

**BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL:  
CUTTACK**

**S.A. No. 317 (VAT) of 2015-16**

(Arising out of order of the learned Addl. CST, South Zone,  
Berhampur in Appeal No. AA (VAT)-48/2014-15,  
disposed of on dated 05.10.2015)

Present: **Shri A.K. Das, Chairman**  
**Smt. Sweta Mishra, 2<sup>nd</sup> Judicial Member**  
**&**  
**Shri M. Harichandan, Accounts Member-I**

M/s. Hindustan Sales (P) Ltd.,  
Gandhi Chowk, Jeypore ... Appellant

-Versus-

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

For the Appellant : Sri N. Ananda Rao, A/R  
For the Respondent : Sri D. Behura, S.C. (CT) &  
Sri S.K. Pradhan, Addl.SC (CT)

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Date of hearing: 16.09.2021 \*\*\* Date of order: 11.10.2021  
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**ORDER**

This appeal at the instance of the dealer-appellant is directed against the order dated 05.10.2015 passed by the learned Addl. Commissioner of Sales Tax, South Zone, Berhampur (hereinafter called as 'first appellate authority') in Appeal Case No. AA (VAT)-48/2014-15 thereby partly allowing the appeal and modifying the order of assessment dated 17.06.2014 passed by the Joint Commissioner of Sales Tax,

Koraput Range, Jeypore (in short, 'assessing authority') u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') raising demand of Rs.27,42,080.00 including penalty of Rs.18,28,054.00 for the tax period 01.04.2007 to 31.12.2012.

2. Shorn of unnecessary details, the facts of the case in brief are that M/s. Hindustan Sales (P) Ltd., Jeypore, a registered dealer, deals in purchase and sale of two wheelers (TVS) and three wheelers (Piaggio), batteries (Amron), lubricant, tyres and tubes, SIM cards of BSNL. Besides the purchase and sale of above goods, the dealer also undertakes the servicing of vehicles for which it purchases spare parts and accessories. The audit team visited the business premises of the dealer on 08.11.2012 to examine the books of account in order to find out the accuracy in filing of returns for the tax period from 01.04.2007 to 31.12.2012. One Ashish Kumar Agrawal, Director of the Company, participated in the tax audit. The visiting team selected ten items for cross-verification with the books of account to find out the accuracy of the same. The audit team found discrepancy of stock to the tune of Rs.29,161.00 and reported the same as sales suppression suggesting to assess the dealer-Company u/s. 42 of the OVAT Act.

2(a). The assessing authority on receipt of Audit Visit Report (AVR) initiated proceeding u/s. 42 of the OVAT Act, issued notice to the dealer-appellant and in response to which Sri Agrawal, Director of the Company, appeared and produced relevant books of account (hard copies of electronically maintained accounts). On being confronted with the charges

framed in the AVR, Sri Agrawal refuted the charges and contended that he was not allowed sufficient time to explain the reason for shortage. It was explained by Sri Agrawal that the spare parts section is dealt by persons having lower educational qualification for which they have not mentioned the details of the spare parts sold in the sale invoices. The assessing authority on account of failure of the dealer-appellant to adduce documentary evidence to refute the charges framed in the AVR, accepted the charges of sales suppression of Rs.29,161.00.

2(b). The assessing authority on scrutiny of the books of account found that the dealer purchased goods both from inside and outside the State as well as it brought goods for transit sale (E-1 sales) in course of inter-State trade and commerce for Rs.64,28,472.49. Thus, the dealer-Company effected purchase of goods worth Rs.137,21,27,735.48 for the tax period under assessment against which he (the dealer) claimed ITC of Rs.2,84,09,271.49 which was adjusted against output tax due on sales. The purchase figures reported by the audit team neither tallied with the purchase details disclosed by the dealer nor with P&L account filed by the Company to the Income Tax Department. On analysis, a difference of Rs.71,15,35,901.48 was noticed in the report of the audit team and the books of account. The assessing authority determined the gross purchase at Rs.137,21,27,735.48 excluding E-1 purchase for the tax period under assessment. The assessing authority on scrutiny of the books of account also noticed the said turnover as per the sale register and report of the audit

