BEFORE THE ODISHA SALES TAX TRIBUNAL: CUTTACK
(Full Bench)

S.A. No.221 (VAT) of 2009-10

(Arising out of order of the learned Additional CST (Revenue), Odisha, Cuttack in Appeal Case No. AA.-57/VAT/ACST/Assessment/Puri/ 2008-09 disposed of on dated 31.12.2009)

Present: Shri R.K. Pattanaik, Chairman,
Shri A.K. Dalbehera, 1st Judicial Member, and
Shri R.K. Pattnaik, Accounts Member-III

M/s. Mangalam Timber Products Ltd.,
Room No. 25, Ist Floor, Rout Complex,
Plot No. 236, Cuttack Road, Laxmi Sagar,
Bhubaneswar-6 ... Appellant

-Versus-

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

For the Appellant : Sri C.R. Das, Advocate
For the Respondent : Sri M.S. Raman, Additional S.C. (CT)

Date of hearing: 04.08.2020 ***** Date of order: 25.08.2020

O R D E R

Pertinent questions, such as, the following have emerged for determination: (i) whether, the order of setting aside the assessment with a direction to examine an issue to be justified in law? (ii) if at all, under the given circumstances, a direction for fresh examination with respect to determination on taxable turnover vis-a-vis industrial inputs @4% was warranted, more particularly, when there was no irregularity noticed in respect thereof? (iii) whether, it was right

in exercising jurisdiction imposing penalty in terms of Section 42(5) of the Odisha Value Added Tax Act, 2004 (in short, 'the Act') due to want of mens rea?

2. Instant appeal under Section 78(1) of the Act is directed against the impugned order dated 31.12.2009 promulgated in Appeal Case No. AA – 57/ VAT/ACST/Asst./Puri/2008-09 by the learned Additional Commissioner of Sales Tax (Revenue), Cuttack (in short, 'FAA') on the grounds inter alia that remand as well as considering the aspect of industrial inputs which was never in dispute as wholly untenable and that apart, imposition of penalty under Section 42(5) of the Act in spite of having no mens rea to be unsustainable.

3. The appellant dealer is a public limited company having a factory in the district of Nabarangpur which is engaged in manufacturing and trading of Medium Density Fibre Boards (MDFBs) and Formalin having its branch office and sales centre at Bhubaneswar besides other branches located in different parts of the State. As revealed from the record, assessment under Section 42(4) of the Act was undertaken, in consequence whereof, the appellant dealer was served with a notice in Form VAT-303 and later to the receipt of AVR, audit assessment was initiated for the period 01.04.2005 to 31.03.2007. The learned Assistant Commissioner of Sales Tax, Puri Range, Bhubaneswar (in short, 'AA') rejected the books of account produced by the appellant dealer and completed the assessment to the best of his judgment and raised the alleged demand and imposed penalty in accordance with Section 42(5) of the Act. Against the said assessment, the appellant dealer preferred appeal and urged the points that there is a minor

discrepancy with respect to the stock which is quite negligible and so, it must not be treated as a sale suppression; Section 42 of the Act does not authorise enhancement of turnover and a serious error has been committed thereby; and as to the manufacture of MDFBs, the tax liability on fire woods @ 4% has been discharged, but was assessed at 12.5% by claiming that the same is not covered under the industrial inputs. However, the appeal was allowed with a remand. Being further aggrieved, the appellant dealer approached the Tribunal assailing the impugned order dated 31.12.2009. According to the appellant dealer, after due verification of the record, taxable turnover @ 4% was determined and in absence of any dispute or irregularity, fresh examination on a particular aspect sans any reason. It is contended that the Audit Unit accepted the books of account with regard to taxable turnover @ 4% on the sales of industrial inputs, but the AA travelled beyond AVR and furthermore, the FAA directed fresh examination, which is beyond the scope and ambit of Section 77 read with Sections 41 and 42 of the Act. The imposition of penalty has also been questioned on the ground that when there is no mens rea, it was unnecessarily saddled against the appellant dealer.

