



2. The brief fact of the case at hand is that Sh. Ved Prakash Agarwala is the Managing Director of M/s. Prakash Industries, Business park, First floor, 25, Shivaji Marg, New Delhi. As per order dtd. 07.10.1997 of Hon'ble Odisha High Court in Civil Revision Case No.212 of 1997, M/s. Ved Prakash Agarwala was appointed as the official receiver in case of M/s. Maitri Shukla, Barbil, KJ 682. As such, the LAO observed that M/s. Ved Prakash Agarwala is liable to pay tax as per Section 19-C of the OST Act from the date of appointment of the receivership. Accordingly, he initiated proceeding U/s.12(5) of the OST Act directing the assessee to appear and produce books of account relating to the period 07.10.1997 to the end of the Financial Year i.e.31.03.1998. In course of examination of accounts by the LAO, it was revealed that Shri Ved Prakash Agarwala, the official receiver of M/s. Maitri Shukla has effected five numbers of sale transactions of iron ore totaling to Rs.2,58,77,117.00 to one M/s. Prakash Industries Ltd., Koira, Sundargarh RC No.RL-I-2095 against five numbers of form IV received. However, he taxed the above amount @16% calculated to Rs.41,40,338.72 and further imposed penalty of Rs.45,27,752.16 U/s. 12(5) of the OST Act as the dealer failed to get himself registered under the OST Act in spite of attracting liability. Since, the assessee has not paid earlier, he demanded the extra tax and penalty of Rs.86,68,091.00 for the impugned period which was challenged by the assessee before the Id. FAA in shape of first appeal. After proper examination of the

case, the ld. FAA dismissed the appeal and confirmed the impugned assessment order passed by the LAO relating to the material period.

3. Being further aggrieved by the aforesaid order, the assessee filed appeal before this Tribunal mainly on following grounds:

a. "for that the learned ACST ought to have held that the learned assessing officer was not legally justified to initiate proceeding and issue notice U/s.12(5) of the OST Act, 1947 which is illegal and without jurisdiction, in as much as, the appellant was the official receiver of M/s. Maitri Shukla of Barbil, duly registered under the OST Act, 1947 bearing certificate of Regn.No.KJ-682 and as per provisions of Sec.19-C of the OST Act, 1947, should have been noticed and assessed as a Regd. dealer U/s. 12(4) of the OST Act, as the appellant had no personal liability to get registered under the OST Act, 1947. Moreover, no notice to appear on 03.04.2002 was issued on the appellant and without giving opportunity to produce the books of account, the learned assessing officer passed the order of assessment behind the back of the appellant on 02.05.2002 which is illegal and not legally sustainable. The appellant is seriously prejudiced by the illegal and invalid notice U/s.12(5) of the OST Act, & consequent order of assessment as well as appellate order passed by the learned ACST. The appellant having challenged this aspect before the learned ACST, there is no justification to ignore the same and passed order ignoring this vital issue.

- b. For that the learned assessing officer was not legally justified to levy tax @16% on sale of iron ore against Form IV which is illegal and unwarranted. The appellant Sri Ved Prakash Agarwal was the official receiver of M/s. Maitri Shukla appointed by the Hon'ble Orissa High Court as per provisions of Sec.19-C of the OST Act, 1947 had liability to pay the tax due on behalf of M/s. Maitri Shukla and accordingly Sri Ved Prakash Agarwal has deposited the admitted tax @4% sale against form IV amounting to Rs.11,90,348.00. The declarations in Form IV in support of the sale having being submitted (under protest) in course of hearing of appeal of M/s. Maitri Shukla and filed a petition on 08.04.2003 in course of hearing of the appeal (Annexure-I) and filed the copies of invoices issued by the appellant on behalf of M/s. Maitri Shukla along with 5 declarations in form IV the learned ACST has committed gross error of law & record to ignore the same and sustained levy of tax @16% instead of 4% permissible under the law.
- c. For that the levy of arbitrary penalty U/s.12(5) of the OST Act, 1947 amounting to Rs.45,27,752.16 as unregistered dealer is illegal and without jurisdiction. The appellant is seriously prejudiced by the same.”

