BEFORE THE ODISHA SALES TAX TRIBUNAL (FULL BENCH), CUTTACK

S.A.No. 102(V)/2011-12

P R E S E N T :

Sri A.K. Panda, 1st Judicial Member — Sri S. Mohanty, 2nd Judicial Member — & — Sri P.C. Pathy, Accounts Member-I

(From the order of the ld.ACST, Puri Circle, Puri,
in Appeal No. AA/41/VAT/PU-I/10-11, dtd.28.03.2011,
confirming the assessment order of the Assessing Officer)

M/s. Zenith,
Prop. Mamata Mohapatra,
C.I. Office Road, Dist. Puri. ... Appellant

-Versus –

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

(Assessment Period : 01.04.2008 to 31.03.2010)

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

Date of Hearing: 17.11.2018 Date of Order: 24.12.2018

ORDER

This second appeal is preferred against a confirming order of the learned First Appellate Authority/Deputy Commissioner of Sales Tax (Appeal), Puri Range, Puri (in short, FAA/DCST) sustaining the tax liability and penalty imposed by the Assessing Authority/Sales Tax Officer, Puri Circle, Puri (in short, AA/STO) against the dealer-appellant in a proceeding u/s.43 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act). Purchase suppression and sale suppression leading to escapement of turnover when detected by the Vigilance Wing during a surprise visit to the business premises of the appellant-dealer followed by a Vigilance report was the basis before the Assessing Authority, Puri Circle, Puri to initiate proceeding u/s.43 of the OVAT Act comprising tax period 01.04.2008 to 31.03.2010 relating to the dealer's unit, which is a proprietorship

concern engaged in purchase and sale of grocery and stationery goods. The tax evasion report submitted by the Vigilance Wing contains four numbers of allegations relating to the detection of purchase suppression as well as sale suppression being supported by seizure of connected documents. As per the report, the dealer had not shown the sale, purchase reflected in the seized document in his books of account and or connected registers led to tax evasion and turnover, which was escaped assessment by such evasion was calculated by the AA ended with re-determination of GTO and TTO and tax liability. After adjustment of output tax collected and VAT paid, the balance tax due was calculated at Rs.3,64,019.26. Twice of it i.e. Rs.7,28,038/- was imposed as penalty as per Sec.43(2) of the OVAT Act. Thus, the total demand raised to Rs.10,92,057/-.

2. In appeal before the FAA, the dealer took a plea that, most of the entries in the estimation slips, which were already reflected in the sale register, was taken into consideration. It amounts to double calculation of the purchase figure or sale figure. However, the FAA turned down the plea of the dealer and confirmed the order of the AA, which led to filing of this second appeal by the dealer.

3. The contention of the dealer is, the estimation slips which were considered as purchase suppression or sale suppression were actually reflected in the register in a latter period when the sale or purchase was complete. It is also contended that, the husband of the dealer, Sri Himanshu Sekhar Mohapatra runs his own business in the same premises and the authorities have taken the sales of the husband's unit in the calculation of the dealer's unit wrongly. The dealer has also challenged the very initiation of proceeding u/s.43 of the OVAT Act for want of any proceeding u/s.39, 40, 42 and 44 of the OVAT Act prior to it.

4. The appeal is heard without cross objection.

5. The substantial question raised by the dealer to be decided in this appeal are, (i) Whether the fora below has committed wrong in accepting the Vigilance report regarding the allegation of escapement of assessment by the

dealer and (ii) Whether the fora below at the very initiation of the proceeding u/s.43 of the OVAT Act in the case in hand is not sustainable ?

6. Coming to the question of escapement of turnover, here in this case, the allegation against the dealer is during surprise visit of the dealer's unit, the Vigilance Wing detected and seized incriminating materials indicating sale suppression by the dealer. On verification it was found that, those transactions were not reflected in the books of account and connected register of the dealer. Argument of the dealer before us, is the transaction reflected in the incriminating documents were actually reflected in the connected register in a latter period. So, the calculation of the AA amounts to double calculation.

