

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

S.A. No. 296 (V) of 2016-17

(Arising out of the order of the learned DCST (Appeal), Balangir Range, Balangir, in First Appeal Case No.AA-02 (NUA) of 2016-17, disposed of on dtd.05.10.2016)

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. Alkesh Rice Mill,
At/P.O.- Komna, Dist.- Nuapada. ... Respondent

For the Appellant ... Mr. M.L. Agarwal, S.C.
For the Respondent ... Mr. B.P. Mohanty, Advocate

Date of hearing: 10.08.2018

Date of order: 16.08.2018

O R D E R

This appeal is directed against the order dtd.05.10.2016 passed by the learned Deputy Commissioner of Sales Tax (Appeal), Balangir Range, Balangir (hereinafter referred to as, the learned DCST) in First Appeal Case No.AA-02 (NUA) of 2016-17, wherein and whereby, though he has confirmed the order of the learned Asst. Commissioner of Sales Tax, Nuapada Circle, Khariar Road (hereinafter referred to as, the learned ACST) relating to levy of interest amounting to Rs.21,846.00 u/s.34(1), has deleted the penalty amounting to Rs.48,528.00 imposed upon the respondent-dealer u/s.34(2) of the of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) in connection with the assessment period from 01.04.2011 to 31.03.2012.

2. The respondent-dealer is a trader of bran, broken rice, rice, gunny bag and parts and accessories of rice mill and haller. In view of the failure of the respondent-dealer to pay the admitted tax of Rs.1,97,405.00 for the period from 01.04.2011 to 31.03.2012 by the due date of 21.04.2012, the learned ACST initiated a proceeding and issued a notice to appear and to show cause as to why interest and penalty u/s.34 of the OVAT Act shall not be imposed upon it. But, in spite of due notice, when none appeared on behalf of the respondent-dealer, the learned ACST considered the matter ex parte on examination of the available materials and found out that, a delay of 332 days has been committed by the respondent-dealer for payment of the admitted tax and as such he levied due interest upon it at the appropriate rate which came to be Rs.21,846.00. Further, in addition to the levy of interest the learned ACST also imposed a penalty of Rs.48,528.00 upon the respondent-dealer u/s.34(2) of the OVAT Act and hence, both the interest and penalty came to be Rs.70,374.00 in total, to be paid by the respondent-dealer.

3. After passing of the order by the learned ACST, being aggrieved, the respondent-dealer preferred an appeal before the learned DCST bearing First Appeal Case No.AA-02 (NUA) of 2016-17. On hearing and on consideration of the materials available on record, the learned DCST agreed to the finding and order of the learned ACST relating to the levy of interest upon the respondent-dealer. But, at the same time, he found out that, the respondent-dealer has shown sufficient cause for non-payment of the admitted tax in due time and as such being satisfied, he deleted the penalty imposed upon it by setting aside the order of the learned ACST passed in this regard. Thus, being aggrieved with the order of the learned DCST relating to the deletion of penalty, 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 learned 1st appeal authority i.e. appears to be unjust and improper.

- (ii) That, when the statute mandates interest/penalty no discretion lies with the appellate authority for its imposition. As revealed from the order of the 1st appellate authority the dealer had provided with the opportunity of being heard by way of issuing notices to him. When the dealer had failed to respond the same, it construed that he has no intention to co-operate in the said proceeding. Giving further opportunity is the discretion of the statutory authority.
 - (iii) That, for the want of given opportunity, the statutory mandate cannot be over ruled. Being a creature of statute, he cannot waive the interest and penalty when he himself has admitted that u/s.34(2), interest and u/s.34(4), penalty is mandatory in nature and the dealer's contention is not correct in this respect. On the contrary he has waived the interest and penalty which is not only unjustified rather illegal.
 - (iv) That, the order of the learned JCST may be set aside and that of the STO may be restored.
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, after being noticed, the respondent-dealer failed to show sufficient cause for non-payment of the admitted tax in due time before the learned ACST and as such the reason assigned by the learned DCST in setting aside the order of the learned ACST relating to the imposition of penalty u/s.34(2) of the OVAT Act appears to be erroneous and as the order passed by him is improper and unjustified in the facts and circumstances of the present case, the same needs to be rectified by this forum. On the other hand, the learned Counsel appearing for the respondent-dealer supported the order of the learned DCST and urged for dismissal of the appeal.
7. Perused the orders of both the learned forums below and the other materials on record. The only dispute relates to the imposition of penalty upon the respondent-dealer u/s.34(2) of the OVAT Act. It is not in

dispute that, the respondent-dealer has not deposited the admitted tax amounting to Rs.1,97,405.00 for the period from 01.04.2011 to 31.03.2012 in due time and has deposited the same after a delay of 332 days. Therefore, by operation of law, it is liable to pay interest at the prescribed rate which came to be Rs.21,846.00 on calculation. Finding the levy of interest to be purely in accordance with law, the learned DCST has confirmed the order of the learned ACST passed in this regard at the first appeal stage and the same has not been challenged by the respondent-dealer further.

8. But, so far as imposition of penalty u/s.34(2) of the OVAT Act is concerned, for proper adjudication, it is beneficial to refer to this sub-section itself which speaks as follows:-

“If a registered dealer, without sufficient cause, fails to pay the amount of tax due and interest payable thereon along with return, revised return or final return, as the case may be, in accordance with the provisions of sub-section (1), the Commissioner may, after giving the dealer a reasonable opportunity of being heard, direct him to pay in addition to the tax and the interest payable by him, a penalty at the rate of two per centum per month on the tax and interest so payable, from the date it had become due to the date of its payment or the order of assessment, whichever is earlier.”

9. On a bare perusal of this provision, it is seen that, the imposition of penalty upon the respondent-dealer is totally a discretionary one and before passing an order in this regard, the authority is to see whether the dealer has failed to pay the admitted tax in due time for sufficient cause or not.

10. On perusal of the materials on record and on due consideration of the contention raised by the respondent-dealer, the learned DCST found out that, due to shortage of fund, the Government of Odisha had not clear the bills submitted by the respondent-dealer in connection with the supply of rice and the same compelled the respondent-dealer not to pay the admitted tax in due time. Therefore, considering the cause shown by the respondent-dealer to be sufficient not to pay the admitted tax in due time, the learned DCST has deleted the penalty imposed upon it u/s.34(2) of the

OVAT Act by exercising discretionary power vested upon him. On further scrutiny of the entire materials available on record, this forum also found out that, the cause shown by the respondent-dealer for non-payment of the admitted tax in due time is a reasonable one and as such the order passed by the learned DCST in deleting the penalty is considered to be proper and justified in the facts and circumstances of the present case. As the order passed by the learned DCST suffers from no infirmity, the same needs no interference.

11. 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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