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

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

S.A. No. 223(V) of 2017-18

(From the order of the ld. JCST (Appeal), Sundargarh Range, Bhubaneswar, in First Appeal Case No. AA V 60 of 2015-16, disposed of on 30.06.2017)

M/s. Techno Millenium Plastic Pvt. Ltd.,
Chandini complex, Panposh Road, Rourkela,
Dist.- Sundargarh. ... Appellant

- V e r s u s -

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

S.A. No. 228(V) of 2017-18

(From the order of the ld. JCST (Appeal), Sundargarh Range, Bhubaneswar, in First Appeal Case No. AA V 60 of 2015-16, disposed of on 30.06.2017)

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

- V e r s u s -

M/s. Techno Millenium Plastic Pvt. Ltd.,
Chandini complex, Panposh Road, Rourkela,
Dist.- Sundargarh. ... Respondent

For the assessment period: 01.04.2009 to 31.05.2013

For the Dealer ... Mr. R.K. Mishra, Advocate
For the Revenue ... Mr. M.L. Agarwal, S.C. &
Mr. M.S. Raman, A.S.C.

Date of hearing: 17.08.2019 ******** Date of order: 28.08.2019

O R D E R

Both the appeals above arised out of self-same order of first appellate authority, hence taken up together for sake convenience and to avoid conflicting opinion, if any.

2. The dealer as appellant in S.A. No.223(V) of 2017-18 has prayed for deletion of demand towards tax, penalty and interest, whereas the Revenue as appellant in S.A. No.228(V) of 2017-18 has prayed for enhancement of demand by setting aside the impugned order.

3. The assessee-dealer M/s. Techno Millenium Plastic Pvt. Ltd., a registered TIN dealer engaged in manufacturing of packaged drinking water in the brand name of ICEFLO. It also deals in empty bottles of various sizes and as per specific requirement of the customers. It effects accessories and packing materials from outside the State. DCST, Sambalpur Vigilance Division, Sambalpur submitted tax evasion report with the allegation of clandestine business transaction/suppression by the dealer basing which an escaped assessment u/s.43 of the OVAT Act covering tax period 01.04.2009 to 31.05.2013 was taken up. In the assessment, learned assessing authority held the dealer liable for sale suppression of Rs.13,40,791.29 for the assessment year 2009-10, Rs.30,84,475.46 for the assessment year 2010-11, Rs.30,25,975.66 for the assessment year 2011-12, Rs.93,96,080.00 for the assessment year 2013-16 and Rs.31,87,881.00 for the period April, 2013 to May, 2013. Learned assessing authority treated the escaped turnover for the tax period from 01.04.2009 to 31.05.2013 at Rs.2,00,35,203.00. Tax on it @ 12.5% on Rs.44,25,266.00 was calculated to Rs.5,53,158.00 and tax @ 13.5% on Rs.1,56,09,937.00 was calculated to Rs.21,07,341.00. Thus, the total tax was calculated to Rs.26,60,499.00. Besides tax, penalty i.e. of the tax due was raised at Rs.53,20,998.00 as per sec.43(2) of the OVAT Act. Thus, the tax and penalty together was raised at Rs.79,81,497.00.

4. Felt aggrieved, the dealer carried the matter challenged the order of assessment before the first appellate authority. Learned first appellate authority in the impugned order recalculated the tax liability in consideration of the explanation of the dealer in detail and vide order dtd.30.06.2017 he reduced the tax due to Rs.3,09,345.00, penalty amounting to Rs.6,18,690.00, thereby the total demand became calculated at Rs.9,28,035.00. When the demand towards tax and penalty became reduced before first appellate authority, Revenue being aggrieved preferred appeal.

5. The contention of the Revenue is, the calculation of the suppression by the first appellate authority is without proper appreciation of the vigilance report. Burden of prove is on the dealer to explain the seized incriminating documents. The first appellate authority has committed wrong in accepting the documents which are manufactured and modified at a later stage. So, he should not have not relied on the books of account and documents produced before him instead relying the vigilance report. On the other hand, the dealer has challenged the impugned order on the contentions like, the authority below has taken consideration of the goods/purified drinking water supplied free of cost for a period of one month as a policy to attract the customers. The assessing authority has taken into consideration of the damage and wastage ignoring the claim of the dealer. The view of the vigilance team is contradictory since at one time it has rejected the figure submitted to BIS but at other place it has accepted the same figure as sale suppression. It is also contended that, when the first appellate authority placed reliance on the C.A. Audit report, he should not have taken consideration of the vigilance report. Further, the penalty levied in this case is not warranted.

