BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 244 (V) of 2013-14

(Arising out of the order of the learned JCST, Balangir Range, Balangir, in First Appeal Case No. AA-21(BP-1) of 2012-13, disposed of on dtd.03.09.2013)

Present: **Mrs. Suchismita Misra**, Chairman,
Shri Ashok Kumar Panda, 1st Judicial Member,
&
Shri P.C. Pathy, Accounts Member-I.

M/s. Akay Steel,
Bolangir. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. N. Agrawal, Advocate
For the Respondent ... Mr. M.L. Agrawal, S.C.

Date of hearing: 14.08.2018 ******** Date of order: 03.09.2018

O R D E R

This appeal is directed against the order dtd.03.09.2013 passed by the learned Joint Commissioner of Sales Tax, Balangir Range, Balangir (hereinafter referred to as, the learned JCST) in First Appeal Case No. AA-21(BP-1) of 2012-13, wherein and whereby, he has allowed the first appeal in part by reducing the balance tax demand and penalty to Rs.11,80,107.00 from Rs.21,32,100.00 raised by the learned Sales Tax Officer, Balangir Circle, Balangir (hereinafter referred to as, the learned STO) in an assessment u/s.43 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) in respect of the appellant-dealer for the assessment period from 01.04.2010 to 31.03.2012.

2. The appellant-dealer M/s. Akay Steel bearing TIN-21961800056 is a trader of cement, M.S. Rod and asbestos. Basing upon a fraud case report submitted by the Sales Tax Officer, Vigilance Division, Sambalpur bearing No.32 of 2011-12, the learned STO initiated a proceeding u/s.43 of the OVAT Act against the appellant-dealer for its assessment for the period from 01.04.2010 to 31.03.2012 and issued a notice to appear and to produce the books of account and in response to the notice, the authorized representative of the appellant-dealer along with his Advocate appeared and produced the books of account which were duly been examined. As per the allegation of the fraud case report, the Sales Tax Officer, Vigilance Division, Sambalpur conducted a surprise visit in the business premises of the appellant-dealer and recovered some ledgers and written loose slips from there having mention of certain transactions as enclosed in the report as Annexure-1 and Annexure-2. As per the Annexure-1 there was sales suppression of Rs.60,35,796.00, Rs.16,20,887.00 and Rs.27,71,526.00 under 4%, 12.5% and 13.5% taxable group and as per the Annexure-2, there was sale suppression of Rs.16,97,709.00 and Rs.13,69,816.00 under 4% and 13.5% taxable group and during assessment, when the allegation of sale suppression was confronted to the appellant-dealer, the authorized representative appearing on its behalf put forth his clarification that, they used to supply goods to different parties as per their requirement and used to issue tax/retail invoices after receipt of the payment made by them and all their transactions have been reflected in their sale register and they have also issued proper invoices in connection with the same. Further, the authorized representative of the appellant-dealer put forth his clarification that, all their purchases are from registered TIN dealers inside the State and are tax suffered goods. On detail verification of the materials available on record, the learned STO found out that, sale transactions amounting to Rs.29,50,804.00, Rs.5,54,351.00 and Rs.12,81,530.00 under 4%, 12.5% and 13.5% taxable categories respectively have duly been accounted for by the appellant-dealer and as such the allegation leveled in the fraud case report in this regard could not be established. But, at the same time, he found out

that, the appellant-dealer could not be able to substantiate its clarification of sale transactions amounting to Rs.47,82,701.00, Rs.10,66,536.00 and Rs.28,59,812.00 under 4%, 12.5% and 13.5% taxable categories by producing due sale invoices and as such he considered the same to be sale suppression and determined it at Rs.87,09,049.00 in total. Then, considering the established sale suppression amounting to Rs.87,09,049.00 as escaped GTO and TTO, he levied tax @ 4%, 12.5% and 13.5% on different transactions which came to be Rs.7,10,700.00. As the appellant-dealer had not paid any tax earlier, he raised the entire demand of Rs.7,10,700.00 and also imposed a penalty of Rs.14,21,400.00, equal to twice of the balance tax demand u/s.43(2) of the OVAT Act and as such both the tax demand and penalty came to be Rs.21,32,100.00 in total, to be paid by the appellant-dealer.

3. After the assessment, being aggrieved with the order of the learned STO, the appellant-dealer preferred an appeal before the learned JCST bearing First Appeal Case No. AA-21(BP-1) of 2012-13. On hearing and on consideration of the materials available on record and on further consideration of the materials produced by the appellant-dealer, the learned JCST found out that, the sale transactions of Rs.19,74,044.00, Rs.5,24,241.00 and Rs.12,79,988.00 under 4%, 12.5% and 13.5% taxable categories respectively has been accounted for by the appellant-dealer and as such he deducted the same from the determined sale suppression and re-determined it at Rs.49,29,776.00 and also re-determined the tax liability accordingly and the same resulted in reduction of the tax demand and penalty to Rs.11,80,107.00 from Rs.21,32,100.00 as raised earlier by the learned STO. But, still being aggrieved with the order of the learned JCST, the appellant-dealer has preferred this second appeal.

