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

S.A.No. 170(V)/2017-18

(From the order of the ld.DCST (Appeal), Cuttack-II Range, Cuttack, in Appeal No. AA/65/OVAT/CUII/2007-08, dtd.20.01.2014, confirming the assessment order of the Assessing Officer)

Present: Sri S. Mohanty
2nd Judicial Member

M/s. Akhandalmani Polythene,
S-23-NIE, Jagatpur,
Dist. Cuttack. .... Appellant

-Versus-

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

For the Appellant : Mr. B.B. Panda, Advocate
For the Respondent : Mr. M.S. Raman, A.S.C. (C.T.)

(Assessment period : 01.04.2005 to 31.12.2006)

Date of Hearing: 16.02.2019 *** Date of Order: 16.02.2019

ORDER

The unsuccessful dealer before the learned First Appellate Authority/Deputy Commissioner of Sales Tax (Appeal), Cuttack-II Range, Cuttack (in short, FAA/DCST) has preferred this second appeal against a confirming order in audit assessment u/S.42(4) of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act) for the assessment period 01.04.2005 to 31.12.2006 with the allegation of stock discrepancy leading to escapement of turnover and wrong claim of exemption without furnishing declaration Form 'H' in proper form as brought by the Audit team through Audit Visit Report (AVR).

2. As mentioned above, the Audit team has reported that, on the date of visit on verification of the opening balance and closing

balance, physical stock available in the dealer's premises, excess stock of granules for 113 Kgs of value Rs.8,475/- and Polythene bag of 168 Kgs for Rs.15,120/- were detected. Similarly, the dealer was also found to have claimed exemption in payment of tax without furnishing the declaration Form 'H' against the export sale. At the same time, there was also wrong claim of ITC by the dealer. The AA on scrutiny of the books of account and connected documents being produced by the dealer during assessment and in comparison of the same with the AVR, found the books of account was not properly maintained. So, it was rejected. Thereafter, in consideration of the value of the excess stock for the day of the visit of the Audit team, the Assessing Authority enhanced the suppression by 20 times for the tax period under assessment. The Assessing Authority disallowed the claim of tax free sale against which declaration Form 'H' was not furnished. Taking consideration of the ITC claimed by the dealer and reconciliation of the same with the sale/purchase disclosed by the dealer, in the ultimate analysis, the GTO was determined at Rs.1,52,24,223/-. Deducting the export sale and the tax collected under OET Act and OVAT Act, the TTO was determined at Rs.1,27,66,734/-. VAT @4% on TTO was calculated at Rs.5,10,669.36. ITC admissible to the tune of Rs.504283.49 was adjusted in each and the balance tax due became determined at Rs.6,385.87/-. Since the dealer was found to have deposited a sum of Rs.5,989/- prior to audit assessment, the actual balance tax due came to Rs.396.87. On this amount, penalty u/s.42(5) i.e. twice of the tax at Rs.793.74 was imposed. Thus, the total due i.e. tax and penalty was rounded to Rs.1,191/- and raised against the dealer. As against the demand and assessment above, the dealer preferred first appeal before the FAA. Ld.DCST as FAA vide impugned

order, declined the claim of the dealer and thereupon confirmed the order of assessment.

3. Felt aggrieved, the dealer preferred this second appeal. The contention of the dealer is, the AA has no jurisdiction under the statute to apply the principle of best judgment assessment when he has assessed the dealer u/s.42(4) of the OVAT Act. So, the FAA has committed wrong in accepting the view of the AA by application of best judgment principle and by enhancing the suppression at 20 times which is illegal and exorbitant. It is further contended that, the FAA has not taken into consideration of the two declaration Forms 'H' produced before him illegally without any valid reason. Further, the FAA has abruptly closed the proceeding setting the appellant ex-parte, which is violative of the principle of natural justice.

The Revenue contested the appeal by filing cross objection contending thereby, the impugned order to be lawful, just and proper.