4. Admittedly, the assessment is consequent upon an audit set in motion in terms of Section 41 of the Act and as per the audit recommendation, the assessment as against the appellant dealer for the period under consideration was initiated. The learned Additional Standing Counsel (CT) for the State contended that any question can be entertained in appeal and also remanded for proper examination as the appellate authority is possessed of the power either to confirm,

reduce or annul assessment of tax, or impose interest or penalty; or even enhance assessment; or set aside assessment directing the assessing authority to make a fresh assessment after such enquiry in view of Section 77(7) of the Act and in the instant case, FAA rightly exercised the jurisdiction and thus, did not commit any wrong or error as has been alleged by the appellant dealer.

5. According to the learned Additional Standing Counsel (CT), as regards the remand and fresh examination directed by the FAA, since the AA failed to investigate as to the correctness of the claim with reference to the notification dated 04.04.2005, the jurisdiction has been correctly exercised. It is also urged that the claim of the assessee rests upon application of appropriate rate of tax on the transaction of sale of finished product i.e. MDFBs to the manufacturers as industrial input and hence, the FAA did commit no mistake in directing remand and proper examination of the matter. It is further apprised that the AA applied the rate of tax at 4% on the sale of MDFBs to the tune of ₹5,16,87,220.00 for it having fallen in the ken of Entry 74 (post amendment vide Odisha Value Added (Amendment) Act, 2005) and Entry 45 of Part-II of Schedule-B read with Finance Department Notification No. 17800-CTA-19/2005-F dated 04.04.2005 and rest of the turnover attracted rate of tax at 12.5% as per Part-III of Schedule-B thereof and under such circumstances, it was quite natural on the part of the FAA to enquire, whether, disposal of MDFBs as industrial input to be in conformity with the norms of notification ibid. It is brought to the attention of the Tribunal that the aforesaid notification demands fulfilment of certain requirements in order to treat goods as

industrial inputs and they are, namely, (i) such commodity is to be used as input which directly goes into the composition of the finished products manufactured by the purchasing dealer for sale; (ii) the commodity is directly used in the manufacturing process for production of the finished goods which the purchasing dealer is licensed to manufacture; and (iii) packing materials shall be construed as such materials which are required for packing of the finished products in its same form as manufactured by the purchasing dealer. Thus, according to the learned Additional Standing Counsel (CT), the terms and conditions of the notification and its satisfaction was to be arrived at before applying a particular rate of tax which, in fact, prevailed upon the FAA to direct the remand for proper examination in order to ascertain, whether, the alleged transactions as effected really cleared the test.

6. The first and foremost question which demands an immediate reply is with regard to the jurisdiction of the FAA, whether, to be in terms of Section 77 of the Act or not? As per the learned Counsel for the appellant dealer, the appellate authority is merely an extended forum of assessment and therefore, the remand was unwarranted. In order to respond to it, it would be profitable to go through the relevant provision, such as, Section 77 of the Act. On a proper reading of sub-section (7) of Section 77 of the Act, it is quite clear that in disposing of an appeal, the appellate authority may after providing the appellant a reasonable opportunity of being heard and causing such enquiry as being necessary, confirm, or reduce, or annul the assessment; or impose interest, or levy of penalty; or enhance the assessment including any part thereof, whether or not, such part is the

subject matter in the appeal; or set aside the assessment and direct the assessing authority to make a fresh assessment after such further enquiry, as may be directed. On the claim of the learned Counsel for the appellant dealer, the provisions of Section 77(7) of the Act are to be examined. On a proper examination of it, the Tribunal is of the considered view that for correct determination of tax liability which is the intent and purport of assessment and where, enquiry into factual aspect of the matter is necessary, the appellate authority, as it is evident from Section 77(7) of the Act, does have the power to remand and direct examination of the matter in order to arrive at a just conclusion as per and in accordance with law. In the instant case, there is a need of confirmation as to whether the appellant dealer, while seeking a rate of tax at 4%, really complied with all the conditions for availing such benefit in consonance with the notification dated 04.04.2005.

