

**BEFORE THE JUDICIAL MEMBER: ODISHA SALES TAX TRIBUNAL:
CUTTACK.**

S.A. No. 191 (V) of 2017-18

(Arising out of the order of the learned JCST (Appeal), Cuttack I Range,
Cuttack, in First Appeal Case No. 106121712000032,
disposed of on dtd.24.05.2017)

P r e s e n t :

Shri A.K. Panda,
1st Judicial Member

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

... Appellant

- V e r s u s -

M/s. Swan Surgicals & Pharmaceuticals,
Gita Nilay, Tarini Lane, Bajrakabati Road,
Cuttack.

... Respondent

For the Appellant ... Mr. M.L. Agarwal, S.C.

For the Respondent ... Mr. A.N. Mohanty, Advocate

Date of hearing: 09.08.2018

Date of order: 06.10.2018

ORDER

This appeal is directed against the order dtd.24.05.2017 passed by the learned Joint Commissioner of Sales Tax (Appeal), Cuttack I Range, Cuttack (hereinafter referred to as, the learned JCST) in First Appeal Case No. 106121712000032, wherein and whereby, he has reduced the balance tax demand and penalty to Rs.1,21,512.00 from Rs.9,49,493.00 raised by the learned Sales Tax Officer, Cuttack I City Circle, Cuttack (hereinafter referred to as, the learned STO) in an assessment u/s.43 of the of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) in respect of the respondent-dealer for the assessment period from 01.01.2010 to 30.06.2012.

2. The respondent-dealer bearing TIN-21671203497 is a wholesaler-cum-retailer of medical and surgical equipments and also of optical lenses. Basing upon a tax evasion report submitted by the Sales Tax Officer, Vigilance, Cuttack Division, Cuttack, the learned STO initiated a proceeding u/s.43 of the OVAT Act against the respondent-dealer for its assessment for the assessment period from 01.04.2010 to 30.06.2012 and issued a notice to appear and to produce the books of account and in response to the notice, the proprietor of the respondent-dealer firm appeared and produced the books of account which were duly been examined. As per the allegation of the tax evasion report, the Sales Tax Officer, Vigilance, Cuttack Division, Cuttack along with some other officials conducted a raid in the business premises of the respondent-dealer situated at Gita Nilay, Tarini Lane, Bajrakabati, Cuttack on 27.06.2012 and recovered a number of incriminating documents and finally submitted the report showing purchase suppression amounting to Rs.2,24,084.00 and sale suppression amounting to Rs.28,48,309.00 on its part. During assessment, as the respondent-dealer failed to clarify the allegation of purchase and sale suppression, the learned STO accepted the same as true and genuine and on consideration of all the transactions determined the GTO and TTO at Rs.97,56,515.71 and Rs.93,70,710.89 respectively and levied tax at the appropriate rate of 5% and 4% on different transactions which came to be Rs.3,85,804.82. After allowing the admissible ITC and on consideration of the payment of tax made earlier, the learned STO raised the balance tax demand of Rs.3,16,497.79 and also imposed a penalty of Rs.6,32,995.58, equal to twice of the balance tax demand u/s.43(2) of the OVAT Act and as such both the balance tax demand and penalty came to be Rs.9,49,493.00 in total, to be paid by the respondent-dealer.

3. After the assessment, being aggrieved with the order of the learned STO, the respondent-dealer preferred an appeal before the learned JCST bearing First Appeal Case No. 106121712000032. On hearing and on consideration of the materials available on record, though the learned JCST found no merit in the contention of the respondent-dealer relating to the

purchase and sale suppression, he considered the payment of tax amounting to Rs.3,11,007.00 made earlier and as such his order finally resulted in reduction of the balance tax demand to Rs.1,21,512.00 from Rs.9,49,493.00 as raised earlier by the learned STO. Thus, being aggrieved with the order of the learned JCST, the Revenue as appellant has preferred this second appeal.

4. In its grounds of appeal, the appellant-Revenue has taken the following grounds:-

- (i) That, the order of the 1st appellate authority appears to be unjust and improper.
- (ii) That, 1st appellate authority has deleted the penalty from the original demand including penalty stating that the dealer has voluntarily paid the tax amount. The 1st appellate authority has never mentioned the exact date of payment made by the dealer. Whether it is after the assessment or at the time of filing of return. In this respect the order appears to be cryptic. Further, Hon'ble Apex Court in the case of Narayan Das Suraj Van vrs. CST UP, Lukhnow observed that the voluntary deposit before the order of assessment shall not absolve the dealer from burden of penalty.
- (iii) That, the order of 1st appellate authority may be modified accordingly.

5. No cross objection has been filed by the respondent-dealer.

6. Heard both the sides. The learned Standing Counsel appearing for the appellant-Revenue submitted that, the order passed by the learned JCST relating to deletion of penalty imposed u/s.43(2) of the OVAT Act in connection with the payment of tax amounting to Rs.3,11,007.00 is quite illegal and as the order passed by the learned JCST in this regard appears to be improper and unjustified, the same is liable to be set aside and the appeal preferred by the appellant-Revenue is liable to be allowed. On the other hand, the learned Counsel appearing for the respondent-dealer

supported the order of the learned JCST and urged for dismissal of the appeal.

7. Perused the orders of both the learned forums below and the other materials on record. From the materials on record, it is seen that, during their visit the vigilance officials, Cuttack Division, Cuttack recovered certain incriminating materials from the business premises of the respondent-dealer showing purchase suppression and sale suppression on its part. During assessment, the allegation of the purchase and sale suppression leveled in the tax evasion report has clearly been established and the same has further been confirmed by the learned JCST at the first appeal stage. Of course, none of the parties to the proceeding has challenged the escaped turnover determined during assessment for levy of tax thereon. The only dispute raised by the appellant-Revenue relates to the deletion of penalty in connection with the payment of tax amounting to Rs.3,11,007.00 by the respondent-dealer. From the order of the learned JCST, it appears that, the respondent-dealer has deposited this amount prior to the assessment and while passing the order the learned STO has lost sight of the same. Therefore, as the respondent-dealer had already deposited a sum of Rs.3,11,007.00 prior to the assessment, the said amount was not due upon it by the time of the assessment and as such on consideration of the same, the learned JCST has deleted the penalty imposed by the learned STO at the rate of equal to twice of the said amount u/s.43(2) of the OVAT Act.

8. This proceeding relates to an assessment u/s.43 of the OVAT Act. On a bare reading of sec.43(2) of the Act which relates to imposition of penalty, it is seen that, this provision is not mandatory, rather a discretionary one. Discretion is the power of an authority to make decisions on matters based on his opinion within certain principles. Therefore, wherever a discretionary power has been conferred upon an authority, he or she must exercise the same in accordance to the legal requirements. Similarly, discretionary power must also be used reasonably, impartially and avoiding operation or unnecessary injury. Here, in the present case, the respondent-dealer had already deposited certain amount of tax prior to the

assessment and by the time of assessment, as there was no due of the said amount upon it, the learned JCST has rightly exercised his discretionary power in deleting the penalty in connection with the same i.e. the deposited amount of tax. Therefore, as the order passed by the learned JCST suffers from no infirmity the same needs no interference of this forum.

9. In the result, the appeal is dismissed being devoid of merit.

Dictated & corrected by me,

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

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