4. The substantive question of law and fact raised for decision in this appeal are, (i) Whether the FAA was wrong in accepting the view of the FAA that, the application of best judgment principle by the FAA and enhancement of the suppressed turnover by 20 times is lawful ? (ii) Whether the FAA has committed wrong in not accepting the declaration Form 'H' furnished before him by the dealer and rejected the same mechanically and (iii) What order ?

Point No.1 :

Advancing argument for the dealer, learned Counsel vehemently argued that, since the original audit assessment was conducted as per Sec.42(4) and the AA had the occasion to verify the books of account and connected documents of the dealer, in that event, in accordance to Sec.42(4), it is illegal on the part of the AA or the FAA to apply the principle of best judgment assessment and enhanced the suppression

by 20 times. It is strenuously argued that, the enhancement of the suppressed turnover by 20 times is neither permissible under law nor relatable to the actual turnover and the suppressed turnover. Learned Counsel placed reliance in a decision of this Tribunal by Division Bench in S.A.No.12(V)/2008-09 dtd.01.02.2011. To appreciate the argument, it is pertinent to reproduce the provision u/s.42(3) and (4) below :

"42. Audit assessment.-

(3) If the dealer fails to appear or cause appearance, or fails to produce or cause production of the books of account and documents as required under sub-section (1), the assessing authority may proceed to complete the assessment to the best of his judgment basing on the materials available in the Audit Visit Report and such other materials as may be available, and after causing such enquiry as he deems necessary.

(4) Where the dealer to whom a notice is issued under sub-section (1), produces the books of account and other documents, the assessing authority may, after examining all the materials as available with him in the record and those produced by the dealer and after causing such other enquiry as he deems necessary, assess the tax due from that dealer accordingly."

The corresponding rule for the audit assessment i.e. Rule 49 of the OVAT Rule is as under :

"49. Audit assessment.-

(1) On receipt of the Audit Visit Report, the assessing authority, shall serve a notice in Form VAT-306, upon such dealer, directing him to appear in person or through his authorized representative on such date, time and place, as specified in the said notice for compliance of the requirements of sub-rules (2) and (3).]"

(6) The assessing authority shall, after hearing the dealer in the manner specified in sub-rules (2), (3), (4) and (5), assess to the best of judgment, the amount of tax payable by a dealer in respect of a tax period or tax periods for

> which the assessment proceeding has been initiated, and impose penalty under sub-section (5) of Section 42."

The provision u/s.42(3) relates to the assessment, where the dealer did not co-operate in the assessment and remained absent. In that event, the legislature has given jurisdiction to the AA to assess the dealer applying reasonable guess work termed as "assessment to the best of his judgment basing on the materials available in the audit report and such other materials as may be available, and after causing such inquiry as it deem proper". On the other hand, Sub section 4 of Sec.42 mandates the assessment on examination of the all materials available and produced by the dealer, the term 'assessment to the best of his judgment' is not there under sub-clause (4). So far as the Rule 49 Clause (6) as it reads, the AA shall after hearing the dealer in the manner as specified in Rule 2, 3, 4 and 5 assess to the best of judgment, the amount of tax payable by a dealer. Here the sub rule 2, 3, 4 and 5 necessarily covers the assessment on scrutiny of the books of account and connected documents of the dealer i.e. covered u/s.42(4) of the OVAT Act. Now the anomaly is application of principle of best judgment even on scrutiny of the books of account is permissible under Rule. On the other hand, the section is not speaking about the term 'best judgment assessment. If we give a thoughtful look to provision under sub section (4) to Sec.42 and sub-clause (6) to Rule 49, the difference is, on scrutiny of all the documents, the AA should complete the assessment to the best of his judgment basing on the materials. It means and includes the authority to apply best of his judgment in accordance to law applicable to the case in hand, so far as the rate of tax, tax liability and any kinds of suppression, underassessment, erroneous claim of deduction, evasion of tax or contravention of any provision of the Act etc. as per sub-section (1) of