team. The sale register produced by the dealer-appellant revealed sale of goods worth Rs.139,33,68,760.58 whereas the audit team reported sale of goods at Rs.62,75,42,948.00. The difference was mainly noticed in the sale turnover of tax exempted goods i.e. 12.5% and 13.5% taxable goods. It was contended by Sri Agrawal before the assessing authority that he filed returns to the Department and also filed audit report in compliance to Section 65 of the OVAT Act. The returns filed by the Company are subjected to scrutiny and the P&L account is an instrument in the hands of the Department to cross-verify the difference. Since the department did not notice any discrepancy, did not issue any notice to him in this regard, which means the returns were correct. The assessing authority on verification of hard copies of the sales account determined the sales turnover at Rs.139,33,68,760.58. He negated the dealer's claim of exemption of Rs.73,51,512.00 on account of transit sales in course of inter-State trade and commerce as provided u/s. 6(2) of the CST Act for non-production of 'C' and 'E-1' declaration forms. He did not accept the photo copies of counter foil of 'C' declaration forms which were not accompanied by 'E-1' form. The assessing authority found that the Company sold batteries to M/s. OHPC ltd., UIHEP, Mukhiguda for Rs.68,30,187.00 and the balance goods to M/s. NALCO Ltd., Demanjodi. The dealer-Company filed photo copies of counter foil of 'C' declaration form without 'E-1' form and no details could be submitted in respect of turnover of Rs.5,21,325.00. Accordingly, he disallowed the claim of the dealer-appellant. Thus, the assessing authority determined the

GTO at Rs.146,94,78,508.76 and after allowing deduction of Rs.82,00,50,081.59 and Rs.6,87,29,075.18 towards sales of tax exempted goods and collection of output tax respectively, determined the TTO at Rs.58,06,99,351.99. The net tax payable by the dealer was determined at Rs.4,12,42,679.42.00 against which the dealer had paid Rs.4,03,28,652.00, he was to pay the balance tax of Rs.9,14,027.42 on which penalty of Rs.18,28,054.00 was levied u/s. 42(5) of the OVAT Act. The total tax demand was computed by the assessing authority at Rs.27,42,081.00.

2(c). The dealer-appellant challenging the said demand raised by the assessing authority, preferred appeal before the first appellate authority who vide its order dated 05.10.2015 partly allowed the appeal reducing the assessment to Rs.16,02,916.00. The dealer being further dissatisfied with the impugned order, knocked the doors of this Tribunal by filing the present second appeal.

3. It was urged by the learned Counsel for the dealer that the forums below have illegally discarded the photo copies of counter foil of 'C' and 'E-1' declaration forms without verifying the genuineness of the same. He had filed the original before the assessing authority, who did not take note of the same and illegally raised the demand to the tune of Rs.27,42,081.00, which was, of course, reduced in appeal to the tune of Rs.16,02,916.00. Had the declaration forms taken into consideration by the forums below, no tax would have been due against the dealer-appellant. The assessment made by the assessing authority as well as by the first appellate authority is

illegal, arbitrary and whimsical being biased by the AVR submitted by the audit team. He strenuously urged before this Tribunal that imposition of penalty by the first appellate authority for non-submission of declarations in Form-C and E-1 is also illegal and unsustainable in view of the Circular of the Commissioner of Commercial Taxes, Odisha and various orders of this Tribunal. The appellant does not stand to benefit for non-submission of 'C' and 'E-1' forms and there is no malafide intention on the part of the dealer-appellant suppressing the actual turnover. So, under these circumstances, imposition of penalty for no-submission of declaration forms is illegal, arbitrary and liable to be set aside and on account of which, the impugned orders of both the forums below are liable to be set aside.

4. Per contra, learned Standing Counsel (CT) for the State in terms of cross-objection filed by him argued that the audit team during their visit found suppression of sales of Rs.29,161.00. This conduct of the appellant shows his malafide intention to evade tax due to the State. Therefore, the forums below did not commit any illegality in imposing penalty on the dealer-appellant. Both the forums below have correctly calculated the tax due against the dealer-appellant which does not warrant any interference from this Tribunal. He submitted to dismiss the appeal and confirm the orders of both the forums below.

