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

S.A. No. 266(V) of 2017-18
(Arising out of the order of the learned JCST, Sambalpur Range, Sambalpur, in First Appeal Case No. AA63/JSG/VAT/2011-12, disposed of on dtd.31.07.2017)

P r e s e n t: Shri A.K. Dalbehera, O.S.J.S.
M.A., LL.M.
1st Judicial Member

M/s. MSP Metallics Ltd.,
Marakuta, Jharsuguda. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. N.K. Dash, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 22.03.2021 *** Date of order: 20.04.2021

O R D E R

This appeal is directed against the order dtd.31.07.2017 passed by the learned Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur (hereinafter referred to as, the learned JCST) in First Appeal Case AA63/JSG/VAT/2011-12, wherein he confirmed the order of the learned Deputy Commissioner of Sales Tax, Jharsuguda Circle, Jharsuguda (hereinafter referred to as, the learned DCST) for the assessment period 01.04.2008 to 31.01.2010

u/s.43 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act).

2. The brief facts of the case are that, the appellant-dealer is engaged in manufacturing and sale of pig iron, sponge iron and MS billet. The appellant-dealer purchases raw materials and sells finished products both inside and outside the State. On the basis of fraud case report submitted by the ACST, Enforcement Range, Bhubaneswar assessment was completed. It was alleged in the report that there was out of account production and sale suppression to the tune of Rs.3,17,60,033.00. Basing on the ratio of utilisation of raw materials for production of finished products as disclosed by the authorised representative of the appellant-dealer company the allegation of suppression had been levelled. On the date of visit of the Enforcement officials it was disclosed that for production of one MT of sponge iron, 1.80 MT of iron ore and for production of one MT of MS billet 0.90 MT of sponge iron and 0.25 MT of pig iron was required. Accordingly, the learned DCST had calculated less production of 83.797 MT of sponge iron and 1386.503 MT of MS billet resulting in sale suppression of Rs.3,17,60,021.00. Thus, the learned DCST determined the GTO and TTO of the appellant-dealer company at Rs.40,94,94,091.00 and Rs.39,49,65,828.00 respectively. Output tax @ 4% on TTO came to Rs.1,57,98,633.12. After allowing ITC at Rs.1,45,28,263.00 for adjustment against the tax due, the appellant-dealer company was liable to pay tax amounting to Rs.12,70,370.12 along with penalty of Rs.25,40,740.00 u/s.43 of the OVAT Act thus totalling to Rs.38,11,110.00.

3. Being aggrieved by the order of the learned DCST, the appellant-dealer preferred an appeal before the learned JCST who confirmed the order of the learned DCST. Being further aggrieved by the order of the learned JCST, the appellant-dealer has preferred the second appeal.

4. The appellant-dealer has come up with the second appeal on the grounds that the orders of both the fora below have neither been based on the facts and circumstances of the case nor on the points of law; that the determination of GTO and TTO is arbitrary, unwarranted and uncalled for and liable to be revised; that the impugned order is ex facie illegal, arbitrary, without jurisdiction and passed in gross violation of the principles of natural justice; that the proceeding was initiated without fulfilling the statutory pre-condition of Section 43 of the OVAT Act; that baring assumption and presumption there is no material brought on record warranting formation of reasonable belief that the turnover of the appellant-dealer has escaped assessment; that the learned DCST did not provide the copies of fraud case report to enable the appellant-dealer to set up its defence effectively; that the impugned order is passed without providing reasonable opportunity of being heard to the appellant-dealer; that the determination of production and sale suppression applying theoretical norms is illegal, arbitrary and based on assumption and presumption; that the levy of penalty u/s.43(2) is illegal, arbitrary and unwarranted.

Cross objection has been filed by the Revenue supporting the impugned order.

5. Heard the learned Counsel for the appellant-dealer and the learned Addl. Standing Counsel appearing for the respondent-Revenue. Perused the materials available on record and the orders passed by both the fora below. I also perused the grounds taken in the appeal and the plea taken in the cross objection. The appellant-dealer was self-assessed u/s.39 of the OVAT Act during the period under dispute. The learned DCST through notice in form VAT-307 initiated proceeding u/r.50(1) of the OVAT Rules, 2005 on the ground that the turnover of the appellant-dealer during the period from 01.04.2008 to 31.01.2010 had escaped assessment. The said proceeding u/r.50(1) of the OVAT Rules was initiated on the basis of the fraud case report submitted by the Investigation Unit, Bhubaneswar with the allegation of production and sale suppression of the value of Rs.3,17,60,033.00 based on SION (Standard Input Output Norms). It was submitted by the learned Counsel for the appellant-dealer that the determination of production and sale suppression applying theoretical norms is illegal, arbitrary and based on assumption and presumption. As per allegation in the fraud case report the authorised person disclosed to the investigation team that for production of one MT sponge iron 1.80 MT of iron ore and for one MT of MS Billet 0.90 MT of sponge iron is required. The learned Counsel for the appellant-dealer argued that the investigating authority without verifying any document calculated the actual production and derived differential production and treated it as suppression of production and sales on the basis of theoretical norms without reference to the quality of raw materials and other

