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

S.A. No. 191(V) of 2018
(Arising out of the order of the learned JCST, Ganjam Range, Berhampur, in First Appeal Case No. AAV 03/15-16, disposed of on dtd.31.08.2017)

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

M/s. Sahu Gunny Merchant,
Main Road, Gosaninuagam,
Berhampur. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. B.B. Panda, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 23.03.2021 *** Date of order: 22.04.2021

O R D E R

This appeal is directed against the order dtd.31.08.2017 passed by the learned Joint Commissioner of Sales Tax, Ganjam Range, Berhampur (hereinafter referred to as, the learned JCST) in First Appeal Case No. AAV 03/15-16, wherein he confirmed the order of assessment but reduced the demand to Rs.17,50,712.00 from Rs.17,56,436.00 raised by the learned Sales Tax Officer, Ganjam I Circle, Berhampur (hereinafter referred to as, the learned STO) for the

assessment period 01.04.2012 to 31.03.2014 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 deals in trading of P.P bags, plastic containers, gunny bags, plastic barrels, empty drums, etc. on wholesale-cum-retail basis and effects purchases both from inside and outside the State of Odisha. During the assessment period the appellant-dealer had disclosed sales in course of intrastate and interstate trade and commerce. As per the returns filed, the appellant-dealer had disclosed gross sale turnover of Rs.1,08,01,818.00 against total purchase turnover of Rs.1,56,66,101.00 during the impugned period which included interstate purchase of Rs.1,30,08,000.00. On the basis of the Audit Visit Report (in short, the AVR), the learned STO initiated proceeding u/s.42 of the OVAT Act by issuing notice in form VAT-306. After issue of subsequent intimations, the appellant-dealer appeared and produced the books of account. The contents of AVR were duly confronted to the appellant-dealer, but the learned STO rejected most of his explanations. The learned STO completed the assessment determining the gross turnover at Rs.1,08,01,818.00 raising a demand of rs.17,56,436.00.

3. Being aggrieved by the order of the learned STO, the appellant-dealer preferred an appeal before the learned JCST who reduced the demand to Rs.17,50,712.00. Being further aggrieved by the order of the learned JCST, the appellant-dealer has preferred the second appeal.

4. The appellant-dealer has come up with this second appeal on the grounds that the learned JCST had acted illegally and justification by upholding the reassessment u/s.43 of the OVAT Act without giving sufficient opportunity to explain correct position of the case; that the learned JCST has unstatutorily and arbitrarily applied higher rate of tax i.e. @ 13.5% on the sale of plastic jars, barrels and drums by treating the items as unspecified goods covered under Part-III of Schedule B of the OVAT Act instead of appropriate rate of tax @ 5% as per OVAT rate schedule; that the appellant-dealer strongly challenged the illegality of treating the said items as unspecified goods on the face of the fact that these items are clearly covered under the entry in Sl. No.83 of Part-II of Schedule-B of OVAT Act i.e. "packing materials of all kinds"; that the appellant-dealer is a regular purchaser of old/used empty PVC/plastic drums, jars, barrels from the registered dealers of Odisha on payment of VAT @ 5% and selling the same as packing materials charging tax @ 5% in accordance with Sl. No.83 of the aforesaid schedule; that the plastic drums, barrels and jars are nothing but clear cut packing materials coming under the entry of the said schedule. The incorporate meaning of packing materials as per the Chambers dictionary is "packing is the wrappers or containers in which goods are packed and presented for sell"; that the appellant-dealer did not purchase and sell of "storage tank" during the period of under assessment; that the learned JCST seems to have failed to apply his mind properly and therefore in the routine manner simply accepted the contention of the learned STO arbitrarily and that the levy of penalty u/s.42(5)

of the OVAT Act is unwarranted to law without any evidence relating to malaise intention of the appellant-dealer.

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. In view of the grounds taken in the appeal and in the light of the submissions of the learned Counsels of both the sides it is necessary to decide the following two issues:-

(i) Whether the fora below are justified by treating the plastic barrels, drums and jars as not covered under "all kinds of packing materials" but covered under unspecified goods in the entry schedule under the OVAT Act?

(ii) Whether under the facts and circumstances of the case, penalty is justified?

6. It was submitted by the learned Counsel for the appellant-dealer that the user test of different kinds of packing materials is available in packing materials industrial publication classifying the kinds of packing materials from "Dotugo Blog website" where the drums, jars and barrels are defined under the kinds of packing materials and nowhere the word storage tank are used. To that effect the relevant extract from the said website was produced by the learned Counsel for the appellant-dealer for consideration of this Tribunal. On

perusal of the said extract it is evident that different types of packages can be classified into two groups:

(a) Retail containers: These containers protect food or the content from different damages and at the same time they advertise the product for retail sale e.g. glass bottles, sachets, over wraps, plastic bottles, metal cans etc.

