

BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 132 (VAT) of 2019

(Arising out of order of the learned JCST (Appeal), Ganjam Range,  
Berhampur in First Appeal Case No. AAV -47/2016-17  
disposed of on dated 26.04.2019)

Present: Shri R.K. Pattanaik,  
Chairman

M/s. Gayatri Fly Ash Bricks,  
At-Kalabada, PO- Chikiti, Dist. Ganjam ... Appellant

-Versus-

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

For the Appellant : Sri R.P. Sahu, Advocate  
For the Respondent : Sri D. Behura, Standing Counsel (CT)

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Date of hearing: 02.03.2021 \*\*\*\*\* Date of order: 07.04.2021  
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**ORDER**

Instant appeal under Section 78(1) of the Odisha Value Added Tax Act, 2004 (hereinafter referred to as 'the Act') is at the behest of the dealer assessee challenging the impugned order dated 26.04.2019 promulgated in Appeal Case No. AAV -47/2016-17 by the learned Joint Commissioner of Sales Tax (Appeal), Ganjam Range, Berhampur (in short, 'FAA') confirming the order of assessment dated 30.12.2016 passed under Section 43 of the Act by the learned Sales Tax

Officer, Ganjam-II Circle, Berhampur (hence called 'AA') for tax periods 01.04.2014 to 31.03.2016 on the stated grounds.

2. Present dealer assessee runs a manufacturing unit of fly ash bricks made from raw materials, such as, sand, gypsum and fly ash in the ratio of 2: 1: 3: 6. From the record, it is revealed that the place of business of the dealer assessee was inspected by a Vigilance Unit on 04.02.2016 and on completion of which, a Tax Evasion Report (in short, 'TER') dated 16.06.2016 was submitted with certain observations. On receipt of TER, action under Section 43 of the Act was initiated against the dealer assessee. The TER was confronted to the dealer assessee and finally, the AA determined the balance tax due at ₹1,23,338.00 and considering the payment of tax of ₹76,501.00, arrived at the net tax due at ₹46,837.00 and then, adding the penalty amount leviable under Section 43 of the Act, raised additional demand of ₹1,40,511.00. Being dissatisfied, the dealer assessee approached the FAA, who, however, confirmed the assessment by the impugned order dated 26.04.2019. As a result, the dealer assessee left with no option but knocked the doors of the Tribunal by filing the instant appeal and confined its claim predominantly to the question of penalty.

3. A cross-objection is filed by the State justifying the impugned order dated 26.04.2019 and levy of tax vis-a-vis sand which was allegedly purchased by the dealer assessee from unregistered sources and utilized it in the manufacture of fly ash bricks. Thus, as per the State, the authorities below rightly taxed sand

under Section 12 of the Act. With respect to the penalty, it is the contention of the State that as the mens rea of the dealer assessee was established, no error was committed by the FAA in levying it and in that connection, cited the rulings, such as, R.S. Joshi Vs. Ajit Mills Ltd: (1971) 4 SCC 100; Gujarat Travancore Agency Vs. CIT; and SEBI Vs. Cabot International Capital Corporation.

4. As per the claim of the dealer assessee, sand worth of ₹8,88,050.00 was shown to have been purchased as per the books of account and since it was not sold, addition of profit margin of 10% to determine the turnover at ₹9,76,855.00 is illegal and bad in law, inasmuch as, tax @ 5% is to be charged on the purchase figure of ₹8,88,050.00 with a reduction in amount to the extent of ₹2,435.00. Admittedly, sand is not again sold but has been utilised in the making of finished product i.e. fly ash bricks and therefore, appreciating the claim of the dealer assessee, the Tribunal reaches at a decision that on the purchase figure of ₹8,88,050.00 only, tax @ 5% ought to have been charged. In other words, the contention of the dealer assessee in this regard is to be accepted and accordingly, tax amount is needed to be reduced to the extent of ₹2,435.00.

5. As regards levy of penalty, the learned Counsel for the dealer assessee contends that it is a discretionary power and to be levied in absence of a reasonable excuse shown. In the instant case, penalty of ₹93,674.00, which is twice the amount of tax due assessed, has been levied against the dealer assessee. By looking at sub-section (2) of Section 43 of the Act, it is crystal clear that levy of

penalty is clearly discretionary in nature and dependent on the explanation offered by the dealer assessee. If it is established that escapement of tax is without any reasonable cause, then only, a dealer assessee shall have to be visited with penalty as per Section 43(2) of the OVAT Act. In this regard, the learned Counsel for the dealer assessee submitted authorities, such as, Sree Krishna Electrical Vs. State of Tamil Nadu and another : (2009) 23 VST 249 (SC); Ruchak Metals Vs. State of Tamil Nadu: (2011) 41 VST 63 (Madras); Arul Constructions Vs. State of Tamil Nadu: (2011) 43 VST 157 (Madras); Zanjhar Cinema Vs. State of Gujarat and another: (2011) 43 VST 161; and Ess Ess Engineering Vs. Commissioner of Central Excise, Chandigarh: (2011) 44 VST 372 (CESTAT-New Delhi), while opposing levy of penalty on the ground that proper books of account had been maintained and periodical returns filed which is clearly evident from the order of assessment itself, but under a bonafide belief that sand is not exigible to tax for having been utilized as a raw material in manufacture of a tax free goods, it was not paid and as such, there was no malafide, so to say and under the above circumstances, levy of penalty was unwarranted and uncalled for. Admittedly, fly ash bricks is a tax free goods at Entry 39A of Schedule-A of the Act. It is not in dispute that sand was purchased from unregistered sources but account was maintained by the dealer assessee. However, tax was not paid for it under the impression that the finished product i.e. fly ash brick is a tax free item. In Sree Krishna Electrical ibid, it is held by the Hon'ble Apex Court that penalty cannot be imposed, when sales of items were incorporated in account

books though not included in the turnover under certain circumstances. In Ruchak Metal's case, the Hon'ble Madras High Court held that addition to the turnover based on books of account not to be considered for levy of penalty. In Arul Constructions supra, the Hon'ble Madras High Court observed that penalty is not leviable, when estimate of turnover is made on the basis of the dealer's books of account. Furthermore, an order dated 03.10.2019 of the Tribunal in S.A. Nos. 231 (ET) and 18 (ET) of 2013-14 and 2014-15 is cited by the dealer assessee on the above point. In the humble opinion of the Tribunal, purchase of sand has not been suppressed by the dealer assessee, but tax under Section 12 of the Act was not paid under a bonafide belief that the fly ash bricks to be tax free goods. Such an impression at times may be quite obvious or possible. Having regard to the ratio laid down in the decisions supra and the fact that the purchase of sand by the dealer assessee has been revealed from the books of account, the Tribunal further reaches at a decision that in absence of any malafide intent to evade tax, penalty on the tax due ought not to have been levied by the authorities below, which is, therefore, to be deleted.

6. Hence, it is ordered.

7. In the result, the appeal stands partly allowed. As a logical sequitur, the impugned order dated 26.04.2019 passed in Appeal No. AAV -47/2016-17 is hereby set aside to the extent indicated above. Consequently, the AA is directed to recompute the tax liability vis-a-vis the dealer assessee for the tax

periods in the light of the observations of the Tribunal and to pass appropriate order in accordance with law, preferably, within a period of three months from the date of receipt of the above order. The cross-objection filed by the State is disposed of accordingly.

Dictated & Corrected by me

Sd/-  
(R.K. Pattanaik)  
Chairman

Sd/-  
(R.K. Pattanaik)  
Chairman