Sec.42. So it can be summed up by saying that, when it is an assessment u/s.42(3), the AA is to act upon the allegation of AVR and connected materials as well as application of best of his judgment which is a reasonable guess work. So far as, when it comes to provision u/s.42(4) read with Sec. 49 is concerned, it is the best of judgment means, the authority is to act upon the books of account in comparison to AVR. Here, the authority is to take consideration of the books of account in relation to the allegations in audit visit report relating to the escapement under-assessment etc. and then he is to apply his mind conscious to the provisions under law in one hand and the facts established as per the audit report on the other. Thus, when there is detection of suppression or under-assessment, it is obvious that, the escapement or under-assessment etc. are not duly reflected in the books of account and in that event, if the books of account is not rejected, there can be no assessment on the basis of audit report. Once audit assessment provision on the basis of AVR is there and the books of account is produced, the authority has the jurisdiction to assess and scrutiny of genuineness of the allegation in AVR in comparison to books of account and when the allegation in AVR is found established, then books of account can't be accepted as correct. Rule has no overriding effect on Section. But where there is no conflict between Rule and Section, then by harmonious reading of both, the intention of the legislature is to be gathered. So it is wrong to say that, the hands of authority is tight in the event of assessment u/s.42(4) but, the fact remains here the authority is to accept the actual escapement as detected for the reason that, the enhancement is unreasonable and baseless.

5. In the case in hand, the allegation as brought by the dealer is, there was stock suppression detected on the date of visit as

per the chart mentioned in the AVR reflected in orders of both the fora below. This is a subjective satisfaction of both the fact finding authorities like AA and extended forum of assessment, the FAA. In that event, in absence of any rebuttal or additional evidence to disbelieve the findings of the AA or FAA, it can safely be said that, the suppression as reported by the Audit team is duly established. Coming to the question of enhancement the fact remains, the enhancement is apparently found to be a whimsical one. No reasonable nexus between the enhancement and the purchase or sale of dealer is found established. Explanation of the dealer throughout the proceedings before all the forums is, the Audit team had not taken consideration of semi-finished goods or the goods available in the machine at the time of visit. The AVR or the assessment order of the FAA do not satisfactorily answered the plea of the dealer. On the other hand, whenever there is a question of enhancement, it must have a reasonable nexus with the turnover of the dealer and the suppression detected. Further, once it is an assessment u/s.42(4) i.e. on scrutiny of the books of account and related documents, then the escapement must be continued to actual suppression. Hence, it can be concluded by saying that, the enhancement by twenty times is exorbitant, erroneous and not sustainable. The authority should treat the escapement detected as the actual for the purpose of addition to TTO.

6. Coming to the next question raised by the dealer i.e. non-acceptance of declaration Form 'H' produced before the FAA, learned Addl. Standing Counsel has drawn the attention of this forum to the LCR containing two numbers of declaration Forms furnished by the dealer before the FAA. The dealer has mentioned about one declaration form, but the LCR contains two numbers of declaration forms. At the same time it is found that, the declaration forms are furnished in

duplicates. The impugned order is very cryptic and unreasoned one so far as the acceptance of the declaration form is concerned. So, it is found necessary for scrutiny of the genuineness of the declaration forms on production of the original by the dealer or otherwise by reliable evidence from the purchasers of the dealer to the satisfaction of the authority. Be that as it may, it is held that, the findings of FAA on this point is not sustainable.

It is pertinent to mention that, the order of FAA is an ex-parte order. From the discussions in the foregoing paragraphs, it is believed that, this is a fit case, when the matter should be remitted back to the FAA for assessment afresh for consideration of the declaration forms as pleaded and furnished by the dealer i.e. to the satisfaction of the authority on verification of the genuineness of the document and other connected evidences if found required. However, it is made clear that, the suppression as detected by the Audit team is to be treated as actual amount of suppression. In the result, it is ordered.

The appeal is allowed on contest. The order of the FAA is set-aside. The matter is remitted back to the FAA for assessment afresh as per the observation herein above.

Dictated and Corrected by me,

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

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