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

S.A. No. 143(V) of 2011-12

(From the order of the ld. DCST (Appeal), Bhubaneswar Range, Bhubaneswar, in First Appeal Case No. AA-106111010000086/ BH-I/10-11, disposed of on dtd.30.04.2011)

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

M/s. contemporary Equipment
& Enterprises (P) Ltd.,
Plot No.63 & 65, Jharapada,
Cuttack Road, Bhubaneswar. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2005 to 30.11.2009

For the Appellant ... Mr. P. Mohapatra &
Mr. A.K. Kamila, Advocates
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 14.08.2019 ******** Date of order: 17.08.2019

O R D E R

Assessee-dealer as appellant preferred this second appeal against the order of first appellate authority passed in an assessment u/s.42(4) of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) raising of tax and penalty with the claim that the impugned order is not sustainable in law and accordingly has prayed for deletion of the demand towards tax and penalty as raised.

2. Brief fact of the case is, the dealer M/s. Contemporary Equipment & Enterprisers (P) Ltd. engaged in dealing of electrical

power tools on wholesale-cum-retail basis. It has branches outside the State and it engaged in intra-State and inter-State as well as sale and stock transfer in course of regular trade. Tax Audit Team duly constituted under the Act visited the dealer's unit on 26.11.2009 and reported about sale suppression to the tune of Rs.7,37,22,844. As per the audit team, on the date of visit they found the dealer failed to produce sale invoices in respect of four nos. of items such as cutting wheel, grinding wheel, unique SD carbon brushes. It is also found that, the dealer claimed to have dispatched goods to its branch office and head office at Calcutta but the transfer is not supported by any declaration form 'F'. On the basis Audit Visit Report (in short, the AVR), the assessment u/s.42(4) of the OVAT Act was taken up in presence of the dealer. The authorized agent of the dealer admitted the allegations brought in by the AVR, thus the assessing authority determined the GTO and TTO by adding the sale suppression mentioned above i.e. Rs.737228.44. Ultimately, he determined the balance tax liability payable by the dealer of Rs.43,569.82, then imposed penalty u/s.42(5) of the OVAT Act, twice of the balance tax liability calculated at Rs.87139.64. Thus, the total demand against the dealer was raised at Rs.1,30,709.00.

3. Being aggrieved, the dealer carried the matter before first appellate authority. The first appellate authority allowed the claim of stock transfer to the tune of Rs.1,19,297.00 against declaration form No.95T738474 and to the tune of Rs.1,15,224.00 against declaration form No.19121040869331. However, the first appellate authority denied the claim of exemption of alleged sale to SEZ unit u/s.18 of the OVAT Act to the tune of Rs.3,20,397.00. It also further determined the suppression of Rs.800.00. Consequently, he reduced the suppression amount of Rs.7,37,228.44 as determined by the assessing authority to (Rs.7,37,228.44 - Rs.2,34,521.00) Rs.5,02,707.44. Thereafter, the first appellate authority re-determined the tax liability, on calculation the balance tax liability from the dealer was assessed at Rs.34,117.39.

Besides tax liability, penalty of Rs.68,234.78 was imposed, as such the total liability against the dealer was raised at Rs.1,02,352.00.

Even though the demand became reduced before the first appellate authority, the dealer preferred this second appeal before the Tribunal on the contentions as follows.

It is contended by the dealer that, the first appellate authority has wrongly disallowed the claim of zero rated tax as per sec.18 of the OVAT Act against the sale of goods like night vision camera which were sold to SEZ unit through intermediary. It is further contended that, the estimated sale suppression on the basis of profit margin @ 10% is in higher side and the penalty as imposed u/s.42(5) of the OVAT Act is not warranted in the case in hand as the dealer had no intention to evade payment of tax. So, in absence of *mens rea*, the penalty is not leviable.

4. In Cross Objection the Revenue supported the findings of the first appellate authority and claimed for dismissal of the second appeal as of on merit.

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

(i) whether the first appellate authority is wrong in not allowing the claim of exemption in tax for the alleged sale to SEZ unit?

(ii) whether the determination of suppression adding profit margin is in higher side;

(iii) whether the penalty u/s.42(5) of the OVAT Act is justified in the case in hand.

6. At the outset, learned Standing Counsel vehemently harped on the point that, the dealer had confessed the guilt before the assessing authority and on the basis of admission of the dealer, the assessing authority has determined the tax liability. So, at a later period the dealer cannot take a u-turn from its earlier stand and in that case the Tribunal should not interfere into the findings of the fora

below. The order of the assessing authority and thereafter the order of the first appellate authority as it revealed, initially the authorized agent of the dealer expressed the intention of the dealer to pay the tax and penalty as suggested by the audit team. The dealer also had taken the same plea before the assessing authority. On this backdrop, whether this door of the Tribunal should be closed to the dealer is the question before us. Learned Counsel for the dealer vehemently strenuously that, it was not a volunteer admission before the audit team. There is a memo available in LCR furnished by the dealer volunteering for payment of tax liability as per AVR.