(b) Shipping containers: These containers contain and protect food and other items during distribution and transport or any other marketing function e.g. sacks, stretch, or shrink wrapped containers, corrugated fire board cartons, drums, barrels, crates and foil bags.

7. It was submitted by the learned Counsel for the appellant-dealer that without taking pain to find out the meaning of packing materials and without applying the user test of such products the storage tank to store any liquid item of 500 to 2000 litres like water tanks and safety tanks and petroleum/gas tanks made up to carry out one lakh litre of petrol or diesel cannot be compared with the jar and barrel of 100 or 200 litres which is mainly used to carry out milk and other food items packed in small containers and pouch.

8. The word pack has not been defined under the OVAT Act. In order to know the definition of pack and continuation of such verb form that is packing the learned Counsel for the appellant-dealer relied upon the judgment of the Hon'ble High Court of Gujarat High Court in the case of State of State of Gujarat vrs. Kishor Timber as reported in (1991) 83 STC 370 in which their Lordships held as follows:-

> ""Pack" means to put together compactly in a box, trunk, etc. for carrying or storing or to fill for carrying or storing. Thus, when things are put together in a compact manner so as to facilitate their transport or sale, then it can be said that they have been packed. Therefore, material which can be used for this purpose will have to be regarded as packing material. It need not be something in which the articles or goods can be placed."

I have respectfully gone through the said decision. But the said decision is in no way useful to the appellant-dealer as the Hon'ble High Court of Gujarat in the said case concluded as follows:-

> "Admittedly, the wooden pallets manufactured and sold by the assessee are used for the purpose of packing cement bags so as to prepare a bundle of certain number of cement bags which can be lifted as a bundle and put in a ship for transhipment for the purpose of their transport and sale. We are, therefore, of the view that the Tribunal was right in considering the wooden pallets as wooden frames falling within entry 12 of Schedule II, Part A to the Act."

9. I have thoroughly gone through the impugned order and found that the learned JCST has meticulously analysed the above ground agitated by the appellant-dealer. On perusal of the entire materials available on record it is seen that the appellant-dealer has challenged the applicability of higher rate of tax i.e. @ 13.5% on the sale of plastic containers, barrels and empty drums which is not acceptable. The argument of the appellant-dealer that plastic containers, barrels and empty drums are covered under the entry at Sl. No.83 of Part-II of Schedule-B of the OVAT Act i.e. "packing materials of all kinds" is not correct at all. The Sl. No.83 of

Part-II of Schedule-B of the OVAT Act actually reads "packing materials of all kinds including gunny bags, hessian cloth, jute twins, but excluding storage tanks made up of any materials" which means that except the storage tanks of all kinds all other packing materials are taxable @ 5%. Thus, storage tanks made up of any materials being not incorporated anywhere under the Schedule-A or B of the OVAT Act indicates that "storage tanks of all kinds" are unspecified items and taxable @ 13.5% under Part-III of Schedule-B of the OVAT Act. The purchase sale invoices further reveal that the appellant-dealer had neither purchased nor sold the plastic containers, barrels and empty drums as packing materials. Hence, the adjudication by the learned JCST by confirming the findings of the learned STO is proper. The imposition of double penalty by the learned JCST is justified as penalty u/s.42(5) is automatic and mandatory and there is no need to establish any mens rea. As regards imposition of penalty it is necessary to have some discussion with reference to the settled position of law as decided by the Hon'ble Orissa High Court and the Hon'ble Apex Court.

10. The audit team undertakes tax audit as per Sec.41 of the OVAT Act read with Rule 41 of the OVAT Rules. The assessing authority is competent to take up assessment in the event AVR submitted u/s.41 of the OVAT Act contains the following:-

i. detection of suppression of purchases or sales, or both;

ii. erroneous claims of deductions;

iii. evasion of tax; or

iv. contravention of any provision of the Act.

In instant case the authorities found that there was suppression of transaction which could be detected during the course of tax audit conducted by the department. The assessing authority therefore imposed penalty u/s.42(5) of the Act consequent upon determination of tax liability based on material evidence produced by the dealer during the course of assessment. Since in the determination of tax liability the assessing authority arrived at the figures as "tax assessed", the penalty being concomitant factor, imposed the same. Interpreting the mandate of imposition of penalty in case of tax delinquency leading to civil consequence, the Hon'ble Apex Court in the case of Union of India v. Dharmendra Textile Processors, (2008) 18 VST 180 (SC) laid down as follows:

> "27. …The object behind the enactment of Section 271(1)(c) read with the explanations indicates that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276C of the Income-tax Act."