However, when the matter was called on for hearing, none appeared on behalf of the dealer-appellant in spite of valid service of notice. Moreover, since, the instant appeal relates to the period 97-98, which is

more than 23 years, it was taken up for ex-parte hearing in the presence of Learned Standing Counsel (C.T.) representing the State.

4. During the course of hearing, the ld. SC (C.T.) vehemently argued in favour of the appeal order passed by the ld. FAA claiming it as just, proper and in accordance with the provision of the Statute and as such, doesn't attract any further interference by the Tribunal.

5. We, now, felt necessitated to address the main grounds taken by the dealer-assessee as appended in the appeal memorandum while filing before the Tribunal taking into consideration the materials available in this record including records of lower forums.

It is observed from the orders of the lower forum that proceeding u/s. 12(5) of the OST Act for the impugned period was initiated against the assessee soon after he was appointed as the official receiver of M/s. Maitri Shukla, Barbil, RC No.KJ-682 as per the order of Hon'ble Orissa High Court in Civil Revision No.212 of 1997 decided on 07.10.1997. In this connection, the relevant entries of section 19-C of the OST Act is quoted below for better appreciation of facts:

**“19-C. Liability of Court of Wards, etc.-**

Where the estate or any portion thereof of a dealer owning a business in respect of which tax is payable under this Act is under the control of the Court of Wards, the Administrator General, the Official Trustee or any Receiver of Manager (including any person, whatever be his designation, who in fact manages the business appointed by, or under

any order of a Court), the tax shall be assessed upon and recoverable from such Court of Wards, Administrator General, Official Trustee, Receiver or Manager in like manner and to the same extent as it would be assessable upon and recoverable from the dealer, if he were conducting the business himself, and all the provisions of this Act, shall apply accordingly.”

On a bare reading of the above provision, it is crystal clear that M/s. Ved Praksh Agarwala, the official receiver is to be assessed to tax in the like manner and to the same extent as it would be assessable upon and recoverable from the dealer i.e. M/s. Maitri Shukla, KJ-682 if he were conducting the business himself, and all the provisions of this Act, shall apply accordingly. The LAO had not committed any error in assessing the dealer-appellant U/s.12(5) of the OST Act as the official receiver is an unregistered dealer in the instant case.

However, from the assessment record, we observe that the dealer-appellant has sold iron ore to the tune of Rs.2,58,77,177.00 to one M/s. Praksh industries Ltd., Koira, RC No.RL-I-2095 against five numbers of declaration form IV received and the assessee has claimed concessional rate of tax of 4% which has been declined by both the forums below who charged tax @16% as per entry Sl. No.117 of List C of OST Rate Chart without assigning any reason thereto. It would be profitable and reasonable to quote the relevant entry in List-C of OST Rate Chart:

Serial number	Description of goods	Rate of tax
81	<p>Goods of the class or classes other than [Petrol, cement, stationery goods, ginger tincture, cosmetics, perfumes], air conditioner, furniture, carpet, telephones, India Made Foreign Liquor (IMFL) or any liquor specified in the certificate of registration of the registered dealer purchasing the goods as being intended for use by him in the manufacture or processing of goods for sale or in mining or in the generation or distribution of electricity or any other form of power subject to the production of true declaration by the purchasing registered dealer or his authorized agent in Form-IV.</p> <p>Explanation.- This entry is also applicable for purchases through leasing or works contract or hire purchases.</p>	... Four percent

## DECLARATION FORM-IV

I/We \_\_\_\_\_ hereby declare that the goods purchased by me/us in cash memo/bill No.- dated the \_\_\_\_\_ from \_\_\_\_\_ shall be used in the manufacturer/processing of goods for sale/in mining/generation or distribution of electricity or any form of power.

