BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 182 (V) of 2010-11

(Arising out of the order of the learned JCST, Balasore Range, Balasore, in First Appeal Case No. AA-27/BA 2010-2011, disposed of on dtd.24.09.2010)

Present: **Smt. Suchismita Mishra,** Chairman,
Shri Ashok Kumar Panda, 1st Judicial Member,
&
Shri P.C. Pathy, Accounts Member-I.

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

- V e r s u s -

M/s. Bhavani Distributors, Vivekananda Marg, Balasore. ... Respondent

S.A. No. 190 (V) of 2010-11

M/s. Bhavani Distributors, Vivekananda Marg, Balasore. ... Appellant

- V e r s u s -

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

For the Revenue : Mr. M.S. Raman, A.S.C.
For the Dealer : Mr. S.B. Agarwal, Advocate

Date of Hearing: 04.12.2018 **** Date of Order: 15.12.2018

O R D E R

As both the second appeals bearing S.A. No.182(V) of 2010-11 and S.A. No.190(V) of 2010-11 arose out of the self-same order, both are disposed of by this common order.

2. S.A. No.182(V) of 2010-11 has been preferred by the Revenue, whereas S.A. No.190(V) of 2010-11 has been preferred by the dealer-assessee against the order dtd.24.09.2010 passed by learned Joint Commissioner of Sales Tax, Balasore Range, Balasore (hereinafter referred to as, the learned JCST) in First Appeal Case No. AA-27/BA 2010-2011, wherein and whereby, though he has confirmed the order relating to the balance tax demand amounting to Rs.9,91,161.00 raised by the learned Sales Tax Officer, Balasore Circle, Balasore (hereinafter referred to as, the learned STO) passed in an assessment u/s.43 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, OVAT Act) in respect of the dealer-assessee for the assessment period from 01.04.2008 to 31.01.2010 has deleted the penalty imposed u/s.43(2) of the Act.

3. The dealer-assessee is a wholesaler of consumer goods like A.C., refrigerator, T.V., washing machine etc. and in course of business transaction it used to purchase the goods only from inside the State of Odisha. Finding escapement of certain turnover, the learned STO initiated a proceeding u/s.43 of the OVAT Act against the dealer-assessee for its assessment for the period from 01.04.2008 to 31.01.2010 and issued a notice in form VAT-401 to appear and to produce the books of account and the other relevant documents and in response to the notice, the authorized representative of the dealer-assessee appeared and produced the books of account and the other relevant documents, which were duly been examined by him. On examination, though the learned STO found no purchase suppression, determined the closing stock by addition of profit margin @6.2% and determined the out of account sale to be Rs.79,29,288.00 and on consideration of the same to be the escaped turnover levied tax thereon @ 12.5% which came to be Rs.9,91,161.00. Then, the learned STO also imposed a penalty of Rs.19,82,322.00, equal to twice of the extra tax demand u/s.43(2) of the OVAT Act and as such both the extra demand and penalty came to be Rs.29,73,483.00 in total, to be paid by the dealer-assessee.

4. After the assessment, being aggrieved with the order of the learned STO, the dealer-assessee preferred an appeal before the learned JCST bearing First Appeal Case No. AA-27/BA 2010-2011. On hearing and on consideration of the materials on record, the learned JCST found no merit in the contention of the dealer-assessee and accordingly confirmed the order of the learned STO relating to the extra tax demand amounting to Rs.9,91,161.00. However, on consideration of the materials on record, he found out the imposition of penalty u/s.43(2) of the OVAT Act upon the dealer-assessee to be improper and unjustified and accordingly deleted the same. Thus, thereafter, being aggrieved with the order of the learned JCST relating to deletion of penalty, the Revenue has preferred the second appeal bearing S.A. No.182(V) of 2010-11. Similarly, being aggrieved with the order of the learned JCST relating to the extra tax demand, the dealer-assessee has preferred the second appeal bearing S.A. No.190(V) of 2010-11.

5. Though no cross objection has been filed by the Revenue in S.A. No.190 (V) of 2010-11, the dealer-assessee has filed its cross objection in S.A. No.182(V) of 2010-11 supporting the order of the learned JCST relating to the deletion of penalty.

