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

S.A. No. 64(V) of 2016-17

(Arising out of the order of the ld. DCST (Appeal), Cuttack I Range, Cuttack, in First Appeal Case No. 106121512000128, disposed of on dtd.29.03.2016)

P r e s e n t: **Shri S. Mohanty,**
1st Judicial Member

M/s. Sun Pharmaceutical Industries Ltd.,
Alamchand Bazar, Cuttack. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2012 to 31.03.2014

For the Appellant ... Mr. N. Panda, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 25.06.2019 ******** Date of order: 26.06.2019

O R D E R

The assessee-dealer in an audit assessment u/s.42(4) of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) being unsuccessful before both the fora below has preferred this appeal against confirming order of first appellate authority.

2. The facts giving rise to the present appeal are, the assessee-dealer is a pharmaceutical industries limited having its registered office at Cuttack was subjected to audit assessment covering tax period 01.04.2012 to 31.03.2014 on the basis of audit visit report (in short, AVR) with the allegation of wrong deduction against credit notes issued beyond the statutory period. In the assessment, STO, Cuttack I West Circle, Cuttack as

assessing authority on verification found the dealer has decreased output tax by Rs.39,295.00 during 2013-14 and Rs.37,857.14 during 2012-13. The dealer had issued credit notes for Rs.37,857.14 and Rs.1,438.14 during the year 2012-13 and Rs.37,857.14 during the year 2013-14. In the year 2012-13, for return of goods, the credit notes were issued within three months of issue of sale invoice but in case of 2013-14, the credit notes were issued beyond three months of the statutory period. The credit note vide No.0891CE0001 dtd.15.07.2013 amounting to Rs.4,15,107.00 MRP value of Rs.7,57,142.86, tax amount of Rs.37,857.14 relates to invoice dtd.22.02.2013 issued more than a gap of three months hence, denied as per Rule 7(2) of the OVAT Rules. As a result, the reduction in output tax by Rs.37,857.14 was disallowed. In addition to disallowance of output tax as it was assessed in a proceeding u/s.42(4) of the OVAT Act, penalty was imposed u/s.42(5) of the OVAT Act for Rs.75,712.00. Thus, the total demand against the dealer towards tax and penalty was raised at Rs.1,13,568.00.

3. Being aggrieved with such assessment, the dealer preferred appeal before the first appellate authority. Learned Deputy Commissioner of Sales Tax (Appeal), Cuttack I Range, Cuttack as first appellate authority in the impugned order declined the claim of the dealer and by reiterating the reasonings given by the assessing authority confirmed the order of assessment. On this backdrop, the dealer knocked the door of this second appellate forum with a prayer for deletion of the tax liability and penalty.

It is contended that, due to the return of the medicine by the purchaser in a late, the dealer issued credit notes accordingly which was just few days beyond the prescribed period of three months as per Rule 7(2) of the OVAT Rules. The purchaser is a regular customer. The dealer is a multinational company having no intention to evade payment of tax, so in that event, penalty u/s.42(5) is not warranted.

4. The appeal is heard with cross objection. Revenue has supported the findings of fora below in its cross objection.

5. From the rival contentions, the questions raised for decision in this appeal are,

(i) whether the issuance of credit notes in the case in hand is beyond the period of limitation and in consequence thereof, the dealer is not entitled to deduction of credit notes amount from output tax collected;

(ii) whether in the facts and circumstances of the case the dealer is not liable to pay penalty, if not, then what should be the amount of penalty to be paid by the dealer.

6. At the outset, the facts admitted in this case are, the dealer had sold pharmaceutical goods like medicine to one purchaser who is a doctor of Rourkela. During the year 2012-13 and 2013-14, there were returns of medicines by the purchasing dealer as against the return of medicine for the year 2012-13, the dealer had issued credit notes within statutory tax period of three months and as against the goods returned for the year 2013-14, the dealer had also issued credit notes beyond the statutory period. The instance where the dealer issued credit notes issued beyond the period of three months is the question in this case. The relevant provisions for the purpose of determination of this question are sec.2(53) OVAT Act i.e. the tax period, Rule 7(2) and Rule 7(3)(d) of the OVAT Rules relates to issue of credit note and return of goods. The provisions are reproduced herein below for better appreciation.

Sec.2(53) of the OVAT Act-

> "(53) ***"TAX PERIOD"*** means such period for which return is required to be furnished by or under this Act;"

Rule 7(2) of the OVAT Rules-

> "(2) Credit note or debit note as referred to in sub-rule (1) shall be issued within three months following the tax period, during which the original sale had taken place."