7. On being asked the Counsel for the dealer miserably failed to substantiate his plea by any evidence. Mere submission on the question of fact when not supported by any evidence is of no avail to the dealer. In a similar fashion, learned Counsel for the dealer-appellant has also submitted that, in the same premises, husband of the instant dealer was also running his business and the Vigilance Wing has taken account of some of the documents of sale relating to the husband's unit while calculating the GTO and TTO of the dealer. Again it is found that, this plea or submission is not supported by any documents. Perusal of the orders of both the fora below does not indicate any kind of evidence in support of this plea of the dealer was produced before them for consideration. Both the fact finding authorities below on due consideration of the Vigilance report, registers and in due consideration of the pleas of the dealer arrived at a conclusion that, the dealer was guilty of purchase suppression and sale suppression leading to escapement of turnover. There is no cogent material produced before us to upset the findings on fact by both the fora below. Hence, the fact of suppression as determined by the fora below calls for no interference.

8. The next plunk of argument advanced by the learned Counsel for the dealer is, proceeding u/s.43 of the OVAT Act in this case has no legs to stand as it is not preceded by assessment under any of the Sections 39, 40, 42 or 44 of the OVAT Act. Answering to this, learned Addl. Standing Counsel draws the attention of the Court to the authority in the matter of ***M/s. Nilachal Ispat Nigam Ltd. Vrs. State of Odisha in W.P. (C) No.22343 dated 07.12.2016.*** In

this case, learned Hon'ble Court has taken consideration of a proceeding u/s.10 of the OET Act and held it :

> "under the taxation rule the assesse is required to furnish self-assessment and the authority is required to assess the same and there is no provision provided under the Act to communicate in case of acceptance of the assessment. Although under the provision of Orissa Value Added Tax Act under Section 38 read with Section 7(10) each and every return in relation to any tax period furnished by a registered dealer shall be subject to scrutiny by the assessing authority to verify the correctness of the calculation, application of correct rate of tax and interest etc. and in case of any mistake, detected in course of scrutiny, the assessing authority shall serve a notice in the prescribed form as we find even from the provision of Section 7 or sub-section (11), then the assessment made by the registered dealer under the provisions of Section-9 will be said to be accepted".

Keeping view the principle as settled above, adverting to the case in hand, it can safely be said that, when there was no intimation to the dealer as per Section-38 of the Act or as per Rule-40 of the OVAT Rule then, definite presumption under law is, the self-assessment u/s.39 was complete. In that event, there is no impediment for initiation of proceeding u/s.43 of the OVAT Act. More to say, when the detection of escaped turnover found established and during the proceedings before both the fora below, the dealer has not claimed that he has not filed periodical return, then by necessary implication, it is held that, the dealer was self-assessed on the basis of periodical return and the detection by the Vigilance wing is nothing but an escapement in relation to the assessment under Section-39 of the Act. With the observation made, it is held that the argument laid by learned Counsel for the dealer has no force both in law and facts.

9. The learned Counsel for the dealer argued that, penalty as imposed i.e. twice of the tax due is not sustainable. Law is no more *res integra* keeping the provision u/s.43(2) of the OVAT Act, that in case of determination of tax liability in a proceeding u/s.43 of the OVAT Act, the Court may impose penalty. However, the fact remains after amendment of the provision of Sec.43(2) of the year 2015, the amount of penalty is reduced to a sum equal to the amount of tax additionally assessed u/s.43(1) of the OVAT Act. Now the question before us is, whether the amended provision is applicable to the case in hand, particularly

when the alleged offence was detected at a period when amendment was not incorporated into the tax book. Bare reading of the new provision the word “Two” mentioned in the sub-section is omitted. If that be, whether the provision as amended should be treated as if there from the date of the original enactment or from the date of such omission is the question. The amendment is made by the legislature, for a benevolent purpose in favour of the dealer. It is undisputed that, appeal is a contention of the order/suit. This forum has also jurisdiction to go into the facts and to make fresh assessment.

In Smt. Dayawati v. Inderjit , AIR 1966 SC 1423 PARA 10 It was held that "Now as a general proposition, it, may be admitted that ordinarily a Court of appeal cannot take into account a new law, brought into existence after the judgment appealed from has been rendered, because the rights of the litigants in an appeal are determined under the law in force at the date of the suit. Even before the days of Coke whose maxim - a new law ought to be prospective, not retrospective in its operation - is off-quoted, Courts have looked with dis-favour upon laws which take away vested rights or affect pending cases. Matters of procedure are, however, different and the law affecting procedure is always retrospective. But it does not mean that there is an absolute rule of inviolability of substantive rights. If the new law speaks in language, which, expressly or by clear intendment, takes in even pending matters, the Court of trial as well as the Court of appeal must have regard to an intention so expressed, and the Court of appeal may give effect to such a law even after the judgment of the Court of first instance."

