BEFORE THE DIVISION BENCH-II: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No.49 (V)/2015

(From the order of the ld. JCST (Appeal), Bhubaneswar Range, Bhubaneswar, in First Appeal Case No. AA-106221622000124, disposed of on 26.12.2017)

P r e s e n t : Shri S. Mohanty, 1st Judicial Member & Shri P.C. Pathy, Accounts Member-I

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

- V e r s u s -

M/s. Geodesic Techniques Pvt. Ltd., At/P.O.- Plot No.2132/4735, Nageswar Tangi, Bhubaneswar. ... Respondent

For the Appellant : Mr. M.L. Agarwal, S.C.
For the Respondent : Mr. B.P. Rout, Advocate

Date of hearing: 17.05.2019 ******** Date of order: 17.05.2019

O R D E R

S. Mohanty,
1st Judicial Member

Revenue is the appellant against the order of Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar, the first appellate authority, herein, in this appeal challenging the mode of calculation of the assessment of tax and deletion of penalty by the first appellate authority in the order impugned as illegal.

2. The dealer M/s. Geodesic Techniques Pvt. Ltd., a registered dealer was assessed u/s.42 of the Orissa Value Added Tax

Act, 2004 (hereinafter referred to as, the OVAT Act) for the tax period 01.01.2013 to 31.03.2014 on the basis of Audit Visit Report (in short, the AVR) from STO, Tax Audit Unit, Bhubaneswar Range, Bhubaneswar with the allegation of incorrect deduction of labour and service charges, non-submission of original TDS and delay payment of admitted tax. The dealer was a works contractor who received net amount of Rs.45,74,12,401.00 after deduction of less service tax of Rs.2,26,14,471.00 against the contract work during the tax period. In absence of the details regarding labour and service charges to his satisfaction, the assessing authority on application of the Appendix to Rule 6(e) of the OVAT Rules determined the labour and service charges calculated at Rs.14,96,33,560.00. Besides, labour and service charges on calculation of output tax adjusted, ITC admissible to the dealer and the payment already made by the dealer along with periodical return and deposits, the balance tax liability was determined at Rs.39,28,269.00. Penalty u/s.42(5) of the OVAT Act was imposed at two times of the tax due above and interest u/s.34(1) of the OVAT Act to the tune of Rs.1,129.00 was also added to it. Thus, the total amount of tax, interest and penalty payable by the dealer was determined at Rs.1,17,88,036.00. The dealer having paid Rs.11,26,077.00 after receipt of audit notice was not adjusted from the tax due, but was deducted from out of total due in the head of tax, penalty and interest. As a result, the demand against the dealer was raised at Rs.1,06,61,959.00.

As against the assessment order, the dealer knocked the door of the first appellate authority who in turn, vide impugned order deleted the penalty and also adjusted the amount of tax deposited after receipt of audit notice in the tax due before imposition of penalty, thereby the total demand against the dealer became reduced to Rs.39,30,098.00.

3. When the demand reduced as above by the order of the first appellate authority, Revenue being aggrieved preferred this appeal with the grounds inter alia, that-

> "Quote:-
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> 2. That, the 1st Appellate Authority has deleted the penalty staying that the dealer has voluntarily paid the said amount before assessment. So it can't be treated as suppression. But it contradicts the proviso to U/s.33(5) read with Rule 34 of OET Act. Further, Hon'ble Apex Court in the case of Narayan Das Suraj Van vrs. CST UP, Lakhnow observed that the voluntary deposit the order of assessment shall not absolve the dealer from burden of penalty.
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> 3. That, the statute mandates penalty which is to be imposed without any discretion as observed by the Hon'ble Apex Court in the case of 18 VST 180 SC Dharmendra Textiles as well as the Hon'ble High Court of Orissa in 54 VST 1 upheld the same in the case of Jindal Steels. As per judgments of the Hon'ble Apex Court and the Hon'ble High Court when the statute is penal in nature/character it must be strictly construed and followed. (Unquote)"

4. The appeal is heard with cross objection. Denying the contention of the Revenue. It is contended by the dealer that, keeping view the ratio laid down by the authorities penalty cannot be imposed in the case in hand and as because there was no tax due in the assessment u/s.42(4), there is no occasion to raise penalty.

5. From the rival pleas above, the questions framed for decision in this appeal are-

(i) whether the mode of calculation of tax due adopted by the authorities below is correct ?

