BEFORE THE DIVISION BENCH-II: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 21 (V) of 2016-17

P r e s e n t : Shri A.K. Panda, 1st Judicial Member & Shri R.K. Pattnaik, Accounts Member-III

M/s. Wipro Ltd.,
Plot No.86A, Saheed Nagar,
Bhubaneswar. ... Appellant

- V e r s u s -

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

S.A. No. 76 (V) of 2016-17

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

- V e r s u s -

M/s. Wipro Ltd.,
Plot No.86A, Saheed Nagar,
Bhubaneswar. ... Respondent

(Both are arising out of the order of the learned ACST (Appeal), South Zone, Berhampur, in Appeal Case No. AA (VAT)-12/2015-16, disposed of on dtd.28.02.2017)

For the Dealer : Mr. P.K. Jena, Advocate
For the Revenue : Mr. M.L. Agarwal, S.C.

Date of Hearing: 31.07.2018 **** Date of Order: 08.08.2018

O R D E R

As both the appeals bearing S.A. No. 21 (V) of 2017-18 and S.A. No. 76 (V) of 2017-18 arose out of the self-same order, both are disposed of by this common order.

2. S.A. No. 21 (V) of 2017-18 has been preferred by the dealer-assessee whereas S.A. No. 76 (V) of 2017-18 has been preferred by the

Revenue against the order dtd.28.02.2017 passed by the learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (hereinafter referred to as, the learned ACST) in Appeal Case No. AA (VAT)-12/2015-16, wherein and whereby, he has allowed the first appeal in part by reducing the balance tax demand and penalty to Rs.1,46,953.00 from Rs.4,39,520.00 raised by the learned Deputy Commissioner of Sales Tax, Bhubaneswar II Circle, Bhubaneswar (hereinafter referred to as, the learned DCST) in an assessment u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) in respect of the dealer-assessee for the assessment period from 01.04.2011 to 31.03.2013.

3. The facts essential for the present appeal are that, the dealer-assessee M/s. Wipro Ltd. bearing TIN-21691106583 is a limited company engaged in software development, wholesale and retail distribution of commodities like computer, spare parts, peripherals and accessories and also in execution of works contract. Basing upon an Audit Visit Report (in short, the AVR) submitted by the Sales Tax Officer, Bhubaneswar II Circle, Bhubaneswar, the learned DCST initiated a proceeding u/s.42 of the OVAT Act against the dealer-assessee for its assessment for the assessment period from 01.04.2011 to 31.03.2013 and issued a notice to appear and to produce the books of account and in response to the notice, the dealer-assessee appeared through an Advocate and produced the books of account which were duly been examined in the light of the allegation of the AVR. Though a number of allegations were leveled in the AVR, on examination of the books of account and the other relevant documents and on hearing the contention of the dealer-assessee, the learned DCST found out the allegations except the allegations of improper determination of taxable turnover on account of Annual maintenance contract (in short, AMC) and non-submission of audited balance sheet as prescribed u/s.65 of the OVAT Act to be not sustainable. Further, the learned DCST also found out that, a separate proceeding under the due provisions of law has already been initiated against the dealer-assessee for non-submission of the audited balance sheet and as such he did not take note of the said allegation and considered the allegation relating to the improper determination of the taxable turnover on

account of the AMC on examination of the relevant materials in detail. As the expenses towards the labour and service charges was not ascertainable from the terms and conditions of the contract executed between the dealer-assessee and the customers relating to the AMC, the learned DCST took note of Rule 6(e) of the Orissa Value Added Tax Rules, 2005 (hereinafter referred to as, the OVAT Rules) along with the entry in Sl. No.8 of the appendix, wherein a lump sum amount on account of labour, service and like charges has been prescribed @ 80% which was 90% of the works prior to 19.07.2012 and determined the value of the works at Rs.46,41,488.00. Similarly, he also found out that, the dealer-assessee has paid less amount of tax to the tune of Rs.31,591.00 in connection with the lease rental of IT products and as such levied the same along with the consequential penalty. Finally, on consideration of all the transactions, the learned DCST determined the GTO at Rs.23,41,53.502.34 and after allowing proper deduction towards the labour, service and like charges and towards collection of tax, determined the TTO at Rs.19,13,64,227.64 and levied tax at the appropriate rates of 4%, 5% and 13.5% on different transactions and after allowing the admissible ITC, determined the tax liability of the dealer-assessee at Rs.70,22,176.60. As the dealer-assessee had already paid tax to the tune of Rs.68,75,670.00 earlier, he raised the balance tax demand of Rs.1,46,506.60 and also imposed a penalty of Rs.2,93,013.20, equal to twice of the balance tax demand u/s.42(5) of the OVAT Act and as such both the balance tax demand and penalty came to be Rs.4,39,520.00 in total, to be paid by the dealer-assessee.

4. After the assessment, being aggrieved with the order of the learned DCST, the dealer-assessee preferred an appeal before the learned ACST bearing Appeal Case No. AA (VAT)-12/2015-16. On hearing and on consideration of the materials available on record, though the learned ACST found out the tax demand of Rs.37,023.00 relating to the works contract (AMC) and the consequent penalty imposed upon the dealer-assessee to be proper and justified in view of the description mentioned in Sl.No.8 of the appendix to the OVAT Rules. But, so far as the less payment of tax amounting to Rs.31,591.00 in connection with the lease rental of IT products is concerned, he found out that, the dealer-assessee has paid the tax in

advance @ 4% which has been revised as 5% w.e.f. 01.04.2012 and as such the less payment of tax was beyond its control. After arriving at such a conclusion, though he has confirmed the tax demand of Rs.31,591.00 as raised earlier by the learned DCST, deleted the consequential penalty imposed upon the dealer-assessee in this regard and levied interest amounting to Rs.9,477.49 instead of the same. Hence, the order passed by the learned ACST finally resulted in reduction of the total demand to Rs.1,46,953.00 from Rs.4,39,520.00 as raised earlier by the learned DCST. But, still being aggrieved with the order of the learned ACST, the dealer-assessee has preferred the second appeal bearing S.A. No.21(V) of 2017-18. Similarly, being aggrieved with the order of the learned ACST relating to the deletion of penalty imposed in connection with the lease rental on IT products, the Revenue has preferred the second appeal bearing S.A. No.76(V) of 2017-18.