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".

This rule is however subject to the limitation contained in Article 20(1) against ex-post facto law providing for a greater punishment and has also no application where the offence described in the later Act is not the same as in the earlier Act i.e. when the essential ingredients of the two offences are different".

In Ratan Lal Vs.State of Punjab, AIR 1965 SC 444. a boy of 16 years was convicted for committing an offence of house-trespass and outraging the modesty of a girl aged 7 years. The magistrate sentenced him for six months rigorous imprisonment and also imposed fine. After the judgment of magistrate, the Probation of Offenders Act, 1958 came into force. It provided that a person below 21 years of age should not ordinarily be sentenced to imprisonment. The Supreme Court by a majority of 2 to 1 held that the rule of beneficial interpretation required that ex-post facto could be applied to reduce the punishment. So an ex-post facto law which beneficial to the accused is not prohibited by clause (1) of Article 20.

Taking cue from the above authoritative pronouncement, it is held that, the terms in the provision u/s.43(2) as amended in the year 2015 has got liberal applicability to the pending cases. Consequently, it is held that, the penalty as imposed by the fora below should be modified to one time of the additional tax due as calculated by the authorities below. In the wake of above narratives, it is ordered.

Dictated & corrected,

(Subrata Mohanty)
2nd Judicial Member

P.C. Pathy, Accounts Member-I

10. The Odisha Value Added Tax (Amendment) Act, 2015 (ODISHA ACT 7 OF 2015) amended the principal Act, in Section- 43(2) which has come into force on 01.10.2015 vide SRO No.490/2015 published in the Odisha Gazette, whereas the present proceeding relates to the assessment period from 01.04.2008 to 31.03.2010 and as such the imposition of penalty at the rate of

'equal' the amount of the balance tax on the basis of the Amendment Act is erroneous and not in accordance with the provision under the law. From the findings of the Tax Evasion Report of ACCT (Vig) Division, Bhubaneswar and confirmation of the same by the assessing authority and appellate authorities including this Tribunal, it is clear that the appellant has evaded tax, hence penalty imposed by the authorities below in accordance with the provision under the Law in vogue for the relevant period does not warrant interference. When the amendment itself was not given retrospective effect, the imposition of penalty as amended would not apply to the present case where the suppression was established beyond reasonable doubt relating to the period prior to the effective date of the Odisha Value Added Tax (Amendment) Act, 2015 i.e. 01.10.2015.

11. Our Hon'ble High Court in the matter of M/s. Bansapani Iron Ltd. Vrs. State of Odisha, 2016 (I) ILR–CUT-50 deciding the point- whether the amendment of the definition of "capital goods" in section 2(8) of the Act is prospective or retrospective in nature the Hon'ble Court has held that the OVAT (Amendment) Act, 2007 did not itself declare the date from which the statute came into operation and left it to the Govt. to issue the appointed date through notification and notification was issued indicating 01.06.2008 as the appointed date. Thus the Hon'ble Court has held that the amendment is not clarificatory but prospective in nature.

Similarly in the instant case the Govt. in Finance Dept. vide notification in SRO No.490/2015 dtd.19th Oct, 2015 has declared the 1st day of October, 2015 as appointed day on which the said Act viz:, The Odisha Value Added Tax (Amendment) Act, 2015 shall be deem to have come into force.

12. It is not out of place to make a mention here that the Hon'ble Judicial Member-I of this Tribunal in his order passed on 01.09.2017 in S.A. No.56(V)/2016-17 in the matter of State of Odisha Vrs. M/s. Praveen Hardware & Steels, Madhupatna, Cuttack relating to the assessment period from 31.12.2009, 01.04.2010 to 31.01.2011 regarding imposition of penalty

U/s.43(2) of the OVAT Act has given the following observations/findings in Para -7 of the Order:-

