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

S.A. No. 297(V) of 2018
(Arising out of the order of the learned ACST, Puri Range, Puri, in First Appeal Case No. 106111811000021, disposed of on dtd.26.09.2018)

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

M/s. Milan Marbles,
Plot No.1521/4642, College Road,
Nayagarh. ... Appellant

- V e r s u s -

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

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

Date of hearing: 16.03.2021 *** Date of order: 12.04.2021

O R D E R

This appeal is directed against the order dtd.26.09.2018 passed by the learned Addl. Commissioner of Sales Tax, Puri Range, Puri (hereinafter referred to as, the learned ACST) in First Appeal Case No. 106111811000021, wherein he reduced the demand to Rs.30,01,694.00 from Rs.30,19,133.00 made by the learned Assessing Authority, Nayagarh Circle, Nayagarh (hereinafter referred to as, the learned AA) for the assessment period 01.04.2015 to

31.03.2017 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 a proprietorship concern carrying on business in trading of marbles, tiles, glazed tiles, vitrified tiles, kadapaa, mosaic, granite, pictorial tiles etc. both on retail and wholesale basis. On the basis of the Tax Evasion Report submitted by the Sales Tax Officer, Vigilance assessment was conducted. As per the report, the appellant-dealer purchased different goods valued Rs.1,43,40,379.00, whereas it sold only goods worth Rs.33,75,407.00. As per the tax evasion report the sale being only 23% of purchases the appellant-dealer had deliberately shown such less sale with the sole motive to evade tax. On the basis of seized documents from the business premises of the appellant-dealer, the STO, Vigilance computed the appellant-dealer's indulgence in suppression amounting to Rs.1,03,93,728.00. Therefore, the learned AA determined the GTO at Rs.1,18,81,467.00 and TTO at Rs.1,16,96,085.00. The output tax was determined at Rs.16,92,041.00 instead of output tax returned at Rs.1,85,323.00, after adjustment with allowable ITC of Rs.92,318.00, the tax due came to Rs.15,99,723.00. The appellant-dealer having paid tax of Rs.93,064.00 in the return during the period under assessment, balance tax due was Rs.15,06,660.00. The learned AA also imposed penalty. The total tax and penalty payable came to Rs.30,19,133.00.

3. Being aggrieved by the order of the learned AA, the appellant-dealer preferred an appeal before the learned ACST who reduced the demand to Rs.30,01,694.00. Being further

aggrieved by the order of the learned ACST, the appellant-dealer has preferred the second appeal.

4. The appellant-dealer has come up with this second appeal on the grounds that the impugned order is not just and legal; that the learned court below should have considered that the appellant-dealer had a separate legal entity having separate rent agreement with the owner of the land and had been granted registration under OVAT Act after proper verification, hence he had no link with other business concern; that the documents found by the inspecting officers are not related to the business concern of the appellant-dealer; that if the materials were kept in a common stock yard then how the inspecting officers confirmed that they had found some incriminating materials from the business premises; that at the time of inspection the vigilance authority had made a statement at their own sweet will and forced the appellant-dealer to sign on that statement and it was done out of fear; that the learned court below should have accepted the statement given at the time of assessment because it is settled that when the statement is different then the appellate authority should have accepted the contention which is more plausible one; that the vigilance authority has detected many irrelevant undated documents at the time of inspection and that the burden of proof whether the entries in the seized accounts relate to a particular period rests with the Revenue.

On the other hand, the respondent-Revenue has filed cross objection supporting the order of the learned JCST.

5. Heard the learned Counsel for the appellant-dealer and the learned Addl. Standing Counsel for the respondent-

Revenue. Perused the materials available on record so also the orders of both the fora below. I also perused the grounds of appeal so also the plea taken in the cross objection. On perusal of the materials available on record, it is seen that the Vigilance team had visited the place of business of the appellant-dealer on 21.12.2016 and found unaccounted for slips amounting to Rs.1,03,93,728.00 which led to suppression of turnover. It is seen that the Vigilance team had submitted some loose slips which did not bear any signature. It is also seen that those slips do not contain any description of goods or their quantity, quality, size or value. Hence the onus lies on the Revenue to prove to whom and for which period those slips related to as submitted by the learned Counsel for the appellant-dealer. To that effect the learned Counsel for the appellant-dealer relied on a decision of the Hon'ble High Court of Orissa in the case of State of Orissa v. Chandra Kanta Moda as reported in (1974) 33 STC 573 (Orissa). The said judgment relates to reference made by the Member, Odisha Sales Tax Tribunal u/s.24(1) of the OST Act, where the following questions were raised for determination of the Hon'ble Court:

(i) Whether on the facts and in the circumstances of the case the Tribunal was right in holding that it was incumbent on the department to satisfy the escapement in order to justify a proceeding u/s.12(8) of the Orissa Sales Tax Act?

