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

Present: Smt. Suchismita Misra, Chairman,
Sri Subrata Mohanty, 1st Judicial Member
&
Sri P.C. Pathy, Accounts Member-I

S.A.No.44 of 2007-08

(Arising out of the order of the ACST, Balangir Range, Balangir, in First Appeal Case No. AA-117(BPI) 2003-04, disposed of on dtd.04.12.2006)

S.A.No.41 of 2007-08

(Arising out of the order of the ACST, Balangir Range, Balangir, in First Appeal Case No. AA-118(BPI) 2003-04, disposed of on dtd.04.12.2006)

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

- V e r s u s -

M/s. T.D.M. (B.S.N.L.) Balangir, At/P.O./Dist.- Balangir. ... Respondent

For the Appellant : Mr. P.K. Harichandan, Advocate
For the Respondent : Mr. M.L. Agrawal, S.C.

Date of Hearing: 06.06.2019 ******** Date of Order: 06.06.2019

O R D E R

Both the appeals above at the instance of the Revenue involve same/sole question for decision, hence heard together and decided by this common order.

As against the appeals preferred by the dealer challenging the sustainability of the confirming order of first appellate authority For the assessment periods 2001-02 and 2002-03 relating to tax liability under OST Act against rent collected against use of telephone handset, the Revenue has preferred these two respective cross appeals with a specific prayer for levy of penalty on the dealer u/s.12(5) of the OST Act. Both the appeals are heard

with cross objection by the dealer contending inter alia, the prayer is not maintainable.

2. The only question raised for decision in these two appeals is:- whether the authority below has committed wrong in not imposing penalty for non-payment of tax by the dealer?

3. **Findings**:-

At the outset, it is pertinent to mention that, the assessing authority has not levied penalty and even has not made any observation in the orders of assessment regarding penalty. The first appeals were preferred by the dealer. There was no occasion for the first appellate authority to decide the question of penalty. Argument of the learned Standing Counsel is, the first appellate authority being an extended forum of assessment could have ordered the dealer for the purpose of penalty sou motu but, he did not prefer to do so.

3.1 Provision u/s.23(e)(a) of the OST Act relates to the appeal and the jurisdiction of the Tribunal. Section 23(3)(a) empowers the Tribunal to hear second appeal preferred by either parties, dissatisfied with the order of first appellate authority. Bare reading of the provision u/s.23 as it understood, unless a question is dealt with by the first appellate authority and unless the decision on that question is not up to the satisfaction of the parties, there is no scope of appeal. Here, in the case in hand, as the question relating to penalty was not raised and dealt with by the first appellate authority then, scope in the hands of the Revenue preferring appeal to this Tribunal is not wide enough to include the question of penalty.

3.2 It may be noted here that, admittedly, the dealer is not guilty of any kind of suppression. He has paid service tax on entire amount of rent received from telephone subscriber. He has a arguable case in his hand. Authorities are ample where penalty is denied when the dealer has arguable case.

In this behalf the observations of the Apex Court made in *Sree Krishna Electricals* v. *State of T.N.* [(2009) 11 SCC 687: (2009) 23 VST 249]

as regards the penalty are apposite. In the aforementioned decision which pertained to the penalty proceedings in the Tamil Nadu General Sales Tax Act, the Court had found that the authorities below had found that there were some incorrect statements made in the return. However, the said transactions were reflected in the accounts of the assessee. The Court, therefore, observed: (SCC p. 688, para 7)

> *"7. So far as the question of penalty is concerned the items which were not included in the turnover were found incorporated in the appellant's accounts books. Where certain items which are not included in the turnover are disclosed in the dealer's own account books and the assessing authorities include these items in the dealer's turnover disallowing the exemption penalty cannot be imposed. The penalty levied stands set aside."*

The situation in the present case is still better as no fault has been found with the particulars submitted by the assessee in its return."

3.4 Further, the penalty under the provision of sec.12(5) of the OST Act is not mandatory in nature as it can be successfully construed from the word "may" as contemplated in the section.

