BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.
S.A.No. 250(V)/2018

(Arising out of order of the ld. Joint Commissioner CT & GST (Appeal), Sundargarh Territorial Range, Rourkela in Appeal Case No. AAV.29 of 2015-16, disposed of on dtd.31.07.2018)

Present: Smt. Sweta Mishra
2nd Judicial Member

M.R. Ferro Private Limited,
Lamloi, Rajgangpur,
Dist. Sundargarh. .... Appellant

-Versus-

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

For the Appellant : Mr. P.S. Patra, Advocate
For the Respondent : Mr. S.K. Pradhan, A.S.C. (C.T.)

(Assessment Period : 01.04.2012to 31.03.2014)

Date of Hearing: 24.03.2021 *** Date of Order: 31.03.2021

ORDER

This appeal is directed against the order of the learned First Appellate Authority/ Joint Commissioner CT & GST (Appeal), Sundargarh Range, Rourkela (in short, FAA/JCST) in First Appeal Case No. AAV.29 of 2015-16 dtd.31.07.2018 in reducing the assessment order passed by the learned Sales Tax Officer/ Assessing Authority, Rourkela-II Circle, Panposh (in short, STO/AA) for the assessment period from 01.04.2012 to 31.03.2014 u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act).

2. The facts of this case can be briefly stated thus :

The dealer-appellant, in the instant case carries on business in manufacturing of steel casting by utilising raw materials like iron and steel, M.S. Scrap, Manganese scrap, alloys and ferro alloys. On the other hand, the consumables used in the process of manufacturing of finished goods are silica, sand and sodium silicate. The dealer-appellant owns an electrical induction furnace for manufacturing of finished goods. The raw materials and consumable used in the process of manufacturing are purchased exclusively from inside the State of Odisha.

The assessment was completed u/s.42 of the OVAT Act basing on the Audit Visit Report (in short AVR) submitted by the Sales Tax Officer, Audit, Rourkela-II Circle, Panposh (in short the learned STO, Audit) observed following discrepancies:

(a) The dealer has claimed ITC of Rs.31933/- from June, 2013 to March, 2014 basing on purchases made inside the State of Odisha, whereas the selling dealers have not shown it in their returns. The learned STO, Audit observed it as unlawful claim of ITC by the dealer-appellant and suggested for rejection of ITC of Rs.31,933/-.

(b) The dealer has claimed ITC of Rs.14251/- basing on purchases made inside the State of Odisha, whereas the selling dealers like Technocom Aids, Subash Trading Co., Sri Sri Akhandalamani Air Product (P) Ltd., Sharada Iron and Steel, SKP Corporate Services, Cooking Feed, Sri Sri Akhandalamani Mig Gas and

Laomga Gases Pvt. Ltd. have collected less tax from the instant purchaser. The learned STO, Audit observed it as unlawful claim of ITC by the instant dealer and suggested for rejection of ITC of Rs.14251/-

(c) The dealer has claimed ITC of Rs.89637/- on the purchase of commodities like spare, washer, nut & bolt, G.I. wire, motor 5HP, Plastic, PPC gold cement, cable, water tank, G.I. strips, battery, weight machine, electrodoes and electrical fitting which includes Bajaj tube Fitting, tube light, CFL, Exhaust fan, battery, cable, PVC tape, switch, wire, sockets, contractors, MCBTP and push button etc. which do not go directly in the process of manufacturing as per the definition of input given u/s.2 of the OVAT Act. Accordingly, the STO, Audit suggested for rejection of ITC of Rs.89,637/-.

(d) During the year 2013-14, the dealer has sold goods to M/s. M.R. Engineers (P) Ltd. and collected VAT for Rs.20,145/-. But the instant dealer neither disclosed in Form VAT-201 nor deposited into the Government exchequer.

Accordingly, basing on the audit observation and after due consideration of the appellant's submission at the time of assessment, the learned AA completed the assessment by accepting the allegations raised by the learned STO, Audit and disallowed ITC to the tune of Rs.1,55,966/-. Thus, tax, interest and penalty comes together at Rs.549686/- which the dealer was required to pay at the time of assessment.