6. Heard both the sides. The learned Counsel appearing for the dealer-assessee submitted that, issuance of notice in form VAT-401 to the dealer-assessee is not proper as the same does not relates to a proceeding u/s.43(2) of the OVAT Act and only on this ground the entire proceeding is liable to be held invalid. Relying upon in the case of **M/s. R.K. Agro Industries vrs. State of Odisha in S.A. No.95(VAT) of 2013-14** of a Division Bench of this Tribunal, the learned Counsel for the dealer-assessee further submitted that, the initiation of the proceeding u/s. 43 of the OVAT Act is illegal and without jurisdiction of the authority in view of lack of any earlier proceeding u/s.39, 40, 42 or 44 of the Act. He further submitted that, the findings and order arrived at by the learned forums below suffers from serious illegality as the same is not based upon the materials available on record and as such the order passed by them raising the tax demand is liable to be set aside. As regard the deletion of penalty imposed u/s.43(2) of

the OVAT Act, he supported the order of the learned JCST and submitted that the same being proper and justified in the facts and circumstances of the present case, the appeal preferred by the Revenue is liable to be dismissed. On the other hand, the learned Addl. Standing Counsel appearing for the Revenue supported the finding and order arrived at by both the learned forums below relating to the tax demand and urged for dismissal of the appeal preferred by the dealer-assessee. As regard the deletion of penalty imposed u/s.43(2) of the OVAT Act, he submitted that, out of account sale has clearly been established against the dealer-assessee and as such the deletion of penalty by the learned JCST can clearly be considered to be improper and unjustified and hence the appeal preferred by the Revenue is liable to be allowed.

7. Perused the orders of both the learned forums below and the other materials on record. It is not in dispute that, basing upon an AVR, the learned STO initiated a proceeding u/s.43 of the OVAT Act against the dealer-assessee for its assessment for the assessment period from 01.04.2008 to 31.01.2010 and issued a notice in form VAT-401 to appear and to produce the books of account. Though the notice issued to the dealer-assessee does not relates to a proceeding u/s.43(2) of the OVAT Act, in response to the notice, the dealer-assessee appeared before the learned STO and participated in the proceeding by producing the books of account and the other relevant documents. Even after passing of the order by the learned STO raising the tax demand, it preferred an appeal before the learned JCST on its own motion. The entire facts and circumstances show that no prejudice has been caused to the dealer-assessee by issuance of a notice in a wrong form. Even section 98 of the OVAT Act creates a bar for the dealer-assessee to challenge an assessment proceeding only on the ground of any mistake, defect or omission in the notice issued to it. Section 98 of the OVAT Act which is relevant herein is quoted below:-

> "(1) No return, assessment, appeal, rectification, notice, summons or other proceedings accepted, made, issued or taken, or purported to have been accepted, made, issued or taken in pursuance of any of the provisions of this Act

shall be invalid or deemed to be invalid merely by reason of any mistake, defect or omission in such return, assessment, appeal, rectification, notice, summons or other proceedings, if such return, assessment, appeal, rectification, notice or other proceedings are, in substance and effect, in conformity with or according to the intents, purposes and requirements of this Act.

(2) The service of any notice, order or communication shall not be called in question if the notice, order or communication, as the case may be, has already been acted upon by the dealer or person to whom it is issued or where such service has not been called in question at or in the earliest proceedings commenced, continued or finalized pursuant to such notice, order or communication.

xxx xxx xxx"

8. In the present facts and circumstances, the contention raised by the dealer-assessee relating to the issuance of a notice to it in a wrong form is inconsequential and hence the contention is hereby rejected.

9. The dealer-assessee has raised the next contention that, the initiation of the proceeding u/s.43 of the OVAT Act against it is illegal and without jurisdiction of the authority in view of lack of any earlier proceeding u/s.39, 40, 42 or 44 of the Act. In support of its contention, it has relied upon in the case of **M/s. R.K. Agro Industries vrs. State of Odisha in S.A. No.95(VAT) of 2013-14**, wherein a Division Bench of this Tribunal has held that:-

> "In view of the foregoing discussion, we are of the opinion that the authorities can reopen the assessment U/s.43 of the OVAT Act, only where the dealer has been assessed U/s.39, 40, 42 or 44 of the OVAT Act. The Section 43 of the OVAT Act, begins with the term that where after a dealer is assessed U/s.39, 40, 42 or 44 of the OVAT Act, for any tax period, the Assessing Authority on the basis of any information may proceed for assessment U/s.43 of the OVAT Act. In the present case, the fora below have no where whispered if the dealer is assessed U/s.39, 40, 42 or 44 of the OVAT Act. Accordingly, the action taken by the Ld. STO is not legally sustainable. This conclusion is fortified from the decision of this Tribunal on S.A. No.110(VAT) of 2009-10 disposed of on 28.04.2012."