4. No cross objection has been filed by the respondent-Revenue.

5. Heard both the sides. The learned Counsel appearing for the appellant-dealer submitted that, the appellant-dealer has not been assessed earlier u/s.39, 40 or 42 of the OVAT Act for the assessment period in question and as such its assessment u/s.43 of the Act can clearly be

considered to be an illegal one and only on this ground the orders passed by the learned forums below are liable to be set aside. He also submitted that, though the appellant-dealer has substantiated its contention by producing sufficient materials and though the learned forums below could not found out any significant discrepancy in between the seized documents and the books of account, they have not considered the matter in its proper perspective and have passed the orders mechanically by accepting the allegation of the fraud case report blindly. He further submitted that, though the imposition of penalty u/s.43(2) of the OVAT Act is a discretionary one, the learned forums below have not exercised the power vested upon them in a justified manner and have imposed the penalty upon the appellant-dealer and the same being illegal, the imposition of penalty is liable to be deleted in case of confirmation of the tax demand by this Hon'ble forum. In support of his contention, the learned Counsel appearing for the appellant-dealer relied upon in the case of **Balaji Tobacoo Store Vrs. Sales Tax Officer, Cuttack I East Circle, Cuttack; (2015) 81 STC 170** of the Hon'ble High Court of Orissa. On the other hand, the learned Standing Counsel appearing for the respondent-Revenue submitted that, on consideration of all the relevant materials available on record, the learned JCST has passed a reasoned order and as the order passed by him suffers from no infirmity, the same needs no interference of this Hon'ble forum.

6. First of all, the appellant-dealer has challenged the very initiation of the proceeding u/s.43 of the OVAT Act by raising the contention that, it has not been assessed earlier u/s.39, 40, 42 or 44 of the OVAT Act for the assessment period in question i.e. for the assessment period from 01.04.2010 to 31.03.2012 and as such the same is clearly violative of the provision mentioned u/s.43 of the OVAT Act. It is true that, in the case of **Balaji Tobacoo Store** (supra), the Hon'ble High Court of Orissa has held that a proceeding u/s.43 of the OVAT Act in absence of any earlier proceeding u/s.39, 40, 42 or 44 of the OVAT Act is not permissible in the eye of law. The statute itself also speaks that where after a dealer is assessed u/s.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 has escaped assessment or been under assessed or been assessed at a rate lower than the rate at which it is assessable or that the dealer has been allowed wrongly any deduction from his turnover or input tax credit, to which he is not eligible the assessing authority may xxx xxx xxx proceed to assess to the best of his judgment the amount of tax due from the dealer. Though the appellant-dealer has not specifically advanced the argument that, it has not been self-assessed, from the argument advanced, it appears that, it has raised the contention that, as because no intimation has been received from the authority by it with regard to the acceptance of the return filed after self-assessment, the same cannot be said to be a completed self-assessment u/s.39 of the OVAT Act and as such no proceeding u/s.43 of the Act is permissible under the provisions of law. But, the contention raised by the appellant-dealer bears no substance as because section 39 of the OVAT Act which deals with the provision of self-assessment does not speaks of issuance of any intimation relating to acceptance of the return furnished by the dealer in all cases. Here it is beneficial to refer to section 39 of the OVAT Act which speaks as follows:-

> ***"39. Self assessment.-***
>
> (1) Subject to provisions of sub-section (2), the amount of tax due from a registered dealer or a dealer liable to be registered under this Act shall be assessed in the manner hereinafter provided, for each tax period or tax periods during which the dealer is so liable.
>
> (2) If a registered dealer furnishes the return in respect of any tax period within the prescribed time and the return so furnished is found to be in order, it shall be accepted as self assessed subject to adjustment of any arithmetical error apparent on the face of the said return."

From a bare reading of the section, it appears that, only in case of any adjustment or any arithmetical error apparent on the face of the return, the dealer is entitled to get any intimation from the authority to cure

the error or defect as the same is a condition for the acceptance of the return. There is an identical provision in Section 9 of the Orissa Entry Tax Act, 1999 which also relates to the self assessment of the dealer. While dealing with that provision of the Orissa Entry Tax Act, the Hon'ble High Court of Orissa in the case of **M/s.Neelachal Ispat Nigam Vrs. State of Odisha in W.P.(C) No.22343 of 2015** decided on 07.12.2016 has held that:-

