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

S.A. No. 305(V) of 2018
(Arising out of the order of the learned JCCT (Appeal), Sundargarh Territorial Range, Rourkela, in First Appeal Case No. AA V 52 of 2014-15, disposed of on dtd.16.08.2018)

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

M/s. Vasundhara Metaliks Pvt. Ltd.,
Podajalanga, Belaimunda,
Dist.- Sundargarh. ... Appellant

- V e r s u s -

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

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

Date of hearing: 12.03.2021 *** Date of order: 07.04.2021

O R D E R

This appeal is directed against the order dtd.16.08.2018 passed by the learned Joint Commissioner CT & GST (Appeal), Sundargarh Range, Rourkela (hereinafter referred to as, the learned JCCT) in First Appeal Case No. AA V 52 of 2014-15, wherein he confirmed the assessment made by the learned Sales Tax Officer, Rourkela II Circle, Panposh (hereinafter referred to as, the learned STO) for the assessment period 01.04.2007 to 31.03.2010 u/s.42 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 of sponge iron for which the appellant-dealer utilizes iron ores, coal and dolomite as basic inputs and machineries, spares as capital goods and uses lubricants, bearing, plastic bags as consumables goods. The appellant-dealer has purchases and sales both outside and inside the State of Odisha and maintains books of account such as purchase register, sales register, stock register electronically and issues tax/retail invoices manually. The audit team of Rourkela II Circle, Panposh undertook tax audit and submitted the Audit Visit Report (in short, the AVR) alleging less payment of tax in the returns filed by the appellant-dealer. The appellant-dealer had effected purchase of certain consumables like Hose, Hose Clamp, electrical goods, white cotton waste etc. which were not directly used in the process of manufacturing of Rs.47,987.56. The appellant-dealer had availed ITC of Rs.1,28,212.73 on the strength of improper tax invoices and the same was not allowable as per Sec.20(6) of the OVAT Act. The GTO was determined at Rs.12,68,96,120.00. After allowing deduction of Rs.47,09,870.00 towards collection of tax, the TTO was determined at Rs.12,21,86,250.00. Tax @ 4% on the entire TTO was computed at Rs.48,87,450.00. Output tax decreased due to sales return of Rs.1,77,874.00, so the tax payable came to Rs.47,09,576.00. After allowing adjustment of ITC to the tune of Rs.31,29,858.00 and tax paid along with return of Rs.14,18,439.00, the balance tax payable came to

Rs.1,61,279.00. The learned STO imposed penalty and interest u/s.42(5) and u/s.34(1) of the OVAT Act on the tax due being calculated to Rs.3,22,558.00 and Rs.62,899.00 respectively. Thus, tax, penalty and interest taken together came to Rs.5,46,736.00.

3. Being aggrieved by the order of the learned STO, the appellant-dealer preferred an appeal before the learned JCCT who confirmed the demand of Rs.5,46,736.00. Being further aggrieved by the order of the learned JCCT, the appellant-dealer has preferred the second appeal.

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

4. Heard the learned Counsel for the appellant-dealer and the learned Addl. Standing Counsel appearing for the Revenue. Perused the materials available on record and the orders passed by both the fora below. I also perused the grounds of appeal and the plea taken in the cross objection. The appellant-dealer has come up with the second appeal on the grounds that the appellant-dealer conceded the clerical mistakes pointed out by the learned STO consequent upon which it deposited the demanded tax of Rs.1,61,279.00 as well as interest charged thereon amounting to Rs.62,899.00 before filing the first appeal and challenged the imposition of 200% penalty amounting to Rs.3,22,558.00 which is not in accordance with law; that as per the amended law w.e.f. 24.09.2015 penalty to the extent of tax can be levied and any beneficial amendment in the law shall be applicable retrospectively. It was further urged that the error committed

by the appellant-dealer is a bonafide one for which the penalty should be limited to the extent of demanded tax.