(ii) whether the first appellate authority has committed wrong in deleting the penalty imposed by the assessing authority in the facts and circumstances of the case in hand ?

(iii) what order ?

6. At the outset, it is pertinent to mention here that, the assessee-dealer here in this case is a works contractor who has executed contract job and received payment against the job work. The audit team has reported irregularity in the tax compliance like non-submission of original TDS, delay in payment of admitted tax and wrong calculation of labour and service charges basing which the tax audit u/s.42 of the OVAT Act was conducted. Since the dealer appeared before the assessing authority the assessment proceeding squarely covered u/s.42(1) read with 42(4) of the OVAT Act. For better appreciation of the dispute in hand the provisions are extracted here.

> "(1) Where the tax audit conducted under sub-section (3) of Section 41 results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit, evasion of tax or contravention of any provision of this Act affecting the tax liability of the dealer, the assessing authority may, notwithstanding the fact that the dealer may have been assessed under Section 39 or Section 40, serve on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report, requiring him to appear in person or through his authorized representative on a date and place specified therein and produced or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.
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> (4) Where the dealer to whom a notice is issued under sub-section (1), produces the books of account and other documents, the assessing authority may, after examining all the materials as available with him in the record and those produced by the dealer and after causing such

> other enquiry as he deems necessary, assess the tax due from that dealer accordingly."

Keeping in mind the mandate of the provisions above, adverting to the case in hand. It is found that, there is no allegation of any suppression of purchase or sale, or erroneous claim of deduction including ITC, evasion of tax. The dealer had attended and participated in the assessment. The assessing authority found the documents are not sufficient to determine the labour and service charges. In consequence thereof, the assessing authority has applied the Appendix to Rule 6(e) of the OVAT Rules for determination of labour and service charges.

7. Gone through the impugned order. The first appellate authority has analyzed the provision u/s.42(4) of the OVAT Act mentioned above and held that, it is only on the amount of tax due as calculated u/s.42(3) or (4) of the OVAT Act, penalty u/s.42(5) of the OVAT Act can be attracted. The term tax due is interpreted as the amount payable by the dealer on assessment.

It is settled that, assessment and calculation is to be done in accordance with Form VAT-312 prescbed under Rule 53 of the OVAT Rules. The mode of assessment/calculation as per Form VAT-312 speaks of tax paid in Col. No.7 and tax assessed in Col. No.8. It indicates, the tax paid by the dealer is to be adjusted first then, the tax due is to be determined.

8. Learned Standing Counsel for the Revenue argued that, there is a violation u/s.33(5) of the OVAT Act by the dealer and the first appellate authority. The provision u/s.33(5) reads as follows:-

> "If any dealer, after furnishing a return under sub-section (1) or sub-section (2), discovers that a higher amount of tax was due than the amount of tax admitted by him in the original return for any reason, he may voluntarily disclose the same by filing a revised return for the purpose and pay the higher amount of tax as due at any time, in the manner provided under Section 50.

> ***Provided that*** no such voluntary disclosure shall be accepted where the disclosure is made or intended to be made after receipt of the notice for tax audit under this Act."

9. Learned Counsel for the dealer argued that, the payment if any made by the dealer after receipt of the notice of tax audit cannot be accepted and it is of no help to the dealer while calculating the tax due. The proviso appended to the section above speaks, voluntary disclosure by filing revised return u/s.33(5) of the OVAT Act shall not be accepted after receipt of notice of the tax audit. The first part of the provision denotes higher amount of tax due then the amount of tax admitted in the original return may be disclosed by filing a revised return. In the case in hand, there is no question of voluntary disclosure, it is simply payment of tax prior to the assessment by the assessing authority. It was deposited at a time when the dealer was not knowing about the exact amount of tax due more particularly when the dealer had an arguable case in hand like, if Appendix to Rule 6(e) is applicable to the case or not. The dealer is not guilty of any suppression or erroneous claim of deductions. His books of account was not accepted and consequently, the provision under the Rule was applied for determination of labour and service charges by the authority, resulting thereby a higher amount of tax payable by the dealer.

