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

S.A.No. 377(V)/2016-17

(From the order of the ld.JCST (Appeal), Bhubaneswar Range, Bhubaneswar, in Appeal No. AA/106221622000094/OVAT/BH-II, dtd.19.11.2016, confirming the assessment order of the Assessing Officer)

Present: Sri S. Mohanty
2nd Judicial Member

M/s. Odisha Mining Corporation Ltd.,
"OMC House", Bhubaneswar,
Dist. Khurda. ... Appellant

-Versus-

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

For the Appellant : Mr. Ch. S. Mishra, Advocate
For the Respondent : Mr. S.K. Pradhan, A.S.C. (C.T.)

(Assessment period : 01.01.2012 to 31.03.2014)

Date of Hearing: 05.01.2019 *** Date of Order: 05.01.2019

ORDER

This second appeal is against a confirming order of First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (in short, FAA/JCST) at the instance of assessee-dealer.

2. **Factual matrix :**

On the basis of Audit Visit Report (AVR) and observations made therein submitted by Assessing Authority/Deputy Commissioner of Sales Tax, Bhubaneswar-II Circle, Bhubaneswar (in short, AA/STO) the dealer was assessed u/s.42(4) of the OVAT Act for the tax period from 01.01.2012 to 31.03.2014. The Assessing Authority dropped the

allegation no.1 which relates to irregular maintenance of the register regarding inter-state purchases. However, he found the allegation no.2 as per the AVR to be established, as the dealer had collected/deducted WCT/VAT @4% from the gross payment value paid to various works contractors for various job works executed by them, but while making remittance of the said deducted amount in Government treasury, there was delay up to 120 days i.e. beyond the 7 days period of limitation attracting thereby violation of Sec.54(4) of the OVAT Act attracting penalty as per Sec.54(6) of the OVAT Act to the tune of Rs.1,70,61,242/-. Thereafter, on verification of the sale, purchase details as per the books of account and connected documents for the period from 01.04.2012 to 31.03.2014, balance tax due and penalty was calculated at Rs.1,36,890/-.

The assessment and the demand raised thereby was questioned by the dealer before the FAA, who in turn, confirmed the assessment of AA vide impugned order with a findings that, the penalty charged is as per the provision of law and the plea of the appellant is not convincing.

3. Felt aggrieved with the concurrent finding of both the fora below, the dealer knocked the door of this Tribunal by way of this second appeal. It is contended by the dealer that, the period under assessment in question is from 01.01.2012 to 31.03.2014, whereas the dealer was already subjected to audit assessment u/s.42 on earlier occasion for the period from 01.04.2008 to 31.01.2012. Thus, the period from 01.01.2012 to 31.01.2012 was taken into consideration twice by the AA, which is not sustainable in law. It is further contended that, when the AA had accepted the books of account of the dealer in that case, re-determination of GTO and TTO i.e. different from the GTO and TTO as per the books of account is also not in

accordance to law. It is also contended that, the AA has wrongly included an amount of Rs.34,168/- by disallowing the debit note issued by the assessee-dealer to its purchaser, without assigning any reason for such disallowance. Levy of penalty is also challenged as mechanical and claimed to be untenable in the facts and circumstances of the case.

4. Revenue has advanced cross objection in support of the impugned order.

5. Keeping view the contention of the dealer in the grounds of appeal, the substantial questions of fact and law framed for decision in this appeal are : (i) Whether both the fora below have committed wrong by including the period from 01.01.2012 to 31.03.2014 within the tax period under assessment since the said period was already covered under the assessment on earlier occasion under the same provision i.e. u/s.42 of the OVAT Act ? (ii) Whether the authorities below have committed wrong in re-determining the GTO and TTO different from the GTO and TTO disclosed by the dealer particularly when the books of account of the dealer was accepted by the taxing authority ? (iii) Whether the penalty imposed in the case in hand is not tenable ?

6. At the outset, learned Counsel Mr. Mishra on behalf of the dealer draws the attention of the Court to the assessment period in question i.e. from 01.01.2012 to 31.03.2012. He has advanced the copy of assessment for previous period of the assessee-dealer covering from 01.01.2012 to 31.01.2012. It is manifest on the records that, the period from 01.01.2012 to 31.01.2012 was taken twice by the taxing authority and the said defect is explicit and found to be a patent error, thereby, it can safely be said that, the assessment cannot withstand in law. As such, it is held that, the matter should be remitted back to the

AA for assessment afresh excluding the period of assessment from 01.01.2012 to 31.03.2014.

7. The next contention of the dealer is, when the books of account was accepted, then there is no reason for re-determination of GTO as well as enhancement of GTO and TTO of the dealer. The assessment order as it revealed, in express terms the AA has accepted the books of account of the dealer. In that event, the re-determination of the GTO and TTO itself is contradictory to the findings of acceptance of the books of account. As it revealed, the AA has casually prepared the order. It is believed that, this fact needs fresh adjudication on remand.

8. The next plunk of argument advanced by the learned Counsel for the dealer is, the debit note issued by the assessee-dealer to purchaser was not considered/disallowed by the AA. However, on perusal of the impugned order, the fact of such debit note amounting to Rs.14,580/- though raised by the dealer in FAA but was not dealt with by the FAA. It is noticed that, the dealer has not challenged the imposition of penalty as per Rule 54(6) of the OVAT Act, but challenged the penalty as per Sec.42(5) of the OVAT Act. The penalty imposed as per Sec.42(5) cannot withstand for the reason that, the matter should be remitted back to the AA for assessment afresh. In that view of the matter, it is held as follows :

The AA has committed wrong by including the period of assessment from 01.01.2012 to 31.03.2012 in the assessment since the said period should be excluded. The AA should have looked into the books of account and connected documents to determine the GTO and TTO in the light of allegation brought in the AVR. In that event, the dealer is at liberty to raise the question of acceptance of debit note,

whereas question of penalty as per Sec.42(5) is a necessary consequence on re-determination of the tax liability only.

With the observation above, it is herby ordered.

The appeal by the dealer is allowed on contest. The impugned order is set-aside. The matter is remitted back to the AA for assessment afresh. Learned AA is requested to complete the remand assessment within a period of four months hence. The dealer is directed to appear before the AA with a copy of this order without waiting for the notice from the AA.

Dictated and Corrected by me,

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

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