7. Then, the learned Additional Standing Counsel (CT) highlighted the distinct features of Section 42(3) and (4) of the Act and contended that there is no bar to consider additional material apart from AVR. The decisions of the Hon'ble Court in Das & Son Infracon Pvt. Ltd. Vs. Sales Tax Officer in W.P. (C) No. 13500 of 2015 dated 31.07.2015 and Steel Junction Vs. Deputy of Commissioner of Sales Tax in W.P. (C) No. 20442 of 2014 dated 18.11.2014 have been placed at the disposal of the Tribunal to suggest that the assessing authority could proceed with the matter on the basis of the materials contained in AVR, besides, such other additional materials in due compliance of natural justice. The learned Counsel for the

appellant dealer contended that the law on the aforesaid subject is well settled to the effect that extraneous materials cannot be looked at by the assessing authority, the materials which are not a part and parcel of AVR, in view of the ruling of the Hon'ble Court in Bhusan Power & Steel Ltd. Vs. State of Orissa reported in (2012) 47 VST 466 (Orissa). In response to that the learned Additional Standing Counsel (CT) claimed that said decision is inapplicable to the facts situation of the present case. It is also contended by the State that even though referring to the above ruling and particularly, considering the other two decisions of the Hon'ble Court in Das & Son Infracon and Steel Junction ibid, there is no absolute bar for considering such other materials besides the materials available in AVR, when it is understood and appreciated vis-a-vis statutory provisions of Section 42(3) and (4) of the Act. According to the appellant dealer, when there was no dispute raised in audit inspection, any such remand by the FAA for proper examination vis-a-vis rate of tax at 4% on goods sold to the manufacturers as industrial input negates the ratio of the Hon'ble Court rendered in Bhusan case. On a careful reading of said decision, what the Hon'ble Court have been pleased to emphasize is to lay stress on the materials available in AVR, as the assessing authority utilized a vigilance report, instead. In fact, in the aforesaid context, as it should be understood, the Hon'ble Court in the case supra proceeded to observe that the audit assessment under Section 42 of the Act was necessarily to be completed on the basis of the materials contained in AVR. If the provisions such as Section 42(3) and (4) are read in unison and the rulings of the Hon'ble Court cited by the State besides Bhusan

case, if applied and understood in its proper perspective, the conclusion would be that there is no bar for the assessing authority in utilizing such other additional materials besides the evidence collected during audit and placed in AVR. The learned Additional Standing Counsel (CT) though objected the application of the ruling of the Hon'ble Court in Bhusan case and at the same time referred to it to suggest that additional materials can still be utilized by the assessing authority, however, further contended that said decision has, in the meantime, been challenged which is pending before the Hon'ble Apex Court nomenclatured as Commissioner of Sales Tax, Odisha Vs. Bhusan Power & Steel Ltd. vide Civil Appeal No. 4286 of 2012 joined with Vedanta Aluminium Ltd. Vs. State of Odisha in S.L.P. No. 4962 of 2012, wherein, vide order dated 27.04.2012, the assessing authority has been directed to continue with the assessment on the basis of the materials in his possession in addition to AVR, however, the final assessment not to be passed without its leave. If the above facts are considered, it would unfailingly suggest that there is no bar for the assessing authority to consider additional or extraneous materials at the time of assessment, but such consideration must have to be by providing an opportunity of hearing to the assessee observing principles of natural justice.

8. Now, the question that falls for consideration is, whether, in the instant case, the AA and for that matter, the FAA did really consider any extraneous materials beyond AVR? As is understood by the Tribunal, the FAA enquired into the matter, if at all the appellant dealer was really entitled to the rate of tax at 4%

and whether, it has been allowed by the AA in conformity with the norms of the notification dated 04.04.2005. No doubt, in AVR, no such objection was raised on the sale of industrial input and applied rate of tax on the taxable turnover which was also accepted by the AA, but the FAA, simply attempted to confirm, if at all, the conditions of the notification dated 04.04.2005 had been satisfied before applying the rate of tax. In the considered view of the Tribunal, such a decision of the FAA, by no stretch of imagination, can be treated as utilizing additional materials or evidence of extraneous nature. Rather, it is not at all a case of use and utility of any extraneous or additional materials beyond AVR, even so as to invite application of the ruling of Bhushan's case ibid. In the further considered view of the Tribunal, the FAA, in view of the powers envisaged in Section 77(7) of the Act rightly exercised the jurisdiction and only wanted to get things confirmed before applying a rate of tax i.e. @ 4% vis-a-vis the goods sold to the manufacturers for being used as industrial input. It can, therefore, be said that the FAA did it merely to enquire into the fact, whether, the conditions of the notification have at all been complied with or not. Thus, the conclusion of the Tribunal is that the FAA had a right approach on the matter remanding it for proper examination as to the rate of tax vis-a-vis the industrial input and as a corollary, the contention of the learned Counsel for the appellant dealer that it resulted in considering extraneous materials beyond AVR to be clearly untenable and outrightly misplaced.