10. It is not disputed that in **Jindal Steel Ltd. v. State (2012) 54 VST 1 (Ori.)** constitutional validity of the provision u/s.42(5) of the Odisha Value Added Tax Act, 2004 has been upheld by the Hon'ble Court. Penalty u/s.42(5) originates from an assessment u/s.42(3) or (4) of the OVAT Act, whereas, assessment u/s.42(3) or (4) always an outcome of defects reported in audit visit report (AVR) as per provision u/s.42(1) of the OVAT Act. Thus, harmonious reading of all three provisions, it can be construed that, if a case covers under any of the contingencies contemplated u/s.42(1) and thereafter, an assessment is done and the assessment is ended

with tax due/payable by the dealer, then penalty is consequential as per Sec.42(5) of the OVAT Act. It is unsafe to accept the view mechanically that, whenever there is an assessment u/s.42(3) or (4) resulting in tax due, penalty u/s.42(5) is automatic. The penalty as per Sec.42(5) of the OVAT Act necessarily has to stand on the assessment and tax due directly related to the factor like, suppression, erroneous claim of deductions including ITC, tax evasion or contravention of any of the provision. Needless to say that, even though a tax is fallen due, penalty is attracted. In **Reckitt Binckiser (India) Ltd. v. Asst. Commercial Taxes Officer, Anti Evasion, Ward III, Jajpur and Another (2019) 60 GSTR 181 (Raj)**, the Hon'ble Court has held that, whenever there is question of interpretation of the Entry Sl. in an assessment, in that case penalty cannot be attracted. It is an example of audit assessment, even though tax is fallen due but penalty is not attracted as per the ratio laid down by the authority.

11. In **Guljag Industries v/s Commercial tax officer 2007(9)VST-1 SC** it is held that "the penalty in default of statutory civil obligation and proceeding are neither criminal not quasi-criminal in nature. Therefore, there is no question of proving of intention or mens rea the same is excluded from the category of essential element of imposing penalty.

Conversely the authorities are there have laid down the principle that, "penalty does not arise merely upon the proof of default and penalty will not be imposed unless the party either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct or acted in conscious disregarded of its obligation." **Hindustan steel Ltd. v. STATE OF ORISSA [AIR 1970 SC 253]** is relied.

Further, it is well settled that the term 'willful' and 'suppression', signify conscious, deliberate and intentional

withholding of information with mala fide, and not an unintentional failure or a failure due to inadvertence. In support of the said contention, reliance is placed in the cases of **Tamil Nadu Housing Board V. Collector of Central Excise [Madras 1994 (74) ELT 9 (SC)**; **Collector of Central Excise V. Chemphar Drugs and Liniments [1989 (40) E.L.T. 276(SC)**; **Padmini Products V. Collector of Excise 1989 (43) E.L.T. 195 (SC)**; **Pushpam Pharmaceuticals V. Collector of C.Ex., Bombay 1995 (78) E.L.T. 401 (SC)**; **Anand Nishikawa V. Commissioner of Central Excise Meerut 2005 (188) E.L.T. 149 (SC)**; **Pahwa Chemicals Pvt. Ltd., V. Commissioner of Central Excise, Delhi 2005 (189) E.L.T. 257(SC)**; **Commissioner of Central Excise Belgium V. Mysore Kirloskar Ltd. [2008 (226) E.L.T. 161(SC)**; **Continental foundation V. Commr. Of C.Ex., Chandigarh 2007 (216) ELT 177 (SC)**; **Uniworth Textiles Ltd., V. CCE Raipur 2013 (288) ELT 161 (SC)** and **Cosmic Dye Chemical V. Collector of Central Excise, Bombay (1995) 6 SCC 117**.

The term "shall" under section 42(5) of the OVAT act indicates what? Whether it relates to levy of penalty or to quantum of penalty or to both? Certainly, it never can be construed for both. So the term 'shall' in the section implies, in case of levy of penalty it must be two times of tax due. Here the term 'shall' relates to quantum of penalty only.

In Raza Buland Sugar Co. Ltd vs Municlpal Board, Rampur AIR 1965 SC 895 = 1965 SCR (I) 970, it is held as follows:-

> "The question whether a particular provision of a statute which on the face of it appears mandatory, inasmuch as it uses the word "shall" as in the present case-is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision

> is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the; provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory."