11. The Hon'ble High Court of Orissa in Jai Jaganath Marble v. Commissioner of Commercial Taxes (2011) 39 VST 312 (Ori.) = 2010 (II) ILR CUT 226 have held as follows:-

> "11. In this respect, reliance was placed by the Revenue on the decision of the Hon'ble Supreme Court in the case of Union of India Vrs. Dharamendra Textile Processors, (2008) 18 VST 180 (SC) wherein the Hon'ble Supreme Court while considering Section 11AC of the Central Excise Act, 1944 (levy of penalty) determined that the application of

> the aforesaid Section would depend upon the existence or otherwise of all the conditions stated in the Section. Once the Section is found to be applicable in a case, the concerned authority would have, no discretion in quantifying the amount and penalty must be imposed as stipulated under sub-section(2) of Section 11A of the Central Excise Act. This view has been re-affirmed by the Hon'ble Supreme Court in the case of Union of India Vrs. Rajasthan Spinning & Weaving Mills, (2010) 1 GSTR 66."

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."

12. The constitutional validity of Sec.42(5) of the OVAT Act was challenged by M/s. Jindal Stainless Ltd. which was answered by the Hon'ble High Court of Orissa vide W.P.(C) No.15962 of 2010 as quoted below:-

> "The matter may be looked into from different angle. Section 42 of the OVAT Act deals with "Audit Assessment". As stated above, imposition of penalty is dependent upon the quantum of tax assessed in audit assessment under Section 42 of OVAT Act. If such a penal provision is not provided then fraudulent dealers would seriously venture to evade tax and whenever they will be caught hold of they will simply pay the tax and escape. Therefore, the provision for imposing penalty twice the amount of tax assessed, under Section 42 of the OVAT Act has been made so that a dealer-assessee would refrain himself from taking any step to avoid payment of legitimate tax. If, however, any dealer indulges himself in any fraudulent activities to evade tax, then in addition to tax assessed he would pay penalty which is twice the amount of tax assessed and therefore, it cannot be said that the provision in this regard is arbitrary and unreasonable.
>
> Against the assessment of tax and penalty there is a provision for appeal. In appeal, if the amount of tax assessed under Section 42 of the OVAT Act is reduced, the quantum of penalty will also be reduced automatically.
>
> In view of the above, we are of the considered view that Section 42(5) of the OVAT Act authorizing imposition of penalty equal to twice the amount of tax assessed under Section 42(3) or (4) of the OVAT Act is constitutionally valid. It is not arbitrary, unreasonable, oppressive, or hit by Article 14 or in any way ultra vires the Constitution of India."

13. 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. Once a quantum of tax is assessed against an assessee under sub-section (3) or (4), penalty equal to twice the amount of tax assessed has to be imposed automatically. There is no requirement to examine the existence of mens rea or malafide intention. Hence, the stand taken by the appellant-dealer is baseless. 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 appellant-dealer had deliberately suppressed the tax and the same came to light only after conducting tax audit. Had the audit not been undertaken, the appellant-dealer would have evaded tax. As the appellant-dealer had suppressed the tax, penalty twice the amount of tax has been rightly imposed upon the appellant-dealer. Hence, the order of assessment is reasonable and the order of the learned JCST needs no interference. The learned STO had assessed the appellant-dealer basing on the findings of the AVR where the irregularities were established. The learned JCST rightly recalculated the tax and imposed penalty on the appellant-dealer. The grounds taken in the present appeal have no merit at all for which I do not find any infirmity in the impugned order.

14. 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 no infirmity in the order of the learned JCST who had confirmed the order of assessment. Needless to mention that had there been no audit and no further enquiry the appellant-dealer would have evaded payment of legitimate tax due to the Government. Similar view has been taken by different Benches of this Tribunal. Hence I am not inclined to interfere with the order of the learned JCST.

15. From the aforesaid discussion it is apt clear that the grounds taken in the appeal are baseless. The appellant-dealer could not establish the grounds taken by it before this forum. The two issues are thus answered in the foregoing paragraphs. The learned JCST has rightly adjudicated the matter by dealing each and every point meticulously and the impugned order covers every aspect raised by the appellant-dealer. In fact, the appellant-dealer has not come up with any solid ground with any cogent evidence in support of its stand. Hence, it is not desirable to interfere with the impugned order. Hence, it is ordered.

16. The appeal is dismissed being devoid of any merit and the impugned order is hereby confirmed. The cross objection is accordingly disposed of.

Dictated & corrected by me,

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

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