9. As regards imposition of penalty, it is a question of considerable importance. Recently on couple of occasions, the Tribunal did express a view vis-a-

vis levy of penalty under Section 42(5) of the Act. In so far as the case in hand is concerned, the AA imposed penalty on account of sale suppression which has strongly been opposed by the appellant dealer due to the fact that there was a minor discrepancy in stock of 05 pieces MDFBs as against a total stock of 3754 and that apart by its very conduct, it can be said that there was no any guilty intent or mens rea to avoid the tax liability. With respect to the provision of penalty, as per Section 42(5) of the Act, which corresponds to audit assessment, it is envisaged that twice the amount of tax assessed under sub-section (3) or (4) thereof shall be the penalty. The learned Counsel for the appellant dealer contends that there was no suppression of sales and the stock discrepancy was on account of error in counting and considering such negligible delinquency, there could not have been a conduct fraught with malafide, inasmuch as, mens rea can be said to be completely absent. Now, the question is, whether, mens rea is one of the essential ingredients of Section 42(5) of the Act as is claimed by the learned Counsel for the appellant dealer? Recent opinion of the Tribunal expressed in S.A. Nos. 200 (ET) of 2013-14 and 174 (VAT) of 2014-15 disposed of on 05.06.2020 and 30.06.2020 respectively by the Tribunal has, in fact, been referred to. Let it be examined in threadbare to have a consistent view on the matter. The learned Additional Standing Counsel (CT) very strenuously urged that imposition of penalty under Section 42(5) of the Act could be concomitant with the tax assessed which is very much clear from the expression appearing therein, such as, 'without prejudice to any penalty or interest that may have been levied under any provision of the Act'; 'an amount twice the

amount of tax assessed'; and 'shall be imposed by way of penalty' and the Tribunal was made to go through the White Paper on Value Added Tax circulated by the Empowered Committee of State Finance Ministers constituted by the Ministry of Finance, Government of India. It is urged that since the contravention of the provisions of the Act, as clearly manifest from Section 42(5) of the Act leads to tax delinquency, it is nothing but a civil liability and in that regard, placed reliance on a decision of the Hon'ble Apex Court in the case of Union of India Vs. Dharmendra Textile Processors reported in (2008) 18 VST 180 (SC). According to the said ruling with reference to Section 11AC of the Central Excise Act, 1944, in case of breach of a statutory obligation, whether, civil or criminal and while considering the expression 'assessee shall be liable', guilty intent or mens rea cannot be attributed, it being a civil liability and endorsed its view expressed in SEBI Vs. Shriram Mutual Fund reported in (2006) 5 SCC 361 and overruled the ruling in Dilip N. Shroff Vs. CIT: (2007) 6 SCC 329. In the decision of the Hon'ble Apex Court in Dharmendra Textile case, it is observed that a provision of penalty provides a remedy for loss of revenue and as such, it is a civil liability, where wilful concealment is not an essential ingredient as in the case of criminal prosecution, while making a comparative study and examination of Sections 271(1)(c) and 276C of the Income Tax Act, 1961. It has further been held by the Hon'ble Apex Court in the case supra that the expression 'assessee shall be liable' or 'liability to pay duty' appearing in provision like in Section 11AC of the Central Excise Act, 1944 cannot mean to suggest that any discretion lies with the adjudicating authority, while levying penalty other than what