5. As regards the imposition of penalty agitated by the learned Counsel for the appellant-dealer it is necessary to refer to the orders of the Full Bench of this Tribunal vide S.A. Nos. 42(VAT) of 2016-17 and 60(VAT) of 2016-17, disposed of on dtd.15.09.2020. In the said order the Full Bench relying upon the decisions of the Hon'ble Apex Court held that even though wilful concealment is not an essential ingredient of Sec.42(5) of the Act, but since a scheme of thing is prescribed therein, the assessing authority on the face of the contentions of the dealer-assessee ought to have considered whether to levy penalty or otherwise. The findings of the Full Bench in the said order are narrated as under:

> "Admittedly, the aforesaid amendment was brought into force w.e.f. 01.10.2015, which is later to the tax period in question. The learned Counsel for the dealer assessee contended that in view of the amendment ibid, the FAA did not commit any wrong and rightly, considered imposing a penalty one time of the assessed tax, if at all such imposition or levy of penalty is considered to be legal and justified. The learned ASC (CT) cited the decisions, such as, Bansapani Iron Ltd. Vs. State of Orissa: 2016 (I) Cuttack 50; Reliance Industries Ltd. Vs. Commissioner of Sales Tax: 2020 (I) OLR 117; Shree Bhagwati Steel Rolling Mills Vs. CCE: (2016) 3 SCC 643; and many more to contend that the FAA did commit a serious wrong to apply the amended Act and in reducing penalty to an amount equal to the amount of tax assessed under sub-section (5) of Section 42 of the Act. The sum and substance of the argument from the side of the State is that for a tax period prior to the amended Act, the penalty should have been twice the amount of tax assessed, as the amendment to

Section 42(5) of the Act cannot be applied retrospectively. It is also contended that a law which is brought into force by way of amendment or changes made therein by whatever means, using expressions 'delete', 'omit', 'repeal' etc. must have to be prospective in nature, unless and until, a contrary intention is clear and apparent. Let us examine the said aspect. A substantive law is always considered prospective in its application. A procedural law, on the other hand, is usually applied retrospectively. But, such application of substantive as well as procedural laws can otherwise be made applicable with a contrary intention expressed. By necessary implication, a law can be applied prospectively or retrospectively which depends on the intention of the legislature. In this regard, it would be profitable to make a mention of a ruling of the Hon'ble Apex Court in the case of Commissioner of Income Tax Vs. Vatika Township Pvt. Ltd. reported in 2014 AIR SCW 5674, wherein, while considering the effect of proviso to Section 113 of the Income Tax Act, which was inserted by Finance Act, 2002, it was held and observed that a legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a Court of law; there is a technique required to draft a legislation as well as to understand the same, as the former is about legislative drafting, whereas, the later is respecting interpretation of statute; and considering various rules guiding interpretation of legislation, one established rule is that unless a contrary intention appears expressly or impliedly, a legislation is presumed not to be intended to have a retrospective operation, the idea behind such a rule is that a current law should govern the current activities and cannot, thus, be applied to the events of the past, which is based on the principle of fairness, a legal rule which was introduced in a judgment legal classical on the point in L'Office Cherifien des Phosphate Vs. Yamashita Shinnihon Steamship Co. Ltd. It is apposite to make a mention that in the decision (supra), the Hon'ble

