for tax audit under this Act "**or** as a result of such audit".

(6) xxx xxx xxx
(7) xxx xxx xxx
(8) xxx xxx xxx"

Form VAT-301 relates to notice for audit visit.

Form VAT-303 is the audit visit report.

Form-306 is notice for assessment for tax as a result of audit.

9. At the cost of repetition it is stated that, the underlined portion of section speaks of with two different time period for making self-disclosure of higher amount of tax payable. The term "notice of tax audit under this act" and the term "as a result of such tax audit" are separated by word "OR" which is disjunctive in implication. This view is more fortified for the reason that, in a later period the legislature has in its wisdom omitted the term 'or as a result of tax audit w.e.f. 01.10.2015 so that, from that date onwards

voluntary disclosure u/s.33(5) became restricted up to receipt of the notice of tax audit.

10. Analysis of the question from other angle, if we look at the form VAT-312 format of the calculation under form VAT-312, it is pertinent to take note of the fact that, the form VAT-312 has also undergone change w.e.f. 01.10.2015 i.e. consequential to the changes in the section above. When the format prior to the substitution period and after the substitution period compared with each other, it is a manifestation of the view above. The relevant portion of the format of two period is reproduced below-

"**Before the amendment dtd.01.10.2015**

06. (a) ITC claimed as per return

(b) ITC allowed in the order

07. (a) Output tax admitted as per return

08. (a) Output tax net of ITC as per return [7(a) – 6(a)]

(b) Output tax net of ITC as determined [7(b) – 6(b)]

09. Tax paid

10. Balance tax due/excess payment, if any [8(b) – 9]

11. Interest levied under Section –

12. Penalty levied under Section –

13. Total tax, interest and penalty due from the dealer [10 + 11 + 12]"

"**After amendment dtd.01.10.2015**

06. Tax assessed/

refund claimed
07. Tax paid
08. Tax assessed
09. Tax / refund found to be due
10. Tax over declared / under declared
(Due to the dealer) (due to the State)
(Score out whichever is not applicable)

As per the format before amendment assessing authority is to take account of ITC claimed and output tax admitted as per return (Sl. no. 6 & 7) but only the tax paid. The term as per return is not appended to Sl. No.9. It indicates the AA is to take account of the entire amount of tax paid. The formats after amendment does not contain such term like "as per return" appended to any of the serial.

The format is outcome of the section. It is a part of the statute. Formats are there for notice, calculation, demand etc. In taxing statute it is the requirement under law that, the notice, calculation, demand etc. should be in strict adherence to the format unless the assessment cannot withstand in law. So, it must be borne in mind that format is not a mere formality.

Further, why, with the change of the section/rule, the format is also changed? Legislators in their wisdom remaining conscious to the change brought into the section in mind brought change in the format. The assessing authority has no jurisdiction to ignore it or interpret it in it's own way.

In M/s. Rajdhani Coir v. CCT, Orissa in W.P.(C) No.11088/2018 dtd.04.12.2018 (Orissa), Hon'ble Court has held that, once the demand as per audit visit report is complied with by an assessee there is no scope for making self-same audit visit report a basis for audit assessment u/s.42 of the OVAT Act. It means the dealer had the option at his hand even to comply the demand under audit visit report so as to avoid audit assessment.

On a conspectus of the discussion hereinabove, the provision under law regarding mode of calculation of tax liability under the audit assessment, it is held as follows.

Thus, for the reasons discussed hereinabove, it is conclusively held that, prior to the change in the statute dtd.01.10.2015 the voluntary disclosure u/s.33(5) was available to the dealer till the outcome of audit visit more fully stated "in between audit notice and outcome of audit". Whereas, for the period after 01.10.2015 onwards, the disclosure can only be made till receipt of the audit visit notice. The tax due, penalty or interest should necessarily be calculated in strict adherence to form VAT-312 in force in respective assessment periods.

11. Reverting to the case in hand, one more thing noticed to our surprise that, the first appellate authority though accepted the voluntary disclosure by the dealer u/s.33(5) but has levied interest with a finding that, the interest is levied due to delay in making self-disclosure. Here, the findings of the first appellate authority is self-contradictory and not correct. So, the interest levied is deleted.

12. Question No.IV

Imposition of penalty is a consequence of tax liability if determined in an audit assessment. Here, even after knowing the result of the audit, if the dealer is found liable to more amount of tax, then penalty and interest on the balance tax due is lawful.

13. In the wake of above, it is held that, the view and reasoning given by the first appellate authority regarding acceptance of self-disclosure is not specific or in accordance to law but when the ultimate result is correct, it needs no interference. However, the impugned order to the extent of imposition of interest at Rs.5,44,954.00 being unlawful is deleted. The dealer is liable to pay interest and penalty only on the tax due.

14. The appeal is dismissed on contest. The cross objection is allowed in part. Calculation of balance tax due, interest and penalty be made accordingly.

Dictated & corrected by me,

Sd/-
(Subrata Mohanty)
1st Judicial Member

Sd/-
(Subrata Mohanty)
1st Judicial Member

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

Sd/-
(R.K. Pattnaik)
Accounts Member-III