Keeping the ratios laid down by the authorities and the legislative intent behind the provisions above, reverting to the case in hand, it is found that, the authority has applied Appendix to Rule 6(e) of OVAT Rules for determination of labour and service charges to the case in hand. Application of Rule 6(e) of the OVAT Rules is not a straight jacket formula in every case of works contract. It is only when the documents produced by the dealer are not sufficient or in the eye of assessing authority, the documents are not acceptable, in that case, the taxing authority can apply the provision u/r.6(e) to determine the labour and service charges in a works contract. So, it is always a question of fact on which the application of Rule 6(e) depends and it varies from case to case. It is a subjective satisfaction of the assessing authority, whether Rule 6(e) will be applied to a given case or not. If that be, it is unsafe to hold that, because of the fact that, the documents of the dealer is not explicit regarding labour and service charges, it amounts to violation of any provision under the OVAT Act as contemplated u/s. 42(1) of the OVAT Act. Liability for non-maintenance of documents or registers are covered under specific provisions like Sec.61(5) and 73(13) of the OVAT Act. But violation of provision as per Sec.42(1) is different from these.

12. Looking at the issue from another angle, the provisions relevant are extracted below:-

Section 38 of the OVAT Act-

> "***Scrutiny of return.***-
> (1) Each and every return in relation to any tax period furnished by a registered dealer under Section 33, shall be subject to scrutiny by the assessing authority to verify the correctness of calculation, application of correct rate of tax and interest, claim of input tax credit made therein and full payment of tax and interest, payable by the dealer for such period.
> (2) If any mistake is detected as a result of scrutiny made under sub-section (1), the assessing authority shall serve a notice in the prescribed form on the dealer to make payment of the extra amount of tax along with the interest as per the provisions of this Act, by the date specified in the said notice."

Rule 46 of the OVAT Rules-

> "***Audit to facilitate voluntary tax compliance.***-
> The audit team, during any audit visit, shall explain the provisions of the Act and these rules so that the dealer does not face any difficulty in maintenance of books of account and due discharge of tax liability."

A careful and thoughtful reading of both the provisions above as it mandates, it is always incumbent upon the taxing authority to verify the correctness of the calculation and determination of the tax liability and the audit team is obliged under law to assist the dealer in understanding the provisions of law and how to maintain the books of account and due discharge of liability. In the case in hand, when the audit team found the dealer has not maintained the labour account properly, there, the audit team came under the obligation under Rule 46. Here, they failed to act in accordance to the statutory obligations, pertinently, when the dealer's maintenance of register is questioned and the dealer has acted bona fide with no intention to evade tax by disclosing his whole GTO and

TTO, he has claimed deduction. If that be, penalty is certainly not warranted. Needless to mention here that, this Tribunal has decided the question of penalty in favour of dealer on application of Sec.38 of the OVAT Act and Rule 46 of the OVAT Rules with the above view on earlier occasions.

Thus, from the discussion hereinabove, it is held that, the mode of calculation of the tax due is to be made in strict adherence to Form VAT-312 prescribed under Rule 53 of the OVAT Rules and in the case in hand, as the dealer is not liable to penalty, the impugned order calls for no interference, hence confirmed. The appeal be dismissed on contest as of no merit.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

Sd/-
(S. Mohanty)
1st Judicial Member

P.C. Pathy,
Accounts Member-I

13. The dealer-respondent is engaged in execution of works contract. The ld. STO completed the audit assessment u/s. 42 of the OVAT Act vide order dtd.16.11.2015 raising balance tax of Rs.39,28,969.00 and imposing penalty of Rs.78,57,938.00 u/s.42(5) of the OVAT Act and taking into consideration interest liability of the dealer to the tune of Rs.11,029.00 u/s. 34(1) of the OVAT Act calculated the total amount of tax, interest and penalty at Rs.1,17,88,036.00. As the dealer has paid Rs.11,26,077.00 on 29.12.2014 after receipt of audit notice on 27.05.2014 but before assessment the same was not acceptable by the ld. STO as per the provision to proviso u/s.33(5) of the OVAT Act for non-levy of penalty.

The ld. STO has given credit of the amount paid after receipt of audit notice after calculation of balance tax, interest and penalty amounting to Rs.1,17,88,036.00 by deducting the amount Rs.11,26,077.00. Accordingly, the ld. STO held the dealer liable to pay tax, interest and penalty due from the dealer to the tune of Rs.1,06,61,959.00. Thus the ld. STO has deducted the amount paid after receipt of audit notice but calculated penalty taking into consideration the proviso u/s. 33(5) of the OVAT Act, 2004.

14. On perusal of the appeal record of the ld. first appellate authority it is noticed that he has granted stay vide order 11.08.2016 before disposal of appeal on 26.12.2017 on the ground that the dealer-appellant has deposited Rs.15,00,000 i.e. 38.10% of the total tax demand at the time of filing of appeal on 09.05.2016. On perusal of the very record it is found that one e-Challan is available showing payment of Rs.15,00,000.00 by the dealer-assessee vide Challan no. and date 0040/220-01/03/2016 towards payment of admitted VAT for 2013-14.

