

**BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.
S.A.No. 90(V)/2017-18**

(From the order of the Id.JCST (Appeal), Sundargarh Range, Rourkela, in Appeal No. AAV.47/2014-15, dtd.24.03.2017, modifying the order of Assessing Officer)

Present: Sri S. Mohanty & Sri P.C. Pathy
2nd Judicial Member Accounts Member-I

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

.... Appellant

-Versus-

M/s. Maa Tarinee Store,
Sundargarh.

... Respondent

For the Appellant : Mr. S.K. Pradhan, Addl. Standing Counsel (C.T.)
For the Respondent : Mr. A. Moharana, Advocate

(Assessment period : 01.04.2011 to 31.03.2013)

Date of Hearing: 26.06.2018 *** Date of Order: 26.06.2018

ORDER

Revenue has preferred this second appeal against the order of the learned First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Sundargarh Range, Rourkela (in short, FAA/JCST) in First Appeal Case No.AAV.47/2014-15 whereby, the FAA has reduced the tax due and deleted the penalty as imposed by the Assessing Officer/Sales Tax Officer, Rourkela-II Circle, Panposh (in short, AO/STO) in a proceeding u/s.42 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act).

2. The facts in brief giving rise to this appeal are :

The unit of the dealer was visited by the Tax Audit team in furtherance to Sec.41 of the OVAT Act and the Audit team in consideration of the assessment period from 01.04.2011 to 31.03.2013 as per the books of account and other connected documents of the dealer, suggested for Audit assessment with the allegation like, the dealer had availed excess ITC. In the

Audit Visit Report (AVR), the Audit team had suggested that, the dealer has collected output tax of Rs.8,45,313/- but adjusted the ITC amount of Rs.7,52,573/- thereby, the dealer is found required to pay balance amount of tax collected of Rs.92,740/-. However, the AO has found that, the total tax calculated by the dealer during the period is Rs.2,14,65,434/-, ITC claimed by the dealer was Rs.2,05,11,781/-. It has shown carried forward ITC of Rs.92,130/-, resulting the ITC allowed to Rs.2,04,19,651/-. Thus, after adjusting the output tax with the ITC, the balance due from the dealer is calculated at Rs.10,45,783/- (Rs.2,14,65,434 – Rs.2,04,19,651). The dealer was found to have paid tax of Rs.9,53,661/- with the return. As a result, the balance due was assessed to Rs.92,122/-. Besides the aforesaid balance tax due, penalty at twice of it as per Sec.42(5) of the OVAT Act was imposed. Apart from that, interest u/s.34(1) of the OVAT Act to the tune of Rs.13,818/- was also imposed. Resultantly, the total demand raised to Rs.2,90,184/-.

3. Being aggrieved with such demand of tax, penalty and interest, the dealer preferred First Appeal before the learned Id.JCST, who in turn, accepted the contention of the dealer to the extent that, the advance payment of tax of Rs.50,000 paid by the dealer dtd.30.03.2013 for the tax period 01.03.2013 to 31.03.2013 was adjusted from out of the tax due and then the balance amount of tax due was imposed with interest on the dealer. However, the penalty was not imposed with the findings that, the dealer had no intention to evade tax.

4. When the matters stood thus, Revenue preferred this appeal with the contentions that, the adjustment of advance tax of Rs.50,000/- was out of the balance tax due amounting to unjust enrichment of the dealer vis-à-vis it is also contended that, the FAA was wrong in deleting the penalty, which is mandatory in nature as per Sec.42(5) of the OVAT Act.

5. The substantial question of law and fact to be determined in this appeal are : (i) Whether the FAA was wrong in adjusting the tax already paid by the dealer from out the balance tax due and (ii) Whether the FAA was wrong in not imposing the penalty on the tax due.

6. In the case in hand, there is no dispute on determination of the GTO and TTO of the dealer as held by the AO. The only question is to be taken care of is, when the dealer has paid some amount besides the tax paid along with the return mentioned in the Part-D, then whether such amount should be taken into consideration while calculating the balance tax due, in a regular Audit assessment? The FAA has accepted the same as a payment of tax before the taxing authority and in consideration of the ChallanNo.385/30.03.2013, accepted and adjusted the same against the tax due. The period of audit assessment is from 01.04.2011 to 31.03.2013. The impugned order is not evident on the date of audit visit notice. Moreover, it is the Part-D of the return reveals payment of Rs.50,000/-. Hence, it is held that, in any case it cannot be said to be unjust enrichment by the dealer since the amount was already deposited. As such it is safely concluded that, it has been rightly adjusted from the tax due. But the fact remains, the dealer was found to be guilty of tax evasion. The dealer has not filed revised return or not made any voluntary disclosure to show his bona-fides. The assessment order is an ex-parte one and is passed based on judicial principle whereas, the GTO or TTO as held by the AO is not disputed. In that case, one can sum up in saying that, the dealer has not shown any bona-fides and the dealer is not guilty of tax evasion. It is only during the assessment u/s.42 of the OVAT Act, the dealer is detected to have not paid the appropriate tax. Provision u/s.42 of the OVAT Act includes the erroneous claim of input tax credit and evasion of tax. Once the dealer is found guilty u/s.42(3) under the head for wrong claim of ITC or tax evasion, then the mandatory provision u/s.42(5) resulted in imposing penalty. So bona-fides or no evil intention will not exonerate the dealer from the liability. Accordingly, it is held that, though the adjustment of Rs.50,000/- paid as advance tax or a deposit made with return as and extra payment, the same should be adjusted from the tax due as done by the FAA in this case so the impugned order to that extent is confirmed. But the FAA has gone wrong in not imposing penalty u/s.42(5) on the balance tax due. Accordingly, it is held that, the balance tax

due should be followed by the penalty as a mandatory consequence thereof. In view of the discussion above, it is hereby ordered.

The appeal is allowed in part. The dealer is liable to pay the balance tax of Rs.42,122/-, and interest as calculated by the FAA and is further required to pay penalty u/s.42(5) of the OVAT Act on the tax dues.

Dictated and Corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

I agree,

Sd/-
(S. Mohanty)
2nd Judicial Member

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