10. There is no dispute with regard to the legal proposition as decided by the Division Bench of this Tribunal in the above case and in

several other cases that an assessment u/s.43 of the OVAT Act is not permissible in absence of any earlier assessment u/s.39, 40, 42 or 44 of the said Act. The statute itself speaks that where after a dealer is assessed u/s.39, 40 [42 or 44] for any tax period, the assessing authority, on the basis of any information in his possession is of the opinion that the whole or any part of the turnover of the dealer in respect of such tax period has escaped assessment or been under assessed or been assessed at a rate lower than the rate at which it is assessable or that the dealer has been allowed wrongly any deduction from his turnover or input tax credit, to which he is not eligible the assessing authority may xxx xxx xxx proceed to assess to the best of his judgment the amount of tax due from the dealer. Though the dealer-assessee has not specifically advanced the argument that it has not been self-assessed, from the argument advanced, it appears that as because no intimation has been received from the authority by the dealer-assessee with regard to the acceptance of the return filed after the self-assessment, the same cannot be said to be a completed self-assessment u/s.39 of the OVAT Act and as such no proceeding u/s.43 of the Act is permissible under the provisions of law. But, the contention raised by the dealer-assessee bears no substance as because section 39 of the OVAT Act which deals with the provision of self-assessment does not speaks of issuance of any intimation relating to acceptance of the return furnished by the dealer in all cases. Here it is beneficial to refer to section 39 of the OVAT Act which speaks as follows:-

> ***"39. Self assessment.-***
>
> (1) Subject to provisions of sub-section (2), the amount of tax due from a registered dealer or a dealer liable to be registered under this Act shall be assessed in the manner hereinafter provided, for each tax period or tax periods during which the dealer is so liable.
>
> (2) If a registered dealer furnishes the return in respect of any tax period within the prescribed time and the return so furnished is found to be in order, it shall be accepted as self assessed subject to adjustment of any arithmetical error apparent on the face of the said return."

From a bare reading of the section, it appears that, only in case of any adjustment or any arithmetical error apparent on the face of the return the dealer is entitled to get any intimation from the authority to cure the error or defect as the same is a condition for the acceptance of the return. There is an identical provision in Section 9 of the Orissa Entry Tax Act, 1999 which also relates to the self assessment of the dealer. While dealing with that provision of the Orissa Entry Tax Act, the Hon'ble High Court of Orissa in the case of **M/s.Neelachal Ispat Nigam Vrs. State of Odisha** in **W.P.(C) No.22343 of 2015** decided on 07.12.2016 has held that:-

> "So far as the grounds taken by the petitioner that the company was assessed as per the provisions of Section 9(1) of the Act and as such, it is not known to them as to whether assessment has been finalized or not or in other words, whether the authorities have accepted the self assessment made by the petitioner-company under Section 9(1)has been accepted or not is concerned, we are of the considered view that Section 9 contains a provision for self assessment, which requires the dealer to be assessed in the manner provided for each tax period or periods during which the dealer is so liable and if the registered dealer furnishes the return in respect of any tax period within the prescribed time and the return so furnished is found to be in order, it shall be accepted as self assessed subject to adjustment of any arithmetical error apparent on the face of the said return. Section 10 of the Act provides for reassessment in certain cases when the authority is of the reason to believe that the dealer has escaped assessment of tax and as such communication regarding acceptance of the assessment made under the provisions of Section 9 of the Act is not required to be communicated to the petitioner and the communication can only go in a situation when on scrutiny it will be found that the same is not in order or there is arithmetical error. Under the Taxation Rule the assessee 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) and as such, if the authorities have not issued any notice under Section 7(11), then the assessment made by the registered dealer under the provisions of Section 9 will be said to be accepted."

11. In view of the above discussion, it is very much clear that the plea taken by the dealer-assessee with regard to the assessment u/s.43 of the OVAT Act in absence of any prior assessment u/s.39, 40, 42 or 44 of the Act bears no substance as because the same is factually incorrect.

12. As regard the factual aspect of the present case, from the materials on record, it is seen that, during assessment, though the authorized representative appearing on behalf of the dealer-assessee produced the books of account before the learned STO, it failed to produce the purchase/sales statement and the closing stock as demanded by him. Maintenance of stock register is a basic requirement u/s.60(1) of the OVAT Act and as the dealer-assessee has failed to produce the stock account before the learned STO, he proceeded to ascertain the stock position on proper calculation by adopting a gross profit margin @ 6.2% basing upon the own documents of the dealer-assessee and the same clearly reveals an out of account sale amounting to Rs.79,29,288.00 on its part. The calculation of out of account sale on the part of the dealer-assessee made by the learned STO and further been confirmed by the learned JCST at the first appeal stage is extracted below:-

