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

S.A.No. 316(V)/2015-16

(From the order of the ld.JCST (Appeal), Sundargarh Range, Rourkela, in Appeal No. AAV.30 of 2010-11, dtd.10.09.2015, confirming the assessment order of the Assessing Officer)

Present: Sri S. Mohanty
2nd Judicial Member

M/s. Badbil Khanij Udyog,
Purohit Market Complex,
Rourkela, Dist. Sundargarh. ... Appellant

-Versus-

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

For the Appellant : Mr. R.S. Agrawal, Advocate
For the Respondent : Mr. S.K. Pradhan, ASC (C.T.)

(Assessment period : 01.04.2005 to 31.03.2008)

Date of Hearing: **18.12.2018** *** Date of Order: **18.12.2018**

ORDER

Concurrent findings of both the fora below is under challenge in this second appeal by the appellant-dealer whereby the order of the learned First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Sundargarh Range, Rourkela (in short, FAA/JCST) in First Appeal Case No. AAV.30 of 2010-11 is under challenge.

2. **Facts in brief :-** The dealer-appellant M/s. Badbil Khanij Udyog was engaged in iron ore crushing and sale of ore sizes and for the purpose it uses to purchase iron ore lumps from the mines of inside State whereas, it sales iron ore sizes both to intra-state and

inter-state dealer. On the basis of Audit Visit Report (AVR) submitted by Audit team, Rourkela, Uditnagar being identified by the Commissioner, the dealer's unit was subjected to assessment u/s.42 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act). The assessment period under consideration was 01.04.2005 to 31.03.2008. On admission of the defects pointed out in the AVR, the dealer had deposited the tax as calculated by the Audit team before the assessment.

As against the findings of less payment of tax, wrong claim of ITC and while converting the export sale into local sale admitting the VAT liability, the tax due was calculated but as the dealer was found deposited the tax due before assessment, the demand raised to Nil. Notwithstanding the fact that, the dealer was assessed to Nil under the head of tax, but the Sales Tax Officer/Assessing Authority, Rourkela-I Circle, Uditnagar (in short, STO/AA) imposed penalty on the dealer as per Sec.42(5) of the OVAT Act and interest u/s.34 of the OVAT Act. The total amount of Rs.1,62,047/- was calculated under the head of penalty and interest and was raised accordingly against the dealer.

3. Being aggrieved with such assessment, the dealer carried the matter before the FAA, who in turn, accepted the view of AA and as a result, the penalty and interest as imposed by the AA remained undisturbed. On this backdrop, the dealer has come up with this second appeal for deletion of penalty and interest.

It is contended by the dealer that, the very initiation of proceeding was not sustainable for the reason that, the dealer was not provided with stipulated period of 30 days as per Sec.42(2) for production of relevant books of account and documents in the notice in Form No.306. The assessment order as passed was despatched and

received in late i.e. of 280 days, it is presumed that, the assessment order was not prepared in time and as because the assessment order was an antedated one, the same is not sustainable as barred by limitation. It is also contended that, in accordance to Rule-41 of the OVAT Rules as it was by then, the audit for the entire period 01.04.2005 to 31.03.2008 being in contravention to the mandate of the provision, is not sustainable. Further, as because the dealer had not suppressed anything but it claimed ITC, which was denied by the audit team and thereafter, when the dealer was prompt enough to deposit the tax due just within six days of the Audit visit in that event, the act of the dealer can never be called as an intentional act to avoid the payment of tax. Since there was no escapement or under-assessment, the dealer should not be imposed with interest or penalty.

4. The appeal is heard with cross objection from the side of the State whereby the State has supported the findings of imposition of penalty on the plea that, penalty being the mandatory in nature in an assessment where the tax due falls on the dealer, there is no scope for deletion of penalty on the plea of bona-fides on the part of the dealer.