3.5 It is also not out of place to mention here that, a series of appeals are preferred by the dealer-BSNL authority of different telephone circles of the State involving the identical issue relate to sustainability of sales tax on rental charges against handset have been disposed off by this Tribunal. The matter is admittedly carried before Hon'ble Court by the dealer. The same question involving in **BSNL v/s. State of AP SLP (CIVIL) CC No.7650-7654/12** is still pending for disposal before the Apex Court of the land. The Revenue has not claimed for imposition of levy of penalty in all the assessments in appeals or in revisions right from this Tribunal to the Apex Court but, selectively chosen few assessment periods and prayed for imposition of penalty by filing appeals. Such a half hearted casual approach of the Revenue itself is against the principle of rule of consistency. The Revenue has not prayed for imposition of penalty for the periods prior to or subsequent to the aforesaid two periods. This itself is against the principle of "rule of consistency" as laid by many pronouncements. Reliance is placed on

the decision of the Apex Court in Radhasoami Satsang v. CIT (1992) 193 ITR 321 (SC).

3.6 There is one more aspect to the matter which needs to be narrated below.

Can an assessee be in a position worse off, as a result of the matter being carried in appeal before the Tribunal by the Revenue, than the position the assessee was in after the assessment order? To put it differently, can there be situations in which the assessee ends up paying more, as a result of the matter having been carried in appeal before the Tribunal, than what it would have paid if the AO's order was simply accepted by the assessee?

The dealer has challenged the assessment before the first appellate authority and then before this Tribunal. Now, the unsuccessful dealer cannot be vexed with additional burden of penalty as it is against the aforesaid principle. The principle of "*no reformation in peius*" (a person should not be placed in a worse position as a result of filing of appeal) is applicable here.

4. *From the discussion hereinabove, it is believed that, the appeal by the State is bad both in law and fact, hence ordered.*

5. *Both the appeals san merit be dismissed.*

Dictated & corrected by me,

Sd/-
(Subrata Mohanty)
1st Judicial Member

Sd/-
(Subrata Mohanty)
1st Judicial Member

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

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

S.A. No. of

2. The next question raised for decision which is seriously contested by the parties is, what should be the mode of calculation of tax, penalty and interest as the case may be, particularly when there was filing of revised return and/or payment of tax before submission of audit visit report, before initiation audit assessment and during audit assessment. Learned Standing Counsel relied strongly on the provision u/s.33(5) read with Rule 34 of the OVAT Rules. It is argued that, there cannot be any voluntary disclosure once the dealer has received the notice of tax audit i.e. as per the proviso appended to sec.33(5) of the OVAT Act.

3. Per contra, learned Counsel for the dealer argued that, the proviso does not say about any restriction on payment of tax. Moreover, the payment of tax if made before audit assessment then, in the assessment while calculating the tax due the tax already paid should be deducted first and, thereafter it is only on the balance tax payable by the dealer, penalty and/or interest should be levied.

4. To appreciate the argument from both sides, it is pertinent to take note of the relevant provisions under both the act like OET Act and OVAT Act. Sec.7 of the OET Act contemplates the return and revised return. Sec.33 of the OVAT Act on the other hand similarly contemplates periodical return and revised return. Rule 34 of the OET Rules says, application of provision of the OVAT Act and Rules mutatis mutandis in the case of assessment under OET Act.

> "***7. Return and return defaults.-***
> (1) xxx xxx xxx

(2) (a) If any dealer, having furnished a return under sub-section (1), discovers any omission or error in the return so furnished, he may file a revised return before the date on which the return for the next tax period becomes due.

(b) Revised returns may also be furnished by the registered dealer under this Act if revised returns are furnished under VAT Act and the rules made thereunder:

Provided that revised return may not be filed under this Act if the revised return furnished under VAT Act does not relate to the transaction of scheduled goods.

(3) xxx xxx xxx
(4) xxx xxx xxx
(5) xxx xxx xxx
(6) xxx xxx xxx
(7) xxx xxx xxx
(8) xxx xxx xxx
(9) xxx xxx xxx
(10) xxx xxx xxx
(11) xxx xxx xxx"

Rule 30 of the OET Rules-

"(1) (a) No Application is required for sanction of refund arising out of any order of (assessment) appeal, revision or rectification under the Act and such refund shall be allowed within sixty days of the date of receipt of such order by the assessing authority.