is legally and statutorily leviable. The application of principle of casus omissus supplementing a provision on the assumption of what the legislature really intended was rejected on the ground that a provision which is clear and simple does not require it, which can only be employed, if the construction of the provision leads to gross absurdity. The aforesaid ruling was further considered by the Hon'ble Apex Court in the case of Union of India Vs. Rajasthan Spinning & Weaving Mills reported in (2010) 1 GSTR 66 in order to obviate its misconstruction. In that case, it has been observed that the decision in Dharmendra Textile must be understood to mean that though the application of Section 11AC of the Central Excise Act, 1944 depends on the existence or otherwise of the conditions expressly stated therein, once it is invoked in a particular case, the assessing authority would have no discretion in quantifying the amount and penalty. So, on a closer reading and careful analysis of the aforesaid rulings of the Hon'ble Apex Court, it would suggest that the conditions appearing in Section 11AC of the Central Excise Act, 1944 once found to be satisfied, there remains no discretion for the assessing authority to exercise as to the quantum of penalty which is equal to the duty assessed under sub-section (2) thereof. Albeit, in Commissioner of Central Excise, Chandigarh Vs. Pepsi Foods Ltd. reported in (2010) 260 ELT 481 (SC), a DB of the Hon'ble Apex Court observed that the penalty provision under Section 11AC of the Central Excise Act, 1944 does contain an element of intent or mens rea as a necessary constituent. At this juncture, the State relies upon a decision of the Hon'ble Court in the case of M/s. Jay Jagannath Marble Vs. Commissioner of

Commercial Taxes, Cuttack and others reported in 2010 (II) ILR -Cuttack 226, wherein, it is observed that under Section 74(5) of the Act, the STO has no discretion vis-a-vis levy of penalty once the circumstances contemplated therein stand satisfied. It was in relation to any discretion remains to exercise while levying penalty under Section 74(5) of the Act that the Hon'ble Court rendered its view. The learned Additional Standing Counsel (CT) placed reliance on the following decisions, such as, R.S. Joshi, STO Vs. Ajit Mills Ltd: (1977) 40 STC 497 (SC); Union of India Vs. Krishna Processors: (2009) 15 SCC 58, while persuading the Tribunal to hold that in tax delinquency, imposition of penalty is a civil consequence, which does not require mens rea. Furthermore, a prominent ruling of the Hon'ble Court in Jindal Stainless Ltd. Vs. State of Orissa reported in (2012) 54 VST 1 (Orissa) is cited, wherein, ultra vires of the provision of Section 42 and concerning penalty as per sub-section (5) thereof was challenged, which was not found favour with. While laying stress on the word 'shall' and explaining its interpretation, the learned Additional Standing Counsel (CT) with reference to Section 42(5) of the Act and placing reliance on the decisions of the Hon'ble Apex Court reported in AIR 1978 SC 1244 and Gangapa Vs. Fakkirappa: (2019) 3 SCC 788; Shree Choudhury Transport Co. Vs. Income Tax Officer in Civil Appeal No. 7865 of 2009 decided on 29.07.2020; Commissioner of Income Tax Vs. Anjum MH Ghaswala: (2002) 1 SCC 633; and ALD Automotive Pvt. Ltd. Vs. Commercial Tax Officer: (2019) 13 SCC 225 and rulings of Hon'ble Gujarat High Court, such as, State of Gujarat Vs. ONGC: (2017) 97 VST 506 (Guj.); Riddhi Siddhi Gluco Biols Ltd. Vs. State of Gujarat: (2017)

100 VST 305 (Guj.); State of Gujarat Vs. Ashirwad Beverages: (2017) 104 VST 114 (Guj.); State of Gujarat Vs. Swastik Surftants Ltd: (2017) 104 VST 251 (Guj.) attempted to convince the Tribunal that imposition of penalty is a must as the expression 'shall' has been employed in Section 42(5) of the Act. It is also contended that in the case of Commissioner of Income Tax Vs. Gangaram Chapolia reported in (1976) 103 ITR 613 (Orissa), the Full Bench of the Hon'ble Court held and observed that the decision of the Hon'ble Apex Court in Hindustan Steel is no authority for the proposition that under Section 12(5) of the OST Act, 1947, the expression 'without sufficient cause' carries an import of mens rea, or that the burden of proof to be on the Revenue to establish its absence. At the end, the maintainability of the plea and argument as advanced by the appellant dealer was challenged for having not laid any foundation therefor and also for want of pleadings by referring to some rulings of the Hon'ble Apex Court as well as of Hon'ble Orissa High Court.