Gross Profit	...	Rs.91,78,743.62
Discount given from G.P.	...	Rs.36,76,949.64
Actual G.P.	...	Rs.55,01,794.00
Determination of percentage of G.P.		
Purchase as on 31.03.09	...	Rs.8,85,93,663.38

Percentage of G.P. – $\frac{\text{G.P. X 100}}{\text{Total purchase Rs.8,85,93,663/-}}$ = Rs.55,01,794 X 100 = 6.2%

Total taxable purchase W/T in the tax Period (1.4.08 to 31.1.2010)	...	Rs.20,14,80,887.00
(+) Profit margin @ 6.2%	...	Rs. 1,24,91,784.00
Value of stock on sale price	...	Rs.21,39,72,171.00
(+) Opening stock (1.4.08)	...	Rs. 54,51,124.90
Total stock value	...	Rs.21,94,23,296.00
(-) Total sale	...	Rs.20,12,61,469.00

Expected closing stock as on 31.1.2010 (Shown in books of accounts)		Rs. 1,81,61,827.00
Actual closing stock as on 31.1.2010		Rs. 1,02,32,539.00
Out of account sale	...	Rs. 79,29,288.00
Tax @ 12.5%	...	Rs. 9,91,161.00

13. As the out of account sale amounting to Rs.79,29,288.00 as ascertained by the learned STO and further been confirmed by the learned JCST is purely based upon the own documents of the dealer-assessee, the same can clearly be considered to be proper and justified. The learned Counsel appearing for the dealer-assessee has failed to point out any significant reason to interfere in the finding and order arrived at by the learned forums below in this regard.

14. But, so far as the imposition of penalty u/s.43(2) of the OVAT Act is concerned, it is beneficial to refer to Sec.43(2) of the OVAT Act, which is as follows:-

> "(2) If the assessing authority is satisfied that the escapement of under-assessment of tax on account of any reasons(s) mentioned in sub-section (1) above is without any reasonable cause, he may direct the dealer to pay, by way of penalty, a sum equal to [* * *] the amount of tax additionally assessed under this section."

15. On a bare reading of the above provision, it is seen that, penalty under this sub-section is not an automatic one, rather a discretionary one and it cannot be imposed in all situations. Discretion is the power of an authority to make decisions on matters based on his opinion within certain principles. Therefore, wherever a discretionary power has been conferred upon an authority, he or she must exercise the same in accordance to the legal requirements. Similarly, discretionary power must also be used reasonably, impartially and avoiding operation or unnecessary injury.

16. In the case in hand, the learned STO has imposed penalty upon the dealer-assessee u/s.43(2) of the OVAT Act as if this is an automatic one. He has not assigned any reason under what basis he satisfied himself to arrive at a conclusion that the default committed by the dealer-assessee is a deliberate one and without any reasonable cause. The principle is very

much clear that, the subjective satisfaction of an authority to arrive at a conclusion should be based on objective facts. Therefore, while imposing penalty u/s.43(2) of the OVAT Act, which is totally a discretionary one, the assessing authority must consider all the relevant factors and also the reason assigned by the dealer-assessee for escapement of certain turnover from assessment.

17. On examination of the materials on record, it is seen that, no purchase suppression on the part of the dealer-assessee has been detected and the sale suppression has been determined only on addition of the profit margin @ 6.2% upon the turnover as shown by it. Perhaps considering this fact, the learned JCST has deleted the penalty imposed u/s.43(2) of the OVAT Act upon the dealer-assessee by the learned STO at the rate of equal to twice of the balance tax demand. On further consideration of the materials on record, it can clearly be said that, the learned JCST has considered the matter in its proper perspective and has deleted the penalty imposed upon the dealer-assessee.

18. In the case of **Hindustan Steel Ltd. v. State of Orissa (1970) 25 STC 211** at page-214 the Hon'ble Apex Court has held that:

> "penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the company in failing to register the company as a dealer acted in the honest and genuine belief that the company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

19. On consideration of the entire facts and circumstances of the present case, a conclusion can clearly be arrived that, the order passed by the learned STO and further being confirmed by the learned JCST raising the balance tax demand suffers from no infirmity and hence the same is

hereby confirmed. Similarly, a conclusion can also clearly be arrived that, the order passed by the learned JCST in deleing the penalty imposed upon the dealer-assessee by the learned STO u/s.43(2) of the OVAT Act suffers from no infirmity and hence, the same is also hereby confirmed.

20. In view of the above discussion, it is very much clear that, both the appeals are devoid of any merit and hence are dismissed. The cross objection filed by the dealer-assessee is disposed of accordingly.

Dictated & corrected by me,

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

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

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

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