5. We have heard the learned Counsel for the parties, gone through the grounds of appeal, orders of the forums below vis-a-vis the materials on record. It appears from the record

that the dealer-appellant furnished photo copies of 2 nos. of declaration in Form-C issued by M/s. Orissa Hydro Power Corporation Ltd., Mukhiguda bearing Sl. No. PQ/Y- 0702735 and PQ/Y-0702736 for an amount of Rs.34,15,094.00 and Rs.34,15,093.00 respectively, photo copy of letter No. UIHEP/GM/FW-1086 dated 31.10.2011 issued by Deputy General Manager (F), OHPC Ltd., UIHEP, Mukhiguda and photo copy of Indemnity Bond. The first appellate authority discarded these documents on untenable grounds without examining genuineness of those documents. He observed in the impugned order that the claim of the appellant cannot be considered in the absence of supporting documentary evidence. When the dealer filed relevant documents in support of his claim, the first appellate authority should have examined the genuineness of those documents itself or it should have remitted back the matter to the assessing authority for examining the genuineness of the same. But the first appellate authority without assigning any reason erroneously ignored these documents illegally holding that the appellant did not file any supporting evidence. Had the two documents taken into consideration, the dealer-appellant might not have to pay any tax as assessed by the first appellate authority. In course of hearing, the dealer-appellant also filed the above documents before this forum. Unless the genuineness of the documents is examined, it cannot be said whether the dealer-appellant is entitled to tax exemption on account of sale in course of inter-State trade and commerce and on account of transit sales for which he submitted declarations in Form-C and E-1. Therefore,

it is required to remit the matter back to the assessing authority to examine the genuineness of these declaration forms and recompute the tax liability of the dealer-appellant afresh.

6. It further appears from the order of the first appellate authority that it has held the Company liable to pay penalty of Rs.1,38,204.72 on the tax due of Rs.69,102.36 u/s. 42(5) of the OVAT Act for non-submission of declaration form of Rs.5,21,325.00 and suppression of Rs.29,161.00. It is settled position of law that penalty cannot be imposed for non-submission of declaration form as non-submission of form is not an incentive for the assessee who is to pay higher rate of tax. The Commissioner of Commercial Taxes, Odisha taking note of the orders of this Tribunal on 20.04.2015 issued a Circular to that effect which has not been taken note of by the first appellate authority as well as the assessing authority. This Tribunal also in case of M/s. Bimal Enterprises, Balliguda, Kandhamal Vs. State of Orissa (S.A. No. 106 (C) of 2012-13, decided on 23.08.2018) took the same view that penalty cannot be imposed for non-submission of declaration form. When there is intentional suppression for the purpose of evading tax, the penalty can be imposed. But, in the present case, we do not find any intentional suppression as pointed out by the audit team for the purpose of evading tax. The assessing authority determined the tax liability of the dealer at Rs.6,96,51,950.91 as against which the dealer had paid Rs.6,87,37,923.49. The dealer who has paid such a huge amount of tax due against him, cannot be believed to have any intention to suppress such

a negligible amount of Rs.29,161.00 for the purpose of evading tax. Such discrepancy may be due to wrong calculation or for any other reason. So, under these circumstances, it would not be just and proper to impose penalty or interest on the dealer-appellant as has been directed by the first appellate authority.

7. In view of the discussions made above, the second appeal filed by the dealer-appellant is allowed and the orders of the fora below are hereby set aside. The matter is remitted back to the assessing authority to examine the genuineness of the documents to be submitted by the dealer-appellant before it and recompute the tax liability of the dealer keeping in view the observations made herein above, after giving an opportunity of hearing to him (dealer) within a period of three months from the date of receipt of this order. Cross-objection filed by State-respondent is disposed of accordingly.

Dictated & Corrected by me

Sd/-  
(A.K. Das)  
Chairman

Sd/-  
(A.K. Das)  
Chairman

I agree,

Sd/-  
(Sweta Mishra)  
2<sup>nd</sup> Judicial Member

I agree,

Sd/-  
(M. Harichandan)  
Accounts Member-I