> "On perusal of the order of the learned JCST, it appears that, the learned JCST has misquoted Sec.42(5) of the OVAT Act instead of Sec.43(2) of the said Act. But, the same has no bearing in the present proceeding, as both the sub-sections of Secs.42 and 43 of the Act has been amended by the Amendment Act, which has come into force on 01.10.2015 being the appointed date by the Government as per Sec.1(2) of the said Act and in view of such amendment 'twice' the amount of the balance tax demand has been substituted by 'equal' the balance tax demand. Of course, it is true that the penalty clauses in the OVAT Act have been amended to give benefits to the dealers-assessees. But, as the Government has appointed a particular date i.e. 01.10.2015 as the date of its application in view of Sec.1(2) of the Amendment Act, it is clear not to have any retrospective effect. The present proceeding relates to the assessment periods prior to the year 2011 and as such the provisions of the amendment act has no application to the proceeding. In such view of the matter, the order passed by the learned JCST relating to the imposition of penalty at the rate of 'equal' to the balance tax demand, is not sustainable in the eye of law and hence the same deserves to be set aside."
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> In view of the above, the penalty imposed by the ld. STO and confirmed by the first appellate authority needs no interference.

Dictated & corrected,

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

Ashok Kumar Panda, 1st Judicial Member

13. I got the opportunity to go through the draft order prepared by the Hon'ble 2nd Judicial Member and also the draft dissent view prepared by the Hon'ble Accounts Member-I relating to the imposition of penalty u/s.43(2) of the OVAT Act. As regard the determination of suppression on the part of the appellant-dealer and the consequential tax demand as raised by the learned forums below, I am in full agreement with the finding and order arrived at by both the Hon'ble members.

14. But, so far as the imposition of penalty u/s.43(2) of the OVAT Act is concerned, there is a conflicting view among both the Hon'ble Members. On consideration of the earlier provision and the amended

provision, the Hon'ble 1st Judicial Member has arrived at a conclusion that, the amended provision being a penal law made for the benefit of the dealers has a retrospective effect and as such the same is applicable to the present case and accordingly the appellant-dealer is liable to pay penalty at the rate of equal to the balance tax demand u/s.43(2) of the OVAT Act. But, relying upon in the case of **M/s. Bansapani Iron Ltd. Vrs. State of Odisha, 2016 (I) ILR-CUT-50** and further relying upon in a Single Bench case of this Tribunal vide S.A. No.56(V) of 2016-17, **M/s. Praveen Hardware & Steels Vrs. State of Odisha**, the Hon'ble Accounts Member-I has held that the law prevailing by the time of assessment is applicable to the present case and as such the appellant-dealer is liable to pay penalty at the rate equal to twice of the balance tax demand under this provision.

15. In S.A. No.56(V) of 2016-17 (supra), relying upon in the case of M/s. Bansapani Iron Ltd. Vrs. State of Odisha (supra), a Single Bench of this Tribunal (wherein myself was the Member) has held that as the Government has appointed a particular date i.e. 01.10.2015 as the date of its application in view of Sec.1(2) of the Amended Act, it is clear not to have any retrospective effect and has also no application to the proceeding relates to the assessment of the dealer-assessee for the assessment year 2011. But, on consideration of the aims and objectives of the Amendment Act and on consideration of general principle of law, the view expressed in M/s. Praveen Hardware & Steels does not appears to be a correct view.

16. The legislatures in their wisdom have amended the provision of penalty mentioned in sec.43(2) of the OVAT Act to give benefit to the subjects. As per the general principle of law, a penal provision must have a retrospective effect, or else the same will create discrimination. Otherwise also an appeal preferred by a dealer, either the first appeal before the first appellate authority or the second appeal before this Tribunal, on the question of fact and law can clearly be considered to be a continuation of the proceeding and as such the amended provision is applicable to all such proceedings pending before any of the authorities. The case of M/s. Bansapani Iron Ltd. (supra) has been decided by the Hon'ble High Court in

a different context and hence is of no application to the present dispute. In such view of the matter, I agreed to the finding and order arrived at by the Hon'ble 2nd Judicial Member relating to the imposition of penalty u/s.43(2) of the OVAT Act.

Dictated & corrected,

Sd/-
(Ashok Kumar Panda)
1st Judicial Member

17. In view of the discussion above, the appeal is allowed in part. The balance tax demand as raised against the appellant-dealer by the learned assessing authority/STO and being confirmed by the learned FAA/DCST is hereby confirmed further. In view of the majority view the consequent penalty imposed upon the appellant-dealer is hereby reduced to one time of the balance tax demand instead of equal to twice of the balance tax demand as imposed by the learned forums below. The demand notice be issued accordingly.

Dictated & corrected by me,

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

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

I agree,

Sd/-
(A.K. Panda)
1st Judicial Member

I agree,

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