> "So far as the grounds taken by the petitioner that the company was assessed as per the provisions of Section 9(1) of the Act and as such, it is not known to them as to whether assessment has been finalized or not or in other words, whether the authorities have accepted the self assessment made by the petitioner-company under Section 9(1)has been accepted or not is concerned, we are of the considered view that Section 9 contains a provision for self assessment, which requires the dealer to be assessed in the manner provided for each tax period or periods during which the dealer is so liable and if the registered dealer furnishes the return in respect of any tax period within the prescribed time and the return so furnished is found to be in order, it shall be accepted as self assessed subject to adjustment of any arithmetical error apparent on the face of the said return. Section 10 of the Act provides for reassessment in certain cases when the authority is of the reason to believe that the dealer has escaped assessment of tax and as such communication regarding acceptance of the assessment made under the provisions of Section 9 of the Act is not required to be communicated to the petitioner and the communication can only go in a situation when on scrutiny it will be found that the same is not in order or there is arithmetical error. Under the Taxation Rule the assessee is required to furnish self assessment and the authority is required to assess the same and there is no provision provided under the Act to communicate in case of acceptance of the assessment. Although under the provision of Orissa Value Added Tax Act under Section 38 read with Section 7(10) each and every return in relation to any tax period furnished by a registered dealer shall be subject to scrutiny by the assessing authority to verify the correctness of the calculation, application of correct rate of tax and interest etc. and in case of any mistake, detected in course of scrutiny, the assessing authority shall serve a notice in the prescribed form as we find even from the provision of Section 7 or sub-section (11) and as such, if the authorities have not issued any notice under Section 7(11), then the assessment made by the registered dealer under the provisions of Section 9 will be said to be accepted."

7. In view of the above discussion, it is very much clear that, the plea taken by the appellant-dealer with regard to the assessment u/s.43 of the OVAT Act in absence of any prior assessment u/s.39, 40, 42 or 44 of the Act bears no substance as the same is factually incorrect.

8. Next, on perusal of the materials available on record, it is seen that, the Sales Tax Officer, Vigilance Division, Sambalpur along with some other officers conducted a surprise visit in the business premises of the appellant-dealer on 15.09.2011 and recovered certain incriminating materials like some ledgers and some written slips having mention of out of account sale amounting to Rs.1,34,95,735.00. During assessment, the appellant-dealer produced some tax invoices duly entered in its sale account and as such considering the same to be genuine, the learned STO accepted its contention and determined the sale suppression accordingly. Similarly, at the first appeal stage, on proper appreciation of the materials produced by the appellant-dealer, the learned JCST found out that, some of the sale has been accounted for by the appellant-dealer and as such on consideration of the same, he re-determined the sale suppression and also determined the TTO accordingly. On perusal of the orders of both the learned forums below, it is seen that, both the learned forums below have examined the materials produced by the appellant-dealer meticulously and have arrived in their respective conclusions.

9. The assessment of the appellant-dealer has been conducted basing upon a fraud case report submitted by the STO, Vigilance Division, Sambalpur on seizure of certain incriminating documents. The provision of law cast a burden upon the appellant-dealer to show that either the seized documents are not related to its business or even if the same are related to its business, the transactions mentioned therein have duly been accounted for in the books of account maintained by it. On being confronted with the allegations of the fraud case report, the appellant-dealer produced certain tax invoices during the assessment and subsequently at the first appeal stage and after due examination of the same along with the books of account in detail, both the learned forums below have accepted it and have

determined the sale suppression accordingly. Though it is the bounden duty of the appellant-dealer to clarify the allegation leveled in the fraud case report basing upon each of the documents, it could not be able to clarify the transactions mentioned in some of the documents and as such there was no option for the learned JCST, rather to consider those transactions as out of account sale. Further, though the law permits a dealer to produce materials at any stage of the proceeding to counter the allegations leveled against it, the appellant-dealer has failed to produce any further materials before this forum in support of its contention. Therefore, as the learned JCST has examined the materials available on record in great detail and has arrived at a just conclusion, the same needs no interference of this forum in absence of any further material.

10. So far as the contention of the appellant-dealer relating to the imposition of penalty is concerned, it is true that, imposition of penalty u/s.43(2) of the OVAT Act is a discretionary one. It is a well settled principle of law that, 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, though the learned forums below have not assigned any reason while imposing penalty u/s.43(2) of the OVAT Act, from the materials available on record, it appears that, they have imposed the penalty after being satisfied of existence of clear materials in connection with the sale suppression on the part of the appellant-dealer. As sale suppression on the part of the appellant-dealer has clearly been established and the same clearly shows its clandestine business activity, the imposition of penalty u/s.43(2) of the OVAT Act upon the appellant-dealer can clearly be considered to be proper and justified in the facts and circumstances of the present case. Therefore, the order passed by the learned forums below relating to the imposition of penalty u/s.43(2) of the OVAT Act needs no interference of this forum.

11. On a close scrutiny of the entire materials available on record, it can clearly be said that, the learned JCST has considered the matter in its proper perspective and has passed the order which suffers from no infirmity.

12. In the result, the appeal is dismissed being devoid of merit and hence, the same called for no interference.

Dictated & corrected by me,

Sd/-
(Ashok Kumar Panda)
1st Judicial Member

Sd/-
(Ashok Kumar Panda)
1st Judicial Member

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

Sd/-
(P.C. Pathy)
Accounts Member-I