manufacturing parameters and without disclosing the authenticated scientific literature which is highly illegal and arbitrary. The learned Counsel for the appellant-dealer further submitted that the actual input/output ratio prevailing in the factory of the appellant-dealer is slightly excess than the purported standard input/output ratio adopted by the department. The input/output ratio in fact depends upon variety of factors such as quality of raw materials and other factors which cannot be the same and may vary year after year. It was submitted by the learned Counsel for the appellant-dealer that the demand in the instant case is confirmed on the basis of microscopic differences in the input/output ratio as adopted in the fraud case report where there is no mention about the quality of raw material consumed for achieving the said result. To that effect it is not out of place to mention as submitted by the learned Counsel that there cannot be an exact mathematical equation between consumption of raw materials and manufacture of final products as held by the Hon'ble Apex Court in the case of Union of India Vs. Indian Aluminum co. Ltd. reported in 1995 (77) ELT 268 (SC). The learned Counsel for the appellant-dealer further submitted that the input/output ratio in any factory is highly reiterative factor and depends upon a variety of factors like (i) quality of raw materials used, (ii) quality of finished goods produced (iii) the age of the machineries employed in achieving the said result (iv) the technology employed for the said result (v) level of technology perfected by achieving the standard results vis-a-vis the appellant (vi) quality of manpower employed for the standard result vis-a-vis

the appellant (vii) the number of time the reported performance is achieved for the standard result out of total number of experiments conducted and (viii) the reported ratio is which is achieved on experiments under normal industrial conditions or under perfect laboratory conditions. It was submitted that unless the said factors related to the standard ratio and the ratio prevailing in the factory of the appellant-dealer are brought on record, no conclusion of under production can be drawn and the two sets of ratio cannot be compared for arriving into any logical conclusions.

6. The learned Counsel for the appellant-dealer relied on a decision of this Tribunal in the case of M/s. T.R. Chemicals Ltd. v. State of Odisha vide S.A. No.11(V) of 2014-15, wherein the Full Bench of this Tribunal held as follows:-

> "In the considered opinion of this Tribunal, the allegation of out of account of sale to such a larger extent by applying "SION" calculation, is not acceptable to be correct. Therefore, the conclusion of the production and sale as per SION was merely arrived at in vaccum and hence not acceptable in view of the judicial pronouncement of Hon'ble Apex Court and High Court as follows:-
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> I. Oudh Sugar Mills Ltd. Vrs. Union of India, 1978 (2) ELT (1172) (SC)
> II. Commissioner of Customs, Calcutta Vrs. South India Television Ltd. 2007 (214) ELT 3 (SC)
> III. Commissioner of Sales Tax, U.P. Lucknow Vrs. Saurastra Chemicals (1996) 100 STC 48 (Allahabad)
> IV. State of Kerala Vrs. M.M. Mathew and another (1978) 42 STC 348 (SC)
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> In support of his contention, the learned Counsel appearing on behalf of appellant dealer has cited the following decisions of this Tribunal, few of such are:-

I. S.A. No.517 of 2007-08 Division Bench (Utkal Metalicks Ltd)
II. S.A. No.1624 of 2005-06, Division Bench (Pawanjoy Sponge Iron Pvt. Limited)
III. S.A. No.2117 and 2118 of 2005-06, Division Bench (Maa Tareni Industries Ltd.)
IV. S.A. No.248(V) of 2012-13, Full Bench (Agarsen Spong Pvt. Ltd.)

It is found that both the lower forums have proceeded to assess the dealer merely on assumption, presumption and surmise. Under the above discussed facts, we find the addition of Rs.4,30,22,300.00 towards unaccounted for production of sponge iron and sale thereof is not sustainable in law, hence deleted."

7. The learned Counsel for the appellant-dealer vehemently argued that both the learned DCST and the learned JCST without applying judicial mind and without considering the facts merely basing on report of the investigating authority determined the suppression of sales while there was no discrepancy in physical stock vis-a-vis raw materials or even where no clandestine activities was noticed nor any excess cash was found or excess consumption of electricity was found during investigation and that being the position the entire exercise by the authority below appears to be a futile one and hence the demand has been raised on presumption. Moreover, it was submitted that as there was no suppression the imposition of penalty is not sustainable. To that effect the appellant-dealer placed reliance on a decision of this Tribunal in a similar matter where the Tribunal directed for fresh assessment of the facts of the case in the case of M/s. Meta Sponge Private Limited Vrs. State of Odisha vide

S.A. No.93(VAT) of 2019, wherein the Tribunal held as follows:-

> ".....While considering imposition of penalty, an element of discretion is definitely involved, in view of the language employed in section 43(2) of the Act. In the instant case, no real suppression was alleged, rather, under or escaped assessment has been claimed by taking into account the stocks lying scattered on being measured by volumetric method and that too when, the quantity of end product depends on multiple factors like quality of ores and coal consumed. Under the above circumstances, the Tribunal is of the humble view that penalty should not have been levied against the dealer assessee."

8. The principles laid down in disposal of the two appeals of this Tribunal as relied upon by the appellant-dealer are squarely applicable to the facts and circumstances of the present appeal. The learned Addl. Standing Counsel appearing for the Revenue could not place anything concrete against the submissions of the learned Counsel for the appellant-dealer and the decisions of this Tribunal as to how this case is different from the aforesaid two cases. In the cross objection nothing concrete could be brought by the respondent-Revenue against the grounds taken by the appellant-dealer.

9. In view of the aforesaid facts and the submissions of the learned Counsel for the appellant-dealer supported by the decisions of the Tribunal it is necessary to remand the case to the learned DCST for fresh assessment of the tax liability of the appellant-dealer. Hence, it is ordered.

10. The appeal is allowed and the impugned order is hereby set aside. The matter is remitted back to the learned DCST for de novo assessment and recomputation vis-a-vis tax

liability of the appellant-dealer in the light of the findings and observations of this Tribunal and in accordance with law preferably within a period of three months from the date of receipt of this order. The cross objection is accordingly disposed of.

Dictated & corrected by me,

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

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