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

S.A. No. 318(V) of 2016-17
(Arising out of the order of the learned DCST (Appeal), Balangir Range, Balangir, in First Appeal Case No. AA-01 (NUA) of 2016-17, disposed of on dtd.18.11.2016)

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

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

- V e r s u s -

M/s. Jain Enterprises,
At/P.O.- Khariar,
Dist.- Nuapada. ... Respondent

For the Appellant ... Mr. M.S. Raman, A.S.C.
For the Respondent ... N o n e

Date of hearing: 10.03.2021 *** Date of order: 24.03.2021

O R D E R

This appeal is directed against the order dtd.18.11.2016 passed by the learned Deputy Commissioner of Sales Tax (Appeal), Balangir Range, Balangir (hereinafter referred to as, the learned DCST) in First Appeal Case No. AA-01 (NUA) of 2016-17, wherein he reduced the demand to Rs.18,361.00 from Rs.36,722.00 made by the learned Sales Tax Officer, Nuapada Circle, Khariar Road (hereinafter referred to as, the learned STO) for the assessment period 01.04.2013

to 31.03.2015 u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, OVAT Act).

2. The brief facts of the case are that, the respondent-dealer is a proprietorship concern engaged in trading of cement, M.S. Rod, M.S. Angle, M.S. Sheet etc. on retail sale basis. Tax audit was conducted in respect of the respondent-dealer u/s.41 of the OVAT Act. On receipt of the Audit Visit Report (in short, the AVR) notice was issued to the respondent-dealer for audit assessment pursuant to which the learned Advocate on behalf of the respondent-dealer appeared and produced the books of account for verification. The Audit Visit team had found an ITC mismatch of Rs.54,757.00 in return. On verification of the books of accounts it was found that the respondent-dealer had disclosed total purchase of goods worth Rs.96,09,588.00 including @ 5% taxable goods worth Rs.6,20,903.00 and @13.5% taxable goods worth Rs.89,88,685.00 for the tax period under assessment. The learned STO also stated that a sum of Rs.35,861.00 was the opening balance of ITC as on 01.04.2013. Accrual of ITC of Rs.12,44,517.00 was during the period of assessment. So, the total ITC came to Rs.12,80,378.00. The respondent-dealer had been disallowed ITC of Rs.19,312.00 and carried forward in the last tax period of Rs.1,08,134.00. So, the ITC adjustment came to Rs.11,52,932.00. Accordingly, the GTO was determined at Rs.1,02,12,783.00 after allowing deduction towards collection of output tax of Rs.11,72,244.00 and the TTO was determined at Rs.90,40,539.00. Tax calculated @ 5% on Rs.5,78,593.00 came to Rs.28,930.00 and @ 13.5% on Rs.84,61,946.00 came to Rs.11,42,363.00. Thus the total

output tax came to Rs.11,71,293.00. As against this the respondent-dealer had not paid any VAT during the entire period under assessment. The respondent-dealer was found to have a tax due of Rs.18,361.00. Penalty of Rs.18,361.00 was imposed u/s.42(5) of the OVAT Act. So, the tax along with penalty together came to Rs.36,722.00 which the respondent-dealer was required to pay.

3. Being aggrieved by the order of the learned STO, the respondent-dealer preferred an appeal before the learned DCST who reduced the demand to Rs.18,361.00. Being aggrieved by the order of the learned DCST, the Revenue as appellant has preferred the second appeal.

No cross objection has been filed in this case.

4. Heard the learned Addl. Standing Counsel for the Revenue-appellant as the respondent-dealer did not participate in the hearing. Although the matter was heard exparte but the same is being disposed of on merit. In this case the Revenue has mainly challenged the deletion of penalty by the learned DCST which was imposed by the learned STO. The learned STO in his assessment order recorded the following:-

> "Thus, total output tax comes to Rs.11,71,293.00. As against this the dealer has not paid any VAT during the entire period under assessment, the dealer is now found to have a tax due of Rs.18,361.00. Further, penalty of Rs.18,361.00 is imposed under Section 42(5) of the OVAT Act as required. Thus, total amount of tax together with penalty works out to Rs.36,722.00 which is now required to be deposited into Government treasury or through e-payment as per the terms and conditions of the demand notice enclosed."

On the other hand, the learned DCST in the first appeal order has recorded the following:-

> "On the other hand as regards to imposition of penalty in the event of demanding of tax against the purchasing dealer where recalculation of input tax credit has not been made to impose one time of penalty on demanded tax, the Rule 11A has not been prescribed."

On perusal of the materials available on record it is seen that the assessment order was passed on 15.02.2016. The amendment to the OVAT Act have not been given retrospective effect and those amendments are prospective. The OVAT (Amendment) Act, 2015 became effective from 01.10.2015. Thus, the learned DCST has erred in deleting penalty upon the respondent-dealer.

5. The provision contained in Section 42(1) contemplates action for assessment in the events circumscribed therein. Upon examination of the matter, when the assessing authority goes to assess the tax, the amount is required to be visited with penalty as provided under Section 42(5). The principle of law as stated in Union of India Vrs. Dharmendra Textile Processors, (2008) 18 VST 180 (SC) that in case of tax delinquency mens rea is not necessary factor for consideration in order to impose penalty would apply to the present facts and circumstances of the case. The position of law has also been clarified in Jai Jaganath Marble v. Commissioner of Commercial Taxes (2011) 39 VST 312 (Ori.) = 2010 (II) ILR CUT 226.

The Hon'ble Supreme Court in Union of India Vrs. Dharmendra Textile Processors (2008) 18 VST 180 (SC)

extracted passage from Corpus Juris Secundum, Vol. 85, at page 580, paragraph 1023 which is as follows:

> "A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

6. From the aforesaid discussion it is clear that, the provision of penalty u/s.42(5) of the OVAT Act is of the nature of civil liability. There is no requirement to examine the existence of mens rea or malafide intention. The imposition of penalty u/s.42(5) of the OVAT Act has no element of criminality. It is consequential to assessment u/s.42 whenever more tax is assessed than what is returned. This is a pure civil liability. Hence, mens rea or criminal intention is absent in provisions u/s.42(5) of the Act. The suppression of tax amounts to evasion of tax. The respondent-dealer had deliberately suppressed the tax and the same came to light only after conducting tax audit. Had the audit not been undertaken, the respondent-dealer would have evaded tax. As the dealer had suppressed the tax, penalty equal to the amount of tax has been rightly imposed upon the respondent-dealer. Hence, the order of assessment is reasonable and the order of the learned DCST needs to be interfered with. The learned STO had assessed the appellant-dealer basing on the findings of the AVR where the irregularities were established. The learned STO rightly calculated the tax and imposed penalty on the appellant-dealer which was deleted by the learned DCST.

7. In view of my elaborate discussion, authoritative pronouncements so also the clear and unambiguous provision contained in the statute and the materials available on record I come to the conclusion that the assessing authority was justified in invoking the provision of Sec.42(5) of the OVAT Act. Therefore, there is infirmity in the order of the learned DCST who had deleted the penalty. Needless to mention that had there been no audit and no further enquiry the respondent-dealer would have evaded payment of legitimate tax due to the Government. Similar view has been taken by different Benches of this Tribunal. It is stated in the grounds of appeal that the order of the learned DCST may be set aside by restoring the order of the learned STO which appears to be just, proper and reasonable. In fact the grounds taken in the appeal have force. Thus I am inclined to interfere with the order of the learned DCST. Hence, it is ordered.

8. The appeal is allowed and the impugned order is hereby set aside. Resultantly, the order of assessment is hereby upheld.

Dictated & corrected by me,

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

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