3. Being aggrieved with the order of learned AA, the dealer-appellant preferred first appeal before the learned First Appellate Authority/Joint Commissioner CT & GST (Appeal), Sundargarh Territorial Range, Rourkela (in short, FAA), who in turn, allowed the appeal in part and the tax demand was reduced to Rs.2,86,167/- (Tax payable Rs.95,389/- + Rs.1,90,778/- penalty).

4. Being further aggrieved, the dealer knocked the door of this Tribunal by way of filing second appeal with the contention that, both the fora below have acted arbitrarily and illegally passed the orders, which is otherwise erroneous, unjustified and against the principles of natural justice.

5. No cross objection has been filed by the State-respondent in this case.

6. Learned Advocate appearing on behalf of the dealer has vehemently argued that, the order of the learned FAA appears to be unjust and improper. The only point of dispute is disallowance of ITC against genuine purchases made by the dealer which are also accepted by the department. ITC on several items was disallowed by the audit team out of them some items were allowed by the Assessing Officer, the FAA again allowed ITC on several items. This goes to show that, there is no fine point where one can surely say that ITC is really allowable or not allowable. Under these circumstances penalty u/s.42(5) cannot be imposed. It is wrong to say that, penalty is to be imposed in all cases. The learned Advocate for the dealer has filed three orders bearing S.A.No.293(V) of 2016-17 of Division Bench and S.A.No.27(ET)/2019 of Single Bench of this Tribunal and First Appeal order

No.AAV.22/2010-11. Perused the orders filed by the learned Advocate for the dealer. He has prayed to allow the appeal filed by the dealer and to set-aside the order of the learned FAA.

7. On the other hand, during the course of hearing learned Addl. Standing Counsel, Mr. Pradhan for the State argued that, the grounds raised in the appeal petition are misconceived and liable to be dismissed in toto. The order of the learned FAA appears to be just and proper. There is no reasonable merit in the second appeal filed by the dealer-appellant, which is not sustainable in the eyes of law. So, he has prayed to dismiss the appeal filed by the dealer and to confirm the order of the learned FAA.

8. Heard the learned Advocate, Mr. P.S. Patra appearing on behalf of the dealer and learned Addl. Standing Counsel, Mr. S.K. Pradhan on behalf of the State. Gone through the grounds of appeal, the impugned orders of appeal and assessment and argument of both the sides at the time of hearing. Sec.42(5) of the OVAT Act says :

> "Without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under sub-section (3) or sub-section (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-sections".

On a bare reading of this provision, it is seen that the imposition of penalty under this sub-section is mandatory in nature. But that does not mean that penalty under this sub section will be imposed in all circumstances, rather the same is subject to the conditions as mentioned in sub-section (1) of Sec.42 of the OVAT Act, which speaks of detection of purchases or sales, erroneous claims of deductions including input tax

credit, evasion of tax or contravention of any provisions of this Act affecting the tax liability of the dealer. Here in the present case, the dealer-appellant has shown all the transactions in its returns and also in the books of accounts. The claim of ITC advanced by the dealer-appellant can never be considered to be an erroneous claim. Therefore, imposition of penalty upon the dealer-appellant at the rate of twice the amount of tax demand appears to be erroneous.

9. In case of Hindustan Steel Ltd. Vrs. State of Odisha (1970) 25 STC 211 (SC), the Hon'ble Apex Court has held that :

> "… An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute …."

In the case of **Voltas Ltd. Vrs. State of Orissa (2008) 15 VST 401 (Ori)**, the Hon'ble High Court of Orissa has also taken the same view.

On consideration of the entire facts and circumstances of the present case and on consideration of the above principle of law, it can be said that the imposition of penalty amounting to Rs.1,90,778/- upon the dealer-appellant u/s.42(5) of the OVAT Act by the learned FAA is improper and unjustified and as

such the same is hereby deleted. Therefore, the dealer-appellant is liable to pay the tax amounting to Rs.95,389/-. Accordingly, it is ordered.

10. The appeal filed by the dealer is allowed in part on contest. The order of the learned First Appellate Authority is hereby set-aside. The dealer-appellant has to pay the tax amounting to Rs.95,389/-.

Dictated and Corrected by me,

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

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