Apex Court further held and observed that when a benefit is conferred by a legislation, the rule against a retrospective construction is quite different; if a legislation confers a benefit on some person(s) without inflicting a corresponding detriment on some other person or public generally and where to confer such benefit appears to have been the legislator's object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect and such is precisely the justification to treat procedural provisions as retrospective. The aforesaid decision of the Hon'ble Apex Court is referred to in one of its later judgment in the case of Commissioner of Income Tax Vs. Essar Teleholdings Ltd. in Civil Appeal No. 2165 of 2012 decided on 31.01.2018. Hence, a rule of beneficial construction based on principle of fairness is stated to be the ratio laid down by the Hon'ble Apex Court in Vatika Township Pvt. Ltd. case ibid. The Tribunal sums it up by concluding that if a law is beneficial and it is unlikely to affect any other person or public at large is to be applied retrospectively. Such a construction is equally applicable to taxation laws. If a disability is created under a law, it cannot be applied from an anterior date since that would substantially prejudice the litigants, who have acted under the legislation earlier prevailed. But, in a situation where a benefit is granted as to the rigour of law and in that respect, a law or amendment is introduced, the same can be applied retrospectively, only if the object of such a law is simply to benefit the litigant and not to affect someone else's right. Having said that, in so far as the present case is concerned, for a penalty under Section 42(5) (pre-amended) which was twice the amount of tax assessed was reduced to an amount equal to the amount of tax as assessed under sub-section (3) or (4) thereof, it has to be held that such a change in law by omission vide Odisha Value Added Tax (Amendment) Act, 2015 w.e.f. 01.10.2015 is to be applied with retrospectivity in view of the ratio enunciated by

the Hon'ble Apex Court ibid. Having concluded so, the Tribunal arrives at a decision that the FAA did not commit any wrong and rightly invoked Section 42(5) of the Act and levied a penalty to an amount equal to the amount of the tax assessed. On the discretion of the assessing authority vis-a-vis the levy of penalty, a good number of citations are referred to by the learned ASC (CT) so as to contend that imposition of penalty under Section 42(5) is mandatory in nature considering the term 'shall' employed therein. The cited rulings are not reproduced which form part of the written note of submission and considering the same, the contention of the learned ASC (CT) as it appears to be that the levy of penalty under Section 42(5) of the Act since contains no element of mens rea, once the default is established, the assessing authority shall have no option left but to impose it. According to the Tribunal, in case of criminal liability, intention or mens rea is the rule and absence of it is an exception, whereas, in civil liability, the reverse is the phenomenon. In other words, it depends on the intent and purport of the law to demand existence or otherwise of guilty intent or mens rea irrespective of whether it is a criminal or civil liability. In the case of Section 42(5) of the Act, no doubt element of mens rea is absent, but whether to impose the penalty or not is dependent on the conduct of the assessee. If an assessee under a bonafide impression or on account of an error or mistake without any malafide defaulted in paying tax, by such conduct, it would not be justified to impose penalty and under such circumstances, a discretion remains with the assessing authority. In the case at hand, having regard to the circumstances under which purchase tax was not paid which is in relation to the taxable goods used and utilized in manufacture of finished products and having regard to the claim of the dealer assessee that considering the uncertainty in disposal of the quantity of goods inside or outside the State and extent thereof and an opportunity was there to allow rectification of

> any such error or omission in the return in view of Section 38 of the Act, there was indeed a necessity to ponder, if at all, penalty under Section 42(5) of the Act was to be levied. Thus, the inevitable conclusion of the Tribunal is that even though wilful concealment is not an essential ingredient of Section 42(5) of the Act, but since a scheme of thing is prescribed therein, the assessing authority on the face of the contentions of the dealer assessee as discussed herein before ought to have considered, whether, to levy a penalty or otherwise."

In view of the aforesaid findings of the Full Bench of this Tribunal it is necessary to remand the case to the learned STO. Hence, it is ordered.

6. The appeal stands allowed and the impugned order is hereby set aside. The learned STO is directed to reconsider and examine whether in the peculiar facts and circumstances of the case imposition of penalty u/s.42(5) of the OVAT Act is justified and such exercise is to be expedited and completed within a period of three months from the date of receipt of a copy of this order after providing a reasonable opportunity to the appellant-dealer and keeping in view the findings and observations of the Tribunal, as aforesaid. The cross objection is disposed of accordingly.

Dictated & corrected by me,

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

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(A.K. Dalbehera)
1st Judicial Member