(ii) Whether on the facts and in the circumstances of the case, the onus is not on the opponent to prove that undated entries in the seized books of account

relate to a particular period and not to another period.

In the said case the assessee had come up in appeal before the Tribunal and the learned Member held as follows:-

> "The appellant's accounts were rejected on the ground of duplicate set of accounts seized from his shop premises and consequently the turnover was enhanced by Rs.10,000. The books seized related to cement expenses, household expenses and a khata containing goods given for approval. The first appellate authority accepted the books of account and house expenses to be irrelevant. As for the khata containing goods given for approval, the first appellate authority held that the 10 per cent enhancement over his turnover is not high but this being a 12(8) proceeding it was incumbent on the department to say specifically what was the escapement. That not having been done, nor any specific amount having been alleged as escaped turnover, this 12(8) proceeding cannot stand. Besides, the books of account of the appellant all through thereafter have been accepted and it is the beginning of his business. As he started business in 1965-66 this book embodying goods given 'on approval' was found to be somewhat not complete. But all the same that does not contain any date so as to link it with the period of assessment. In that view of the matter this 12(8) proceeding cannot stand and the appeal is allowed and the assessment is annulled."

6. From the appellate decision the aforesaid two questions of law arose and the Hon'ble Court held as follows:-

> "The Tribunal has not come to find that the books of account of the assessee were not liable to be rejected. If the accounts are rejected, a best judgment assessment is bound to follow. In S.J.C. No.65 of 1971 (State of Orissa represented by Commissioner of Sales Tax, Orissa Cuttack v. Durga-dutta Moda [1973] 32 S.T.C. 98) disposed of by us on 10th April, 1973, we have held that Section 12(8) of the Act does not require the assessment to be confined to the exact suppression or escapement.

Section 12(8) of the Act prescribes that the reassessment is to be made in accordance with Section 12(5) of the Act. Therefore, there can be a best judgment assessment. It is inherent in the scheme of a best judgment assessment that such an assessment is not the result of mere calculation but it is based upon estimate. Therefore, every part of the assessed turnover cannot be supported by an account and the law does not require the assessing officer to correlate his estimate to the books of account, which upon being discarded, he takes to the method of best judgment assessment. As we have already indicated in the said case a best judgment assessment cannot be capricious or arbitrary and it has got to be based upon some sort of material which would justify the estimate. The Tribunal appears to have labored under a misconception of law that in a proceeding under Section 12(8) of the Act it is only the escaped turnover which can be brought into the net of taxation. If the Tribunal had kept the legal position in view and come to hold that suppression had not been established that would have been a finding of fact. It is true, in the order of assessment the assessing officer has not indicated any clear instance of suppression or escapement though he has indicated reasons for discarding the books of account. Our answer to the first question is:

On the facts and in the circumstances of the case, the Tribunal was not right in holding that it was incumbent on the department to specify the escapement in order to justify a proceeding under Section 12(8) of the Orissa Sales Tax Act.

The next question does not indeed arise in the facts and circumstances of the case. The Tribunal found as a fact in its appellate order that the business was commenced during the assessment year in question. The inspector of the department visited the shop in February, 1966, that is, in the course of the very first year. Therefore, there was no room for doubt that the seized accounts did relate to the assessment year in question. It is true that in a case under Section 12(8) of the Act the initial burden would lie on the revenue to establish that the seized books of account relate to a particular period because, until such correlation is established, the said

> accounts cannot be utilised as the basis for a finding even prima facie for holding that there has been a suppression or escapement. It would always be open to the assessee to dispute the prima facie view of the assessing officer by establishing that the seized books of account do not appertain to the period indicated by the assessing officer. In the present case, however, there is no room to raise such a question of law. We accordingly decline to answer the second question as it does not arise out o the appellate order and in the facts and circumstances of the case.
>
> Once the questions are answered our advisory jurisdiction ends and we are not entitled to give any directions to the Tribunal as to how the further proceeding is to be disposed of. Under Section 24(5) of the Act, a copy of our judgment is to be sent to the Tribunal and the Tribunal is required to dispose of the case accordingly. We are therefore, not in a position to accept the contention of Mr. Rath for the assessee that we should direct the Tribunal to rehear the appeal. In view, however, of the fact that the Tribunal proceeded on the footing that it was for the department to establish the quantum of the suppression, he appears not to have examined the other aspects of the matter. It would be for the Tribunal now to dispose of the appeal in an appropriate way in accordance with law. We make no order as to costs."