Findings :

5. In the appeal in hand, the dealer has challenged the very initiation of proceeding as wrong, sustainability of the order as barred under law and in violative of the mandate of the procedure as per Sec.42(2) of the OVAT Act. It is also argued that, the dealer is not entitled to penalty as there was no intention to avoid the payment of tax by the dealer. Thus, from above, it is remained undisputed that, the allegations in the AVR like wrong claim of ITC and others are remained undisturbed, rather can be treated as admitted by the dealer

as the dealer has paid the balance tax due without protest. Sec.42(2) of the OVAT Act contemplates 30 days time period to be available to the dealer for production of the relevant books of account and documents for the purpose of audit assessment. Here in this case, the notice for audit assessment was given on 27.11.2009 fixing the date for appearance on 30.12.2009. A clear cut 30 days and more was given, but the fact remain the letter was issued on 30.11.2009 and was received by the appellant on 21.12.2009. Taking cue from the ratio laid down by the Hon'ble Court in **Jindal Stainless Steel –Vrs.- State of Orissa, 54 VST (1)**, learned Counsel for the dealer argued that, since the mandate of the provision has not been strictly complied with by not giving 30 days period, the initiation of the proceeding is wrong. It is a fact that, if the notice was issued on 30.11.2009, the date fixed for appearance of production of the document falls on 31 days. On the other hand, the LCR as it revealed the dealer after making appearance has been provided with sufficient opportunities to advance his defence. The dealer had appeared before the AA on 31.12.2009 and produced the relevant books of account and written submission. The dealer had not raised the question of limitation or has not prayed for adjournment, rather participated in the hearing. By participating in the hearing without protest, the dealer has waived the delay and surrendered to the view that the provision has been sufficiently complied with. It is not the case of the dealer that, he was seeking time or adjournment for production of document and his prayer was not allowed. In that case, the plea of the dealer though sounds well in law but factually not correct as the dealer cannot take the plea that, sufficient opportunity of being heard was not provided to

him or principle of natural justice has been violated in the case in hand.

6. The next point raised by the dealer is, the assessment order was an antedated one and even barred by limitation, so the entire proceeding should be vitiated. As per the record, the audit assessment was passed on dt.30.12.2009 and issued to the dealer on dt.17.03.2010, whereas it was served on the dealer on dt.06.10.2010. The delay in issuing the assessment order on the date of the order, which was shown to have the date on which it was prepared, is 77 days. Thereafter, the delay in serving the order i.e. the date of issue to the date of receipt to the dealer is more than seven months. As per Sec.42(6) of the OVAT Act, the assessment is to be completed within a period of six months from the date of service of notice. In this case, the delay in between passing of order and dispatch or service of order on dealer remained unexplained by the State. In the case of **State of Andhra Pradesh Vrs. Ramakishtaiah & Co.** in **Civil Appeal No.491 of 1977** and in **State of Andhra Pradesh Vrs. Khetmal Parekh** in **Civil Appeeal No.1014 of 1977,** it is held as follows :

> "We are of the opinion that the theory evolved by the High Court may not be really called for in the circumstances of the case. We are of the opinion that this appeal has to be dismissed on the ground urged by the assessee himself. As stated above, the order of the Deputy Commissioner is said to have been made on January 6, 1973, but it was served upon the assessee on November 21, 1973, *i.e.,* precisely 10 ½ months later. There is no explanation from the Deputy Commissioner why it was so delayed. If there had been a proper explanation, it would have been a different matter. But, in the absence of any explanation whatsoever, we must presume that the order was not made on the date it purports to have been made. It could have been made after the expiry of the prescribed

> four years' period. The civil appeal is accordingly dismissed. No costs.
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> Though the dates are different in this case, the facts are substantially similar. Indeed, the delay in communication in this case is more than one year and five months. For the reasons given in Civil Appeal No.491 of 1977, this appeal too is dismissed. No costs.]

Reliance can also be placed in **Chandrika Sao Vrs. STO, Balasore and another (2015) 81 CST 86 (Orissa)**. Being guided by the authority above in the case in hand, it can be said that, the Assessing Authority while trying to save the period of limitation has shown to have proceeded the order within the period. Therefore, in all likelihood, the Assessment order when found not passed within the time period is consequently rendered invalid in the eye of law.