Rule 7(3(d) of the OVAT Rules-

> "(d) the goods or part thereof are returned to the seller and, the seller accepts the return of the goods subject to the condition that such return of goods is made within three months from the date of sale:"

As per the provisions above, in case of sale of goods if it is returned by the purchasing dealer, it must be returned within the period of three months as per Rule 7(3)(d). Beyond that, the selling dealer is not bound to receive back the goods. Similarly, as per Rule 7(2) of the OVAT Rules the credit note or debit note should be issued within a period of three months. Here, in the case in hand, when the dealer sold the goods to dealer of Rourkela and later when the purchasing dealer returned the goods, the assessee-dealer should not have accepted that return beyond the period of three months as mandate u/r.7(3)(d) of the OVAT Rules. So, here the assessee-dealer by receiving back the goods beyond the statutory period has committed wrong and for that reason, he cannot take rescue of a plea that, the purchaser is a regular customer and the transaction is bona fide.

In a similar fashion, when the provision u/r.7(2) speaks of issuance of credit note within the period of three months following the tax period, then any credit note issued beyond that period will not be taken into consideration for the purpose of reduction in output tax. The tax period is defined u/s.2(53) of the OVAT Act i.e. for the present dealer is month-wise.

7. On conspectus of the provision mentioned above, here in this case, there is no escaped from the conclusion that, the credit notes issued by the instant dealer beyond three months of the tax period is of no avail to him. So, there is no reason for the taxing authority to give deduction of output tax to the amount of credit note issued. To that effect, the finding of both the fora below calls for no interference.

8. Coming to the question of penalty u/s.42(5) of the OVAT Act, learned Counsel for the dealer argued that, this is the single instance where

the dealer has committed mistake i.e. due to ignorance of law and on good faith. The dealer has received back the goods beyond the period of three months from the purchaser without any evil intention. So, in absence of *mens rea*, the dealer should not be imposed with penalty.

Per contra, learned Addl. Standing Counsel strenuously argued that, *mens rea* is not a pre-condition for imposition of penalty u/s.42(5) of the OVAT Act, because the penalty under the provision is a civil in nature for which *mens rea* is not required.

9. Avoiding further discussion on this question, it can safely be said that, this Tribunal has been awarding penalty u/s.42(5) invariably when there is a case of audit assessment attracting the ingredients of sec.42(1) of the OVAT Act. The present one is covered u/s.42(1) of the OVAT Act, so penalty is a must. So far as the quantum of penalty is concerned, here it is held that, this authority has taken a view consistently with regard to the quantum of penalty in view of the change in law w.e.f. 01.10.2015. Though, there is no express provision for application of the changed of law with retrospective effect but in view of the omission of the word "two" relating to the quantum of penalty in the changed provision, it has been accepted that, in case of penalty, the penalty must be confined to one time of the tax due.

In **Royal Corporation Pvt. Ltd. & Others -Vrs.- Director of Enforcement (1970) AIR 494**, the Apex Court has held as follows :

> "Section 6 of the General Clause Act cannot obviously apply on the omission of Rule 132(A) of the BIRS. For the second above reason, Sec.2 applies to repeals and not to omission and applied allegation report is of a Central Act or Regulation and not of a Rule."

Well settled principle is: The rule of beneficial construction requires that ex-post facto law should be applied to reduce the rigorous sentence of the previous law on the same subject. Such a law is not affected

by Article 20(1). The principle is based upon the legal maxim “Salus Populi Est Suprema Lex” which means the welfare of the people is the supreme for the law. It is inspired by principles of justice, equity and good conscience.

The rule of beneficial construction requires that even ex-post facto law of such a type should be applied to mitigate the rigour of the law. This principle is based both on sound reason and common sense. This finds support in a passage that “A retrospective statute is different from an ex-post facto statute”.

Reliance is placed in the matter of Smt Dayawale v. Indrajit AIR 1966 SC 1423 para 10.

10. It is settled both on authority and principle that a later statute again described an offence created by an earlier statute and imposes a different punishment or varies the procedure of the earlier statute is repealed by implication. In this regard, we may refer to the decision in Rattan Lal v. State of Punjab, AIR 1965 SC 444 and in Ramesh v. State of Madhya Pradesh and Another 2004 CriLJ 62.

Here, we may profitably referred to the case of State v. State v. Gian Singh, AIR 1999 SC 3450, wherein the Apex Court expressed the view as under:-

> "It is the fundamental right of every person that he should not be subject to greater penalty what the law prescribes, and no ex post facto legislation is permissible for escalating the severity of the punishment. But if any subsequent legislation would downgrade the harshness of the sentence for the same offence, it would be a salutary principle for a administration of criminal justice to suggest that the said legislative benevolence can be extended to the accused who awaits judicial verdict regarding sentence."

It is well also settled in law that mere differentiation does not per se amount to discrimination within the inhibition of the equal protection clause. In the case of Ashutosh Gupta v. State of Rajasthan, (2002) 4 SCC 34 is relied.

11. Thus, from the discussion above, here in this case, it is held that, the finding of both the fora below regarding determination of tax liability is not interfered with. Similarly, the imposition of penalty is also not

interfered with but the quantity of penalty is reduced to one time only, hence it is ordered.

12. The appeal is allowed in part. The dealer is liable to pay tax and penalty of Rs.75,712, the demand be raised accordingly.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

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