BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.
S.A.No. 137(ET)/2017-18

(From the order of the JCST (Appeal), Jajpur Range, Jajpur Road, in Appeal No. AA/J/DCST/696/13-14(ET), dtd.31.07.2017, modifying the assessment order of the Assessing Officer)

Present: Smt. Sweta Mishra
2nd Judicial Member

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

-Versus-

M/s. Nilachala Carbo Metalicks (P) Ltd., Dist. Keonjhar. .... Respondent

For the Appellant : Mr. M.L. Agarwal, Standing Counsel
For the Respondent : Mr. B.B. Panda, Advocate

(Assessment Period : 01.04.2009 to 07.09.2011)

Date of Hearing: 20.07.2019 *** Date of Order: 20.07.2019

ORDER

The present second appeal is directed against the order of the learned First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Jajpur Range, Jajpur Road (in short, FAA/JCST) reducing the tax demand raised on the dealer from Rs.1,82,809/- to Rs.42,338/- in the order of assessment passed by the Assessing Authority/Deputy Commissioner of Sales Tax, Jajpur Circle, Jajpur Road (in short, AA/DCST) for the assessment period 01.04.2009 to 07.09.2011 us/.10 of the Odisha Entry Tax Act, 1999 (in short, OET Act).

2. The fact of the case in a nutshell is that:

The dealer-respondent in the instant case is a private limited company engaged in the business of manufacturing and sales of LAM Coke. Basing upon an adverse report prepared by Sales Tax Officer, Investigation Unit, Jajpur Road, the dealer was issued with statutory notice in Form E-32 u/s.10 of the OET Act to appear before the AA and produce books of account and other related documents for the assessment period under OET Act for necessary verification. After availing several opportunities, finally Sri S.K. Adhikari, Power-of-attorney holder on behalf of the Director of the Company appeared with the books of account along with all requisite documents for perusal of the AA. On scrutiny of the books of account and other relevant documents and on detection of physical stock of 249.33 MT of Lam Coke which calculated @Rs.23,500/- per MT, the dealer is already found guilty of sale suppression worth of Rs.58,59,255/- under the OVAT Act for the self-same assessment period in question for the self-same matter. Hence, the AA levied tax due on the entire sale suppression of Rs.58,59,255/- @4%, which became calculated at Rs.2,34,370.20. Thus, the total sale suppression stood at Rs.60,93,625.20. Thereafter, the AA imposed tax @1% on the above entire sale suppression to the tune of Rs.60,936.25 besides imposing penalty twice on it u/s.10(2) of the OET Act to the tune of Rs.1,21,872.50, which altogether aggregated to Rs.1,82,808.75 or say Rs.1,82,809/-, which the dealer became ultimately liable to pay at the assessment stage for the assessment period in question.

3. Being aggrieved with the assessment order passed by the AA, the dealer preferred first appeal before the FAA as JCST, who in turn, after re-considering the stock discrepancy, purchase and sale suppression by the dealer, reduced the total tax demand to Rs.42,338/-.

4. Feeling dis-satisfied by the order of the FAA reducing the demand to such an extent, the State-appellant knocked the door of this Tribunal by filing grounds of appeal with a prayer to set-aside the first appeal order, thereby restoring it to the original assessment figure with the sole contention that, the FAA has righteously upheld the suppression of physical stock by the dealer, but at the time of detection of stock discrepancy of the raw materials, the FAA has illegally and arbitrarily passed the order being lenient to the dealer and has considered that, no actual weighment was taken by the reporting authority and the stock discrepancies were based merely on eye estimation and without any supporting evidence and hence dropped the allegation.

Contradicting the above mentioned point raised by the State, the dealer-respondent has filed cross objection along with a written note of submission before this Tribunal. In his written submission, the learned Advocate of the dealer vehemently argued that, as per the Finance Department Notification No.III(III)112/2010-18796/CT, dtd.16.11.2010 whereas vide Finance Department Notification No.44229/CTA-45/2009-F, dtd.21.10.2010, the OVAT Rules, 2005 has been undergone amendment changing the tax periodicity of return filing for register dealer assigned with TIN from “monthly” to “quarterly” with objection of extending relief to the small

dealer who have been filing monthly returns until now. Further, he has put emphasis on the Section 43(1) of the OVAT Act, 2004 regarding turnover of escaping assessment, which reads as follows :