In the instant case, it is ascertained from the orders of forums below that M/s. Ved Prakash Agarwala, the official receiver has sold iron ore to the tune of Rs.2,58,77,117.00 to one M/s.Praksh Industries Ltd., Koira RC No. RL-I-2095 against five numbers of valid declaration form IV received which were not challenged before the forums below. Accordingly, in our considered view, the dealer-assessee is entitled to

rate of tax of four per cent against such sale as per above entry in the OST Rate Chart. We further observe from the assessment record that when a demand of Rs.86,68,091.00 was raised by the LAO and confirmed by the Id. FAA for the impugned period, the assessee moved for stay before the Id. Commissioner of ST who vide his order dtd.17.01.2004 directed the petitioner to pay Rs.20 lakhs including the amount already deposited subject to which the balance demand was to remain stayed. Against such stay order, the assessee filed a writ application before the Hon'ble Orissa High Court in W.P.(C) No.1381 of 2004 which was disposed of on 23.03.2004 with the following order:

“But we are of the view that this is a fit case in which full stay should have been granted by the Commissioner of Sales Tax, Orissa. We, accordingly, direct that the entire demand in question shall remain stayed during pendency of the 2<sup>nd</sup> appeal and the impugned order passed by the Commissioner of Sales Tax, Orissa, Cuttack is modified accordingly. It is made clear that the petitioner will pay the admitted tax, if such admitted tax or any part thereof has not been paid. The writ application is disposed of.”

From the above order, it transpires the fact to us that the assessee has wrongly been demanded tax @16% against its legitimate claim of tax @4% towards sale of iron ore against declaration form IV received.

Now, on imposition of penalty, the relevant provision of the Act is quoted below for better appreciation of the case:

**“Section 12(5)**

If upon information which has come to his possession, the Commissioner is satisfied that any dealer has been liable to pay tax under this Act in respect of any period and has nevertheless, without sufficient cause, failed to get himself registered, the Commissioner may, at any time within [five years] from the expiry of the year to which that period relates, call for return under sub-section (1) of section 11, and after giving the dealer a reasonable opportunity of being heard, assess, to the best of his judgment, the amount of tax, if any, due from the dealer in respect of such period and all subsequent periods and **may also direct that the dealer shall pay, by way of penalty, in addition to the amount so assessed, a sum not exceeding one and half times that amount:**

Provided that no penalty shall be levied for the quarter during which the dealer first or again becomes liable to pay tax under this Act and for the period between the date of application for registration and the date of registration.”

In this connection, a case law reported in (1970) 25 STC 211 (SC) is referred to. In the aforesaid case law, in case of M/s. Hindustan Steel Limited Vrs. State of Orissa, the Hon’ble Apex Court held that penalty must be exercised judiciously. Penalty will ordinarily be

imposed in case where the party acts deliberately in defiance of law but not in cases where there is a technical or venial breach of the provision of the Act or where the breach follows from a bona-fide belief that the offender is not liable under the Act. .... Penalty will not be ordinarily imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligations.

In the instant case, we observe that the assessee has been appointed as an official receiver of M/s. Maitri Shukla, Barbil, KJ-682 as per order dtd.07.10.1997 of Hon'ble Orissa High Court in Civil Revision No. KJ-682. Accordingly, he is liable to pay tax U/s.19-C of OST Act and was accordingly assessed U/s. 12(5) of the OST Act for the impugned period on due production of books of account with other relevant document before the LAO. It further transpires the fact that the assessee has disclosed all his transactions relating to sales before the LAO for the relevant period, who assessed him accordingly without finding any defects or omissions in the books of accounts maintained by him. Since, no defects or suppressions in the accounts of the assessee have been detected by the LAO, penalty should not have been imposed on the tax calculated as the provision of the Statute speaks that the LAO **may** direct the dealer to pay **a sum not exceeding one and half times of the tax assessed**. Hence, discretion has been conferred upon the LAO to or not to levy penalty taking into consideration the facts and

circumstances of the case. As such, we are of the considered view that penalty should not have been imposed on the dealer-assessee. However, the assessee is liable to pay surcharge on tax admitted as per provisions of the Act.

6. Accordingly, it is ordered.

The appeal filed by the dealer-assessee is allowed in part and the case is remanded to the LAO for re-computation of tax in the light of above observation of the Tribunal preferably within three months from the date of receipt of this order, after giving the dealer-assessee a reasonable opportunity of being heard.

Dictated & corrected by me,

Sd/-  
**(Srichandan Mishra)**  
Accounts Member-II

Sd/-  
**(Srichandan Mishra)**  
Accounts Member-II

I agree,

Sd/-  
**(A.K. Das)**  
Chairman

I agree,

Sd/-  
**(S. K. Rout)**  
2<sup>nd</sup> Judicial Member