15. When the dealer has deposited Rs.15,00,000.00 which is 38.10% of the total tax demand as stated by the ld. DCST and the dealer had deposited Rs.15,00,000.00 after the audit assessment order was passed by the ld. STO and treated the amount as payment of admitted tax for 2013-14, it is not proper on the part of the ld. first appellate authority to delete the penalty on balance tax due.

16. It is pertinent to reproduce the provision contained u/s.42(5) of the OVAT Act as relevant for the period in question:-

"(5) Without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under sub-section (3) or sub-section (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-sections."

17. The ld. first appellate authority has disposed of the appeal allowing in part and reducing the assessment to the extent of Rs.39,30,098.00. As the ld. first appellate authority has concluded that the order of assessment is reduced to the tune of Rs.39,30,098.00, he should not have dropped the imposition of penalty in the face of relevant provision under the Act. The ld. first appellate authority has concluded that all observation made by the ld. AO at the time of assessment stands established excepting imposition of penalty considering the contentions taken by the ld. Counsel on behalf of the dealer-appellant before him without discussing the relevant provision for imposition of penalty u/s.42(5) of the OVAT Act so far audit assessment is concerned.

18. It will not be out of place to reproduce the relevant portion of the judgment passed dtd. 07.08.2012 by our Hon'ble High court in the case of M/s. Jindal Stainless Ltd. (Now JSL Ltd.) vs. State of Orissa and Others reported in (2012) 54 VST 1 (Ori.)

"28. Question No. (ii) is with regard to imposition of penalty under section 42(5) which is equal to twice the amount of tax assessed under sub-section (3) or sub-section (4) of section 42 of the OVAT Act which according to the petitioner is arbitrary, unreasonable, oppressive and ultra vires the provisions of articles 14, 19(1)(g), 21 and 265 of the Constitution of India.

29. Section 42 of the OVAT Act deals with "audit assessment".

30. Section 42(5) provides that without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under sub-section (3) or sub-section (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-sections."

The Hon'ble Court has further observed as follows:-

"32' VAT is indirect tax on consumption of goods. It is the form of collecting sales tax under which tax is collected in each stage on the

value added to the goods. The basic object of VAT Scheme is to provide voluntary and self compliance. It goes without saying that to plug the leakage of revenue, the Legislature enacted law authorizing imposition of penalty for infraction of any statutory provision. We are conscious that generally penalty proceedings are quasi-judicial in nature. Therefore, before imposing penalty, opportunity of hearing should be provided to the affected assessee-dealer. In the OVAT Act, various sections provide for imposition of penalty for infraction of statutory provisions. In most of those sections opportunity of being heard is provided to a dealer before imposition of penalty. Those sections are section 28(1), section 31(9), section 34(3), section 54(6), section 61(5), section62(6), section 65(2), section 73(10), section 73(12(e), section 73(13), section 76(3), section 76(8), section 101(4) and section 107(4). The present position is entirely different. Quantification of penalty is dependent on the tax assessed under section 42 of the OVAT Act. For the purpose of assessing tax, opportunity of hearing was afforded to the assessee, the explanation of the assessee and its books of account were examined and considered. Penalty is only quantified on the basis of the tax assessed. No discretion is left with the assessing officer for levying any lesser amount of penalty. Therefore, even if further opportunity will be given to the assessee before imposing penalty that will be a futile exercise. Penalty is not independent of the tax assessed. If the tax is assessed, imposition of penalty under section 42(5) is warranted."

19. In view of the relevant portion of the Judgment of the Hon'ble Court cited above I am of the view that the ld. first appellate authority has deleted/dropped penalty on tax assessed after taking into consideration payments made before passing of the order of the ld. Sales Tax Officer for which he is not competent being a creature of statute. Hence, the impugned order of the first appellate authority

ought to be set aside and the order of the ld. assessing authority ought to be modified accordingly.

Dictated & corrected,

Sd/-
Accounts Member-I,
Odisha Sales Tax Tribunal

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O R D E R

In view of the conflicting views above, the matter need to be placed before the Larger Bench, hence the matter is referred to the Hon'ble Chairman for necessary action.

Sd/-
1st Judicial Member,
Odisha Sales Tax Tribunal

Sd/-
Accounts Member-I,
Odisha Sales Tax Tribunal