"43. Turnover escaping assessment.-

(1) Where, after a dealer is assessed under Section 39, 40 [42 or 44) for any tax period, the assessing authority, on the basis of any information in his possession, is of the opinion that the whole or any part of the turnover of the dealer in respect of such tax period or tax periods has –

(a) escaped assessment, or
(b) been under-assessed, or
(c) been assessed at a rate lower than the rate at which it is assessable ;

or that the dealer has been allowed –

(i) wrongly any deduction from his turnover, or
(ii) input tax credit, to which he is not eligible,

the assessing authority may serve a notice on the dealer in such form and manner as may be prescribed and after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he deems necessary, proceed to assess to the best of his judgment the amount of tax due from the dealer."

While explaining the aforesaid section, learned Counsel for the dealer-company stated that, no where under the said section and prescribe notice in Form VAT-307 has made it clear that, the ld. assessing authority should intimate to the appellant that on which date any kind of assessment under section 39/40/42/44 has been completed putting the date of such

assessment, where he found that there was part or whole of his turnover has been escaped. The AA as well as the learned FAA has received information on part of the tax periods where no return was available to compare with the books of accounts whether the appellant has disclosed its all particulars of purchase and sales and discharged his correct tax liability under the Act for further proceeding in the matter.

The learned Advocate for the dealer further contended that, without having any return from the tax periods from August, 2011 to the date of visit that was on 06.09.2011, no escaped turnover assessment is permissible under the Act in absence of any kind of previous assessment as on the date of visit and discrepancies noticed on account of stock. In this regard, he has submitted a copy of the judgment passed by the Division Bench of this Tribunal in **S.A.No.238(VAT)/2016-17 dtd.18.12.2017**, wherein this Tribunal has firmly relied upon the judgment of the Hon'ble Apex Court in the case of **Larsen and Tourbo Ltd. Vrs. State of Jharkhand & Others** reported in **Vol.103 VST (2017) Page 1 (SC)** which clearly envisaged that, according to Sec.32 of the Odisha Sales Tax Tribunal Regulations, 1992, when a larger Bench has decided same question or questions of law in a particular way until revision of the same, the smaller Bench of this Tribunal will decide the said question accordingly. Apart from that, he has also argued that, at the time of audit visit by the Enforcement Wing, the person identified as Account Clerk was not well conversant with the technical nature and character of manufacturing ratio and consumption of raw materials. Therefore, the AA should have believed the documents and books of accounts produced

by the Authorised Agent of the Company instead of taking into consideration the oral submission presented by the Account Clerk during the spot verification.

Furthermore, in order to fortify his stance on the point of eye estimation of stock by the audit officials during the audit, the learned Counsel for the dealer cited a judgment of the **Hon'ble High Court in STREV No.44/2002 dtd.06.12.2013** in the case of **State of Orissa Vrs. Orissa Food Products Ltd.**, wherein the Hon'ble Court has confirmed the order passed by this Tribunal wherein this Tribunal has deleted the finding of stock discrepancy based on eye estimation of stock. In addition with the above citation, the learned Advocate also placed reliance on another judgment passed by the Hon'ble High Court of Orissa in the case of **Haribhagat Agarwalla Vrs. State of Orissa** reported in **Vol.51 STC Page 355 (Orissa)**, wherein the Hon'ble Court has held that, sampling method of physical verification might be useful for certain purposes, but it cannot be utilised as the basis for imposition of tax.

5. Heard the learned Standing Counsel for the State-appellant, Mr. M.L. Agarwal and learned Advocate Mr. B.B. Panda on behalf of the dealer-respondent during the course of argument. Perused the assessment order as well as first appeal order and the materials available on record besides the grounds of appeal submitted by the State-appellant vis-à-vis cross objection along with written note of submission filed by the dealer-respondent.

6. Consequent upon going through the whole proceedings and arguments as aforementioned, I am of the considered view that, there is enough force behind the

argument advanced by the learned Advocate for the dealer-respondent coinciding with the written submission and different relevant citations, which at no stretch of imagination can be averted in the present case to accept the plea brought by the State-respondent, keeping in mind the Hon'ble Court as well as Apex Court's orders. Accordingly, it is ordered.

7. In the result, the appeal by the State is dismissed on contest and the impugned order passed by the learned FAA hereby stands confirmed. The cross objection is disposed of accordingly.

Dictated and Corrected by me,

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