10. Thus, having regard to all the above rulings, the Tribunal is to take a call on the aspect of existence of mens rea or otherwise vis-a-vis Section 42(5) of the Act and what significance the expression 'shall be imposed' as appearing therein carries and what is mandatory and if at all, the assessing authority has any role to play in exercising discretion thereunder. Normally, in cases of tax liability, imposing penalty plays a part to remedy the revenue loss which is of a civil consequence, where mens rea does not find its place. However, in certain cases, the language very clearly and unequivocally suggests it otherwise and demands proof of guilty intent, and there it can certainly be said that before imposing

penalty, not only the conditions of the default are to be established, but also mens rea, whether, to be present or not is to be gone into. It is equally true that mens rea is a fundamental feature of a criminal prosecution, where, for the offence committed, persons evading tax liability are penalized. Further, it would not be out of place to mention that in some prosecution, guilty intention or mens rea does not form an essential ingredient and once the basic elements of the offences are proved, the persons who are liable for the offences are straight away punished. So, there is no point in raising a plea and advancing an argument that in case of tax liability and delinquency, in all circumstances, mens rea has no place, rather, it depends on the language of the provisions with which it is couched that determines existence or otherwise of the guilty intent. If a particular provision shows that mere concealment or suppression simpliciter has been committed without more, it can well be said that no element of mens rea exists, however, besides such concealment or suppression, something more is attributed, like indulging in fraud, collusion etc., notwithstanding the fact that it relates to a case of tax evasion, mens rea plays a significant role. So far as the term 'shall' used, it is to mean that the provision to be mandatory, unless and until, a contrary intention appears. At times, 'shall' is used as 'may' depending on the construction of the provision, scheme of the law and intention of the legislature. In other words, the term 'shall' may be used inter-changeably as 'may' keeping in view the provisions of the Act. As such, there may or may not be an expression of mandatory compliance notwithstanding use of the term 'shall'. It is also correct to suggest that

expression 'may' is likely to be treated as 'shall' in a given circumstance and all that depends on the language of the law. In the present context vis-a-vis Section 42(5) of the Act, appreciating the rulings of the Hon'ble Apex Court, it has to be understood that the term 'shall' appearing therein must have to be understood as a mandatory compliance with respect to the imposition of penalty and its quantum and for that matter, no discretion is left to exercise. Thus, it can well be said that if a particular provision provides circumstances which demand or necessitate consideration of mens rea, the same has to be looked into, or else in ordinary course of civil delinquency, guilty intent plays no role at all. To Section 42(5) of the Act, it can fairly be claimed that there is no need of considering mens rea or guilty intent of the dealer which is required to be ascertained, inasmuch as, it is not such a provision akin to Section 11AC of the Central Excise Act, 1944. As earlier discussed, only upon fulfilment of the conditions, as appearing in Section 42(1) of the Act, penalty is to be imposed under sub-Section (5) thereof and as such, no discretion remains for the authority to exercise, whether, to impose penalty or not and also as to its quantum, which is what enunciated by the Hon'ble Apex Court in Rajasthan Spinning Mills' case. But, fact of the matter is, while considering, whether, the circumstances as indicated in Section 42(1) of the Act is/are satisfied, the conduct of the dealer is to be thrashed out. It does not mean that ascertainment of conduct of the dealer, whether, to be bonafide or not would lead to finding out its mens rea or guilty intent which is altogether quite distinct and separate. In this regard, it would be apposite to cite a decision of the Hon'ble Apex Court in the