7. The next point raised by the dealer is, the period of assessment as taken in the case in hand i.e. from dt.01.04.2005 to 31.03.2008 contravenes the statute as per Rule 41 as it was before the amendment of the year 2009. The provision u/r.41 before the amendment of the year 2009 reads as follows :

> **"41. Selection of dealers for tax audit.-**
>
> (1) The Commissioner shall, under the provision of Section 41, select by the 31st of January or by any date before the close of every year, commencing from the appointed day, not less than twenty per cent of registered dealers for audit during the following year, by random selection with or without the use of computers:
>
> ***Provided that*** for the year commencing with the appointed day, the selection of dealers for audit under this sub-rule shall be made by the 30th of September of that year.]"

If we go by the proviso above, the period for assessment as taken in the case i.e. from dt.01.04.2005 till dt.31.03.2008 contravenes the

proviso and in that case, the assessment also found to be not sustainable in the eye of law.

8. The next point raised by the Counsel for the dealer is, the dealer was prompt enough to pay the tax as determined by the Audit team. Drawing attention of the Court to Rule 46 of the OVAT Rule, learned Counsel argued that, the dealer had claimed ITC on certain goods treating those goods as capital goods. The Audit team had denied the same. In that event, the dealer admitting the suggestion of the Audit team had deposited the tax. So, when the tax is paid in compliance to Rule 46 of the OVAT Rule, which cast a duty on the Audit team as per the statute, then the dealer cannot be said to be a willful defaulter and since there was no *mens rea* to defraud the authority the dealer should not be imposed with penalty. For better appreciation the provision u/r.46 of the OVAT Rules reads as follows :

> **"46. Audit to facilitate voluntary tax compliance.-** The audit team, during any audit visit, shall explain the provisions of the Act and these rules so that the dealer does not face any difficulty in maintenance of books of account and due discharge of tax liability."

Similarly, learned Counsel drawn the attention to the provision u/s.34 of the OVAT Act, which speaks of the imposition of interest in default of filing of return. Here in the case in hand, according to him the dealer was not a defaulter in filing return. The dealer had disclosed the turnover without any suppression. There is no escapement of turnover. The only thing is, the dealer had claimed ITC on certain things, which was denied. Needles to mention that wrong claim of ITC is covered u/s.42(1) of the OVAT Act. It is argued that, penalty u/s.42(5) of the OVAT Act is an independent provision and it can be imposed in addition to interest and penalty imposed in a regular audit

assessment. When it is imposed it must be imposed at the rate of twice of the tax due calculated. In the case in hand, according to the counsel for the dealer, the tax due is Nil. Once in the assessment it is held that, the tax due from the dealer is Nil, then there is no scope for imposition of penalty. The provision u/s.42(5) of the OVAT Act speaks of imposition of penalty on the amount of tax assessed under sub section 3 or 4. Here in this case, the AA during audit assessment has held that, the dealer is not required to pay any tax as it has already deposited the tax. Learned Addl. Standing Counsel capitalized his argument on the provision u/s.33(5) proviso, where restriction has been given for voluntary disclosure after receipt of the Audit visit notice. Here in this case, there is no question of any voluntary disclosure by the dealer. The dealer had already disclosed his turnover. It was a wrong claim of ITC only. So, it is not the case that, the dealer had made any attempt to disclose voluntarily about certain escaped turnover. In that case, it is held that, after receipt of the AVR, the dealer is debarred from paying any voluntary disclosure but the dealer is not debarring from paying the tax against the disclosure already made. It was the allegation of irregular claim of ITC, which was rectified and the tax was paid immediately when it was pointed out. A harmonious reading of Rule 46 of the OVAT Rule and then Sec.33 above does not debar the dealer to pay the tax and once the dealer is assessed to Nil, there is no reason to impose penalty. Similarly, interest as imposed also found to be unreasoned. Thus, it is held that, the imposition of penalty or interest in the case in hand has no legs to stand. It is not out of place to mention here that, in the discussion above, it is held that, the assessment order is otherwise bad as barred by limitation and it was in contravention to Rule-41 also, in that event,

to sum up, it is held that, the penalty and interest as imposed by the authorities below is not sustainable. Hence, the concurrent findings of both the fora below on the two issues above are hereby deleted.

In the wake of above narrative, it is ordered.

The appeal is allowed on contest. The penalty and interest as imposed in the case in hand is deleted. The impugned order is reversed accordingly.

Dictated and Corrected by me,

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

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