7. Now the question is, whether the confessional statement before the audit team is a conclusive piece of evidence? For sake of argument if the answer to the question is yes, then in every case of such confession before the audit team the liability should have been set at rest before the assessing authority only and confession before the audit team is not parallel to the confession before the adjudicating authority like the assessing authority. If the confession is confronted to the dealer during the assessment and the dealer admitted the confessional statement, in that event only the confessional statement can be a basis raised tax liability.

8. Learned Standing Counsel placed reliance in the matter of Simla Automobile Pvt. Ltd. v. State of H.P. (2017) 103 VST 158 (H.P.), Achal Singh v. Commissioner of Sales Tax (1977) 39 STC 173 (All.), Kanpur Vanaspatti Store v. Commissioner of Sales Tax (1973) 32 STC 655 (S.C.). It is pertinent to mention here that, the first appellate authority which is an extended forum of assessment has taken into consideration of the grievances of the dealer in the grounds of appeal before him and has given some relief in favour of the dealer. Once the first appellate authority has gone into the merit and the findings of the first appellate authority is not disputed by the Revenue, in that case Revenue is estopped from taking a plea that, the second appeal is not maintainable. If the first appeal is maintainable then why not the

second appeal? It is remained unanswered. Law is also well settled that, there cannot be admission on the point of law. The jurisdiction of the Tribunal in the second appeal is extended to go into the law and/or fact both and this jurisdiction as per the statute is to scrutinize the sustainability of the impugned order whether both in law and fact. Accepting the order of first appellate authority the Revenue has surrendered to the jurisdiction of the second appellate authority. So, it is held that, the door of this Tribunal cannot shut to the dealer on the plea that, he had made a confessional statement before the reporting officer i.e. the audit team or had filed a memo before the assessing authority.

9. Delving into the merit of the case, the claim of the dealer is, he had sold goods worth of Rs.3,20,397.00 tax @ 0% u/s.18 of the OVAT Act as it was sold to SEZ unit M/s. S.P. Fabricators which is a contracting partner of SEZ unit M/s. Tata Consultancy Service Ltd. The view of the first appellate authority that since the goods were not directly sold to SEZ unit, the dealer is not eligible to claim of exemption at zero rated sale u/s.18 of the OVAT Act. Drawing the attention of the forum to sec.18(c)(i) of the OVAT Act and the explanation appended to the provision argued for tax zero rated tax for the sale effected by the dealer.

Learned Standing Counsel on the other hand argued that, there was no declaration form in VAT-616 as per Rule 6(c) & (d) along with declaration form 'I' u/r.12(2) and form 'E' as per CST(O) Rules furnished. So, for wanting of these documents, the dealer's claim is not maintainable.

10. Gone through the order of first appellate authority. The first appellate authority has denied the claim of the dealer solely on the ground that the dealer has not affected sale directly to SEZ unit which is contrary to the mandate of the statute u/s.18 of the OVAT Act. On the other hand, it is disputed that, to qualify the sale covered u/s.18(c) of the OVAT Act the dealer is required to furnish the necessary

documents as submitted by the learned Standing Counsel. In that event, it only can be said that, the disputed questions should be reconsidered by the first appellate authority on the basis of necessary documents produced before him by the dealer.

11. Learned Counsel for the dealer further submitted that, calculation in accordance to the AVR contains certain arithmetical mistake. This being a calculation mistake, it can be taken up by the first appellate authority afresh, whereas the other point i.e. the calculation of suppression at a higher side on the basis of addition of profit margin at higher side cannot be interfered into on the mere submission of the dealer without any rebuttal and cogent evidence to form a definite opinion that the dealer used to get profit at a lower rate. The profit margin as determined by the fora below which is a pure question of fact cannot be interfered with a mere hypothetical submission. Similarly, avoiding elaborate discussion on the question of penalty it only can be said that, in the case in hand, in the event the dealer is found liable to pay tax then as because it is an attempt by the dealer to evade the payment of tax which is detected in audit assessment, the dealer is required to pay penalty as per sec.42(5) of the OVAT Act which is mandatory in nature when there is a question of suppression or evasion of tax.

Accordingly, it is ordered.

The appeal is allowed in part. The matter is remitted back to the assessing authority for a limited purpose of reconsideration of the question relating to the claim of the dealer against the sale to SEZ unit if covered u/s.18 of the OVAT Act and correction of arithmetical mistake, if any, then to raise tax liability accordingly.

Dictated & corrected by me,

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

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