

**BEFORE THE SINGLE BENCH: ODISHA SALES TAX
TRIBUNAL, CUTTACK.
S.A.No. 370(V)/2016-17**

(Arising out of order of the ld.DCST (Appeal), Koraput Range,
Jeypore, in First Appeal Case No. AAV (KOR)19/16-17,
disposed of on dtd.14.12.2016)

**Present: Smt. Sweta Mishra
2nd Judicial Member**

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

-Versus-

M/s. D.R. Retails,
Kella Nagar, Jeypore. Respondent

For the Appellant : Mr. S.K. Pradhan, A.S.C. (C.T.)
For the Respondent : None

(Assessment Period : 01.04.2014 to 31.03.2015)

Date of Hearing: 20.04.2021 *** Date of Order: 27.04.2021

ORDER

This appeal is directed against the order of the learned First Appellate Authority/ Deputy Commissioner of Sales Tax (Appeal), Koraput Range, Jeypore (in short, FAA/DCST) in First Appeal Case No. AAV (KOR)19/16-17 dtd.14.12.2016 in reducing the assessment order passed by the learned Sales Tax Officer, Koraput Circle, Jeypore (in short, STO) for the assessment period from 01.04.2014 to 31.03.2015 u/s.42 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act).

2. Facts of this case can be briefly stated thus:-

The dealer-respondent in the instant case is a proprietorship firm deals in goods like biscuits, waffles, ghee,

perfumes, grocery, atta, agarbati etc. He has been granted R.C. with effect from 11.01.2014. Upon receipt of audit visit report submitted by the audit team of Koraput Range, the learned STO completed the assessment of the dealer u/s.42 of the OVAT Act. At the assessment stage, the learned STO observed that, the dealer wrongly claimed ITC of Rs.2,021/- against fake Registration Certificate and accordingly initiated proceeding against the dealer. The learned STO examined the books of accounts of the dealer-assessee and confronted the said allegation to the dealer and established the total mismatch of ITC to the tune of Rs.35,527/- and carried forward ITC of Rs.18,455/- to next tax period i.e. April, 2015. So, out of total claim of ITC of Rs.3,01,312.92, he disallowed Rs.53,982/- and allowed Rs.2,47,330.92 as admissible ITC. Accordingly, against total output tax of Rs.2,84,312.55, the assessing officer adjusted admissible ITC of Rs.2,47,330.92 and tax payment of Rs.1,455/-. Thereby, he passed the assessment order raising balance tax demand of Rs.35,526.63 and penalty at the rate of twice the tax demand u/s.42(5) of the OVAT Act, which became calculated to Rs.71,053.25. Thus, both the tax due along with penalty aggregated to Rs.1,06,580/-, which the dealer is liable to pay at the stage of assessment.

3. Being aggrieved with the order of assessment the dealer preferred first appeal before the ld. First Appellate Authority/ Deputy Commissioner of Sales Tax, Koraput Range, Jeypore, who in turn, allowed the appeal in part and thereby reduced the tax due to Rs.17,762/-.

4. Being dis-satisfied with the order of the ld. FAA/DCST, the State-appellant has knocked the door of this

Tribunal by way of filing this second appeal with contention that the order passed by the ld. FAA is illegal, arbitrary and in contravention of provisions of law and hence needs to be set-aside.

5. No cross objection has been filed by the dealer-respondent in this case.

6. Despite due service of notice on the dealer, for reasons best known to him, he neither engaged a counsel nor anybody on his behalf remained present before this Tribunal on the schedule date of hearing. This Tribunal, therefore, left with no other alternative except to hear the argument of Mr. S.K. Pradhan, learned Addl. Standing Counsel appearing on behalf of the State and to dispose of the matter on ex-parte basis.

7. Perused the assessment order as well as first appeal order, all the materials available in the record, grounds of appeal submitted by the State-appellant. During the course of hearing, Mr. Pradhan, Addl. Standing Counsel for the State argued that, the order of the learned FAA appears to be unjust and improper. The order of the first appellate authority is irregular, against the mandate of OVAT Act and Rules as well as against the verdict of the Hon'ble High Court of Orissa as well as Apex Court. The Assessing Authority has completed assessment of the instant dealer u/s.42 of the OVAT Act. The sub-section 5 of Section 42 of OVAT Act in a clear cut manner has mandate to impose penalty two times the amount of tax assessed. But the first appeal order is going against the mandate of the Act and the first appellate authority has waived the penalty on the ground of non-concealment of any

turnover. But the Hon'ble Orissa High Court as well as Apex Court has given their verdict that the penalty is a mandate which shall not be deleted. The Apex Court in case of **Dharmendra Textile** reported in **18 VST Page 180** has passed verdict that, when the statute mandates penalty, there is no need of proving the *mens rea*. But in the instant case, the learned FAA has waived penalty on the ground of *mens rea*. Even the Hon'ble Orissa High Court in case of **Jindal Steel** reported in **VST 54 Page 1** has taken the similar stand that, penalty u/s.42(5) is a mandatory penalty. Hence, the first appeal order may be quashed. While disposing the first appeal order, the learned FAA at Page-3 has observed :

“Regarding imposition of penalty, the learned advocate argued that the dealer has not concealed any turnover nor withheld any tax amount. Only because the selling dealer has not filed his return, the assessing officer has disallowed corresponding ITC on which penalty has been imposed. He requested this forum to waive out penalty in the interest of natural justice. Considered the facts and circumstances along with the contention of the learned advocate. The fact narrated by the learned advocate seems to be genuine. Since no tax involved in the demand raised, I am inclined to consider the contention of the learned Advocate and no penalty is imposed u/s.42(5) of the VAT Act”.

Basing upon the argument of the Advocate of the dealer, the learned FAA deleted the penalty u/s.42(5) of the OVAT Act. As regards penalty, it is submitted that since terms of provisions of Sec.42 of the OVAT Act are attracted, penalty under sub-section 5 is concomitant. So, the learned Addl. Standing Counsel has prayed before this Tribunal that, in the interest of justice, the second appeal filed by the State may be allowed and penalty twice the amount of Rs.17,762/- (i.e. Rs.35,524/-) as assessed by the learned FAA may be imposed.

8. Heard the learned Addl. Standing Counsel, Mr. S.K. Pradhan on behalf of the State in absence of participation of the dealer in hearing of this appeal. Gone through the grounds of appeal, the impugned orders of appeal and assessment and argument of the learned Addl. Standing Counsel at the time of hearing. The dealer has not adduced any evidence on his behalf nor he has appeared before this Tribunal to defend himself against the grounds of appeal filed by the State-appellant. No reasonable excuse is also explained by the dealer. In view of the facts and circumstances of the case and after analysing the points raised in this appeal, I am of the considered opinion that, the argument advanced by the learned Addl. Standing Counsel is quite genuine and satisfactory. The dealer is required to pay the tax due and penalty twice the amount of Rs.17,762/- (i.e. Rs.35,524/-) as assessed by the learned FAA. Accordingly, it is ordered.

The appeal filed by the State-appellant is allowed. The order of the learned First Appellate Authority is hereby set aside. The dealer is required to pay the tax and penalty as indicated above.

Dictated and Corrected by me,

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

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