(b) Refund sanctioned under clause (a) shall be paid either through refund adjustment voucher in Form E35 or through refund payment voucher in Form E36 or both.

(2) x x x

(3) (a) Where any dealer claims refund in return furnished for a tax period on account of sales in course of export out of the territory of the India or on account of deductions or exemptions provided under the Act and these Rules, he shall make an application in Form E37 to the assessing authority of the Circle or Range, as the case may be, within thirty days from the date of furnishing such return:

Provided that an application for refund made after thirty days may be admitted, if the assessing authority is satisfied that the dealer has sufficient

cause for not making the application within the said period.

(b) Where the refund is claimed on account of sale in the course of export out of the territory of India, the application shall be accompanied by the evidences including the purchase order placed by the foreign buyer with the date, the agreement with the foreign buyer, bill of lading, letter of credit, evidence of payment made by the foreign buyer and/or such other evidences as may be required to establish the claim of refund and where the refund is claimed on account of deductions or exemptions as provided under the Act and these Rules, the application shall be accompanied by such evidences as may be required to establish the claim of refund.

(c) The assessing authority, on receipt of the application for refund along with the documents referred to in clause (b), shall refer the case for tax audit to determine the admissibility, or otherwise, of the claim of refund.

(d) If the application for refund as referred to in clause (b) is correct and complete and if after completion of the tax audit, the claim of refund is found to be correct and supported by required evidences, the assessing authority concerned, after receipt of report of such findings, shall sanction the refund claimed.

(e) Where the tax audit results in assessment, the claim of refund shall be subject to the result of such assessment:

Provided that in calculating the period of ninety days, the period taken for completion of assessment consequent upon tax audit, shall be excluded."

5. I failed to understand why Rule 30 will be application. At the outset, I am constrained to say that, there is no scope for any doubt about the procedure of filing of the revised return under OET Act. So, there is no reason for application of Rule 34 of the OET Rules to the case in hand. When the provision u/s.7 is self-contained about the filing of return and revised return, then absolutely there is no scope of application of the Rule 34 to a dispute regarding filing of revised return under the OET Act. The

provisions of filing of return and revised return under both the Acts mentioned above, clearly mandates that, the dealer can file periodical return under the OET Act as per provision u/s.7 of the OET Act. It can also file revised return within a period of three months u/s.7(2)(a) and (b) of the OET Act. Similarly, on the other side, the return and revised return under the OVAT Act how to be filed is contemplated u/s.33.

Rule 34. Implementation.-

> "For any other matters not specified under these rules but required for the carrying out the purposes of the Act and these rules, the provision under VAT Act and the rules made thereunder shall, mutatis mutandis, apply."

6. If we look at the provision u/s.33 of the OVAT Act, the provision of filing revised u/s.33(4) is related to returns u/s.33(1) & (2). The contingencies under which the revised return u/s.(4) can been filed has been categorized under clause (a) and (b) to sub-section (4) of Sec.33 of the OVAT Act. Sub-section (5) to sec.33 is another provision. The stage of sub-section (5) comes only after furnishing return under sub-section (1) & (2) and the scope is limited to the extent like, when it is discovered by the dealer that, higher amount of tax was due then, the amount of tax was admitted by him in the original return for any reason, he may make a voluntary disclosure of the same by filing revised return. So, the scope and ambit under sub-section (5) is quite different from scope and ambit of sub-section (4). The time limitation of revised return under sub-section (4) is three months following the tax period to which original return relates,

whereas, the time limitation for filing of revised return under sub-section (5) is extended up to receipt of the notice of "tax audit under this Act or" as a result of such audit. The proviso appended to sub-section (5) contemplates the two fold time period, one is up to the period of receipt of notice of tax audit and another is as a result of such tax audit or as a result of such tax audit. The term 'or as a result of such tax audit' engrafted in the proviso has been omitted in view of the amended of the provision w.e.f. 2015. Such omission itself indicates that, the legislature has intended to scuttle the time limit for making such disclosure and it has wanted to confine the time up to the receipt of notice of the tax audit.