6. In the case in hand, there was allegation of sale suppression during the tax period under assessment. The assessing authority held the dealer guilty of suppression. On the other hand, the first appellate authority though held the dealer guilty of

suppression but in consideration of the incriminating document, the books of account, audit balance sheet and connected documents, he recalculated the suppression which became reduced. On a careful perusal of the assessment order and then comparing the same with the order of first appellate authority it is found that, the first appellate authority in the impugned order after a threadbare discussion on each incriminating documents seized, calculated the suppression. The first appellate authority has considered the pleas of the dealer before him. No new materials are produced before this Tribunal. No rebuttal evidence also produced to interfere with the calculation of the first appellate authority. The claim of the dealer like, there was free supply of drinking water for one month wrongly taken into account and further plea like, the authority has discarded the figure as per BIS at one time, whereas at other point it has also not taken into consideration of the C.A. report are the pleas but thereby it is not substantiated how the calculation by first appellate authority is wrong or to be discarded. It is a subjective satisfaction of the first appellate authority in consideration of the vigilance report, order of the assessing authority and the explanation of the dealer with his books of account and connected documents. The calculation on factual side by the first appellate authority cannot be disturbed basing the grounds which are conjectural and presumptions only. Hence, I am of the considered view that, there is no reason to interfere with the calculation on suppression by the first appellate authority, resultantly, the same is hereby confirmed.

Once it is held that, the determination of suppression before the first appellate authority is just and proper in that case, there is no scope to entertain the plea of the Revenue taken in the grounds of appeal. The Revenue has failed to apprise while the calculation of the first appellate authority is to be treated as erroneous. Therefore, it only can be said that, there is no reason to enhance the grounds of suppression.

7. In the case in hand, the dealer is found guilty of suppression. The suppression is derived from the seized incriminating documents. Being a wrong doer, the dealer deserves no mercy taking cue from the word 'many' as contemplated in the provision.

However, with regard to the quantum of penalty it is believed that, the quantum should be one time instead of two times as imposed. The assessment was made only on 24.09.2015, thereafter the assessment before the first appellate authority was done on 30.06.2017.

As such, by the date, the assessment order passed, the provision under law changed to penalty at one time of the tax assessed. The argument of the Revenue through learned Standing Counsel is, the audit visit conducted prior to the date 01.10.2015 should be guided by the provision as it was before the amended provision effective from 01.10.2015. So, the dealer is liable to pay penalty at two times.

8. Well settled principle is, the rule of beneficial construction requires, ex-post facto law should be applied to reduce the rigorous sentence of the previous law on the same subject. Such a law is not affected by Article 20(1). The principle is based upon the legal maxim *"Salus Populi Est Suprema Lex"* which means the *"welfare of the people is the supreme for the law"*. It is inspired by principles of justice, equity and good conscience.

8.(a) It is held by authorities that, even ex-post facto law of such a type should be applied to mitigate the rigour of the law. This principle is based both on sound reason and common sense. "A retrospective statute is different from an ex-post facto statute". Reliance is placed in the matter of **Smt. Dayawati v. Inderjit, AIR 1966 SC 1423 PARA 10.**

9. The First Appellate Authority is an extended forum of assessment. In the present case, by the date of order of first appellate authority, there was omission of the word "twice" from the section u/s.43(1) of the OVAT Act. It is not the case of repeal of the entire provision but a word of the provision relating to quantum of penalty is

omitted and in its place a reduced amount towards quantum of punishment is inserted.

9.(b) The intention of the legislature will be frustrated if a liberal and pragmatic approach is not given. Principle of parity or equality before law will not be violated here because, it is certain, the changed quantum of penalty is an inevitable application to the assessments for subsequent period.

9.(c) Law relating to taxation are undergoing changes time to time looking at the hardship and burden on the tax payer by a welfare state. Reduction in quantum of penalty is inserted in the said process by the legislature. Therefore, a tax payer in pending lis cannot be debarred from enjoying the fruit of the change in law as he is one among them for whose benefit the change of law is made. An instruction in administrative side if any cannot debar the dealer from getting the benefit of the change in law.

Keeping in view the discussion hereinabove, it is held that, the penalty is to be calculated at one time of the tax assessed only. Thus, from the discussion above, it is held that penalty u/s.43(2) of the OVAT Act should be calculated at one time of the tax due in that case.

In the result, it is ordered.

The appeal is allowed in part. The dealer is liable to pay tax of Rs.3,09,345.00, penalty of Rs.3,09,345.00 i.e. calculated at one time of the tax due. Thus, the total demand against the dealer be raised at Rs.6,18,690.00. The cross appeal is dismissed as of no merit.

Dictated & corrected by me,

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

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