7. The claim of the dealer is that the determination of suppression on the basis of loose slips recovered and seized by the Vigilance Team during the visit of dealer's unit is not sustainable in law. So no reliance can be placed on the statement which was prepared at the instance of the officer of the Vigilance Team. It is further argued that, the loose slips no way reflect dealer's business, so no positive inference can be drawn on the basis of those seized documents regarding sale suppression by the dealer. On perusal of the impugned order, it is found that, the seized documents have been accepted as

proved on the basis of presumption under law, such as, Sec.95(k) of the OVAT Act. Provision u/s.95(k) of the OVAT Act reads as follows:-

> "95. Burden of proof.-
>
> (k) any book, document or account kept or found in his business premises or any place including a godown, warehouse, vehicle or vessel over which he has ultimate control does not relate to his business,
>
> the burden of so proving shall be on him and, for the purpose of proving one or all or any of the claims, he shall produce or furnish such documents containing such particulars, within such time, before such authority and in such manner, as may be prescribed and such authority may, for sufficient reasons; require him to produce such further evidence as it may deem necessary, and where no document has been prescribed, such authority may require such evidence to be produced before it as it may deem necessary."

8. The learned Addl. Standing Counsel for the Revenue argued that, the word "documents" contemplated in the provision includes any incriminating documents seized or recovered from the premises of the dealer. On the other hand, learned Counsel for the dealer vehemently argued that, the loose slips if any does not cover u/s.95(k) of the OVAT Act. In a case where some papers/documents depicting entries relating to business transactions are recovered, that too the place of recovery is the dealer's premises, then the provision u/s.95(k) can be drawn successfully. It is the settled principle of law that, a person who asserts a particular fact is required to affirmatively establish it but it is when the circumstance indicates knowledge about a particular fact is with a person

having exclusive domain over the subject by virtue of his position either official or personal, then, the burden rests on him to rebut the presumption under law.

Burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence unless it is provided any law that, the proof of that fact shall lie on any particular person. Sec.95(k) is a provision under special statute resting the burden of proof on the dealer to explain any document relating to its business. By producing those documents, the department has discharged the initial burden. In consequence, the burden is shifted to the dealer to disprove the facts which is presumed on the basis of those incriminating documents. Putting it in another way, the burden of proof as to any particular fact lies on that person who wishes the court to believe a thing and its existence who by reason of circumstance especially has the knowledge of that thing. Similar view has been taken by this Tribunal in S.A. No.5(V) of 2018, disposed of on dtd.23.09.2019 as relied upon by the learned Counsel for the appellant-dealer.

9. The facts remain even though prima facie it is established that, the documents relate to unaccounted for business activities but without any investigation into it by procuring best piece of evidence, no opinion can be formed based on surmises and conjectures. The assessing authority needs to examine the seized documents in detail by comparing with the books of account maintained by the dealer or the person who is supposed to be the maker of the document. It is when the dealer is found to be non-cooperative to meet the queries by the assessing authority, in that case presumption

under law will necessarily lie in favour of the department by virtue of the provision u/s.95 of the OVAT Act. So, it can be said that, the matter relating to determination of suppression on the basis of seized documents needs to be answered afresh on due consideration of the seized documents with the explanation by the dealer. Be that as it may, it is held that, this is a fit case where the matter should be remitted back to the assessing authority for assessment afresh. However, it is made clear that, by virtue of remand of the case the assessing authority will form his opinion independently on the basis of evidence at his hand. The finding on the question of penalty is redundant. However, it is made clear that this being a question of suppression in the event the dealer is found guilty, penalty u/s.43(2) of the OVAT Act will necessarily be attracted to the case in hand. The quantum of penalty will be in accordance with the suppression determined and the well settled principle of law. Hence, it is ordered.

10. The appeal is allowed and the impugned order is hereby set aside. The matter is remanded to the learned AA for fresh assessment in view of the aforesaid observations which should be completed within a period of three months from the date of receipt of a copy of this order. The cross objection is disposed of accordingly.

Dictated & corrected by me,

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

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