The present case in hand relates to a period prior to the amendment when there was the scope as per the provision was the dealer had a right to make disclosure as a result of such audit. If that is, where is the restriction put on the dealer by the proviso not to make any payment even after receipt of notice of tax audit, the answer is emphatic no. So, it is firmly believed that, there should not be any quarrel on the proposition of low regarding payment of tax by the dealer. At any time before receipt of notice of tax audit or at a time after the tax audit as it is understood from the term 'or as a result of such audit'. The provision u/s.----- of the OET Act itself mandates the revised return or disclosure/payment of tax u/s.33(5) of the OVAT Act.

7. At this stage, we also need to take care of the prescribed format as per the Rule of the OET Rules, the relevant format are E-30(2) relatable to

306, 30(12) of the OVAT Rules. For better appreciation, the formats are reproduced herein below. ----

8. The prescribed format is prepared as pr the Rule. Rule is not in conflict with the section whether it is inconsonance to the section of the statute. Whenever there is any payment, there is filing of any return and payment of tax, the dealer is asked to submit the same in accordance to the format. The format as it revealed the balance tax due is to be calculated as per Col.10 before hand the tax is to be adjusted. It is only balance tax due, interest is to be levied independently and penalty is to be levied independently. Then, thereafter the penalty and interest should be added to the tax due to raise demand under another format VAT-313 issued to the assessee-dealer. So, a harmonious reading of the provision, rules and format, there is no ambiguity in the findings that, during the relevant period i.e. the period before the amendment of the Act i.e. 01.10.2015, the dealer had the option in his hand to make disclosure and payment of tax when his case falls under the scope of sec.33(5), the case in hand is one of that nature. Here, the dealer had paid tax before completion of audit visit. The tax audit notice issued to the dealer along with the audit visit report at a later period to the payment of tax. So, in no case it can be said that, the first appellate authority has committed wrong in determination of the tax due i.e. by adjusting the tax already paid by the completion of audit assessment.

9. Now, we need to take care of the prescribed format under E25, E27 and E30 of the OET Rules relatable to form under VAT-301/303 and

VAT-306 and VAT-312 in relation to OVAT Rules. Section 33(5) of the OVAT Act of the proviso mentioned above is reproduced as below-

Section 33 of the OVAT Act-

"***33. Periodical returns and payment of tax.-***

(1) xxx xxx xxx
(2) xxx xxx xxx
(3) xxx xxx xxx
(4) xxx xxx xxx
(5) 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 **"or as a result of such audit"**.

(6) xxx xxx xxx
(7) xxx xxx xxx
(8) xxx xxx xxx"

Voluntary disclosure in case of discovery by the dealer that, a higher amount of tax is payable than admitted in the original return for any reason, the dealer can made it and pay tax. The limitation for such voluntary disclosure is up to notice for tax audit or as a result of such audit. Form VAT-301 relates to notice for audit visit.

Form VAT-303 is the audit visit report.

Form-306 is notice for assessment for tax as a result of audit.

Notice for audit u/s.42 is necessarily called otherwise as notice for tax audit. It is not noticed for audit visit by the audit team but it is meant for notice for tax audit or audit assessment after receipt of audit visit report by the taxing authority. If that be, the dealer has a right to make any

disclosure of payment of higher rate of tax till receipt of notice of tax audit under form VAT-306.

On the other hand, the term 'as a result of such audit' in the proviso above speaks of the result of completion of the audit visit. The said term is omitted in the amendment in the year 2015. So, this aforesaid term extends the period of such disclosure for a further period i.e. given after notice of tax audit but before completion of tax audit. A harmonious reading of the provision u/s.33(5) read with the formats prescribed under the Rule, it can be said that, the assessment made under the old provision i.e. prior to amendment of 2015 gives the scope to the dealer to make disclosure and pay tax, where there is no suppression but liability of additional amount of tax to be paid by the dealer.