case of Hindustan Steel Ltd. Vs. State of Orissa reported in (1970) 25 STC 211 (SC), wherein, it is observed that liability to pay penalty does not arise merely upon proof of default; an order imposing penalty for failure to carry out a statutory obligation is a result of a quasi-criminal proceeding; penalty shall not ordinarily be imposed, unless one who is obliged under law either acted deliberately in defiance of law or has been guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation; and penalty shall not also be imposed merely because it is lawful to do so. In other rulings, such as, Tamil Housing Board Vs. Collector of Central Excise, Madras: 1994 (74) ELT 9 (SC), Padmini Products Vs. Collector of Excise: 1989 (43) ELT 195 (SC), Puspam Pharmaceuticals Vs. Collector of Central Excise, Bombay: 1995 (78) ELT 201 (SC) and some decisions of the Hon'ble Apex Court have highlighted the significance of the conduct of the dealers reflecting as to what a wilful or deliberate conduct could really be. In fact, a wilful suppression may be considered as a deliberate conduct or intentionally withholding certain information with malafide which can be ascertained and deduced from the overall conduct of the dealers that may ultimately weigh either in favour of or against imposing penalty. So, on ultimate analysis, the conclusion of the Tribunal is that Section 42(5) does not require mens rea or guilty intention is not to be ascertained and only its conditions are required to be fulfilled in juxtaposition to the conduct of the appellant and in so far as imposition of penalty is concerned, it is a must, on such circumstances being proved, without leaving any discretion to exercise, which includes a discretion regarding its quantum. Having

concluded so, in the instant case even though mens rea is not to be ascertained as Section 42(5) does not need such determination, but, the conduct of the appellant must have to be unearthed before imposing penalty.

11. The learned Counsel for the appellant contended that the stock discrepancy is marginal and that apart, during the period under dispute notwithstanding exemption of firewood at Entry 14 of Schedule-A of the Act, by mistake, it paid VAT under Section 12 of the Act at a proportionate value which was used in manufacturing of MDFBs, although, it was not under obligation for such payment of tax. It is also apprised that by an advance ruling of the Tribunal dated 20.04.2011 in Application No. 1 of 2010-11, it has been held that firewood of all varieties including casuarinas and eucalyptus is exempted from VAT under Entry 14 supra. Furthermore, it is claimed that during the assessment proceeding, on account of calculation error, the appellant wrongly reversed ITC on stock transfer of goods and bearing in mind the above facts, it would not be fair to allege that there was any malafide or dishonest conduct so as to invite penalty under Section 42(5) of the Act. The learned Additional Standing Counsel (CT) cited the following decisions in the case Shiv Prasad Sahu Vs. State of Orissa: (2009) 19 VST 417 (Orissa); Narmada Bachao Andolan Vs. State of M.P: AIR 2011 SC 1989; etc. and contended that such plea and argument of the appellant dealer without there being a foundation should not be taken cognizance of. Similarly, it is also alleged that in absence of proper pleading, such as, mistake in payment of tax etc. no any relief ought to be granted to the appellant and in this regard, some more rulings

have been cited by the learned Additional Standing Counsel (CT). So, the contention of the State is that due to want of duly constituted pleading on the matter, which essentially requires adjudication of facts, the argument advanced by the appellant dealer in that behalf must not be accepted and acted upon and no relief be granted. In the humble opinion of the Tribunal, on the anvil of absence of pleading of the appellant dealer on the matters raised at present, which is indeed a fact, it would be just and proper to direct remand in order to ascertain the bonafide in the alleged claims, the purpose being to find out its conduct. It is to reiterate that a whole lot of scheme is provided under Section 42(5) of the Act to provide an opportunity of hearing to the dealers, the very intent and purpose being to pin point latter's conduct. If under a wrong notion or by a mistake or error without any malafide, a statutory obligation could not be discharged, then in that case, considering the conduct as bonafide, penalty may not at all be imposed. Having said that, in the peculiar facts and circumstances of the case, the Tribunal reaches at a conclusion that to consider the conduct of the appellant dealer, the matter deserves a remand.

12. Hence, it is ordered.

13. In the result, the appeal stands partly allowed. As a logical sequitur, the impugned order dated 31.12.2009 promulgated in Appeal No. AA.-57/VAT/ACST/Assessment/Puri/2008-09 is hereby set aside to the extent indicated herein above. Consequently, the matter is remitted back to the AA for determination as to the conduct of the appellant dealer vis-a-vis discharge of the

statutory obligations by it primarily to ascertain the conduct, whether, to be bonafide or not for the purpose of imposing penalty or otherwise in terms of Section 42(5) of the Act with a direction that it shall be expeditiously disposed of preferably within a period of three months from the date of receipt of the above order in the light of the findings and keeping in view the observations of the Tribunal, as aforesaid.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(A.K.Dalbehera)
1st Judicial Member

I agree, Sd/-
(R.K. Pattnaik)
Accounts Member-III