5. Both the parties have filed their cross objections supporting their contentions raised in their respective second appeals.

6. Heard both the sides. Though the dealer-assessee has taken several grounds in its grounds of appeal, the learned Counsel appearing on its behalf, did not press the other grounds except the ground relating to the imposition of penalty u/s.42(5) of the OVAT Act. In support of his contention he submitted that, the dealer-assessee has deposited the due tax in advance @ 4% on lease rental of the IT products and as the rate of tax on that score was changed subsequently to 5% from 4% w.e.f. 01.04.2012, the dealer-assessee could not be able to deposit the balance tax amounting to Rs.31,591.00 and as such considering the facts and circumstances properly, the learned ACST has deleted the penalty imposed in this regard. He further submitted that, in earlier years, the dealer-assessee has been allowed deduction @ 90% of the gross receipt towards the labour, service and like charges and some of the orders of the assessing authorities have already been confirmed by this Hon'ble Tribunal and as such no wrong has been committed by the dealer-assessee in claiming the same percentage in the assessment period in question and as the demand has been raised in view of the change in Sl. No.8 of the appendix of the OVAT Rules, the consequent

penalty imposed in this regard can clearly be considered to be improper and unjustified and the same is liable to be deleted by this Hon'ble forum. On the other hand, the learned Standing Counsel appearing for the Revenue submitted that, the imposition of penalty u/s.42(5) of the OVAT Act is mandatory in nature and hence there is no option for the assessing authorities rather to impose the same at the rate of equal to twice of the balance tax demand and hence, the deletion of penalty by the learned ACST relating to the demand in connection with the lease rental of the IT products is quite illegal and hence, the order passed by the learned ACST in this regard needs to be rectified by this Hon'ble forum. So far as imposition of penalty relating to the demand in connection with the deduction towards the labour, service and like charges is concerned, he supported the order of the learned ACST and urged for dismissal of the appeal preferred by the dealer-assessee.

7. Perused the orders of both the learned forums below and the other materials available on record. So far as the balance tax demand is concerned, none of the parties to the proceeding has challenged the same. Therefore, the only dispute involves in both these appeals relates to the imposition of penalty u/s.42(5) of the OVAT Act in connection with the transactions, firstly, relating to the lease rental of the IT products and secondly, relating to the allowance of deduction towards the labour, service and like charges.

8. Before proceeding further, it is beneficial to refer to section 42(5) of the OVAT Act, which speaks as follows:-

> "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."

9. On perusal of the materials available on record, it is seen that, the dealer-assessee has made less payment of tax amounting to Rs.31,591.00 in the assessment period in question which relates to the lease rental of the IT products. Earlier, the tax rate in this regard was 4% which

was subsequently revised to 5% w.e.f. 01.04.2012. While passing the order, the learned ACST has taken note of the fact that, the dealer-assessee had deposited the tax at the prescribed rate of 4% in advance and due to the subsequent change of the rate of tax to 5%, balance tax demand of Rs.39,591.00 has been raised. Further, taking note of the fact that, the dealer-assessee had already disclosed the TTO in this regard properly and had paid the tax in advance without collection of the same, the learned ACST found out its conduct to be bonafide and accordingly deleted the penalty imposed earlier by the learned DCST and instead of the same levied interest of Rs.9,477.49 on consideration of the delay in payment of tax. But, so far as the imposition of penalty relating to the transactions in connection with the labour, service and like charges is concerned, on perusal of the materials available on record, it appears that, the learned ACST has not applied the same principle and reasoning as applied in case of lease rental of IT products. Here also, the deduction to be allowed towards the labour service and like charges was 90% of the receipt amount as per Sl.No.8 of the appendix to the OVAT Rules and the same was subsequently changed to 80% of the received amount by the Orissa Value Added (Amendment) Rules, 2012 w.e.f. 19.07.2012 and as such the balance tax demand of Rs.37,023.00 was raised in this regard. From the materials available on record, it is also seen that, the dealer-assessee has shown the transaction properly and has paid the tax due upon it as per the provision of law existing prior to 19.07.2012. As the percentage of deduction has been changed at a subsequent rate, the non-payment of the due tax as per the changed provision by the dealer-assessee can never be considered to be an intentional or deliberate one and the consequent imposition of penalty in this regard can be considered to be improper and unjustified.

10. Of course, on a bare perusal of the sub-section (5) of section 42 of the OVAT Act, it appears that, the imposition of penalty under this provision is mandatory in nature. But, that does not mean that, penalty shall be imposed upon a dealer in all cases rather, the same is subjected to the conditions mentioned in the other sub-sections of section 42. Similarly,

before imposition of penalty, the entire facts and circumstances in each of the cases are required to be considered. In the case of **Hindustan Steel Ltd. v. State of Orissa (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 ……"

11. Similar view has also been expressed by different benches of this Tribunal in several cases.

12. On consideration of the entire facts and circumstances and on consideration of the settled position of law, it can clearly be said that, levy of imposition of penalty u/s.42(5) of the OVAT Act on both the count as discussed above can be considered to be improper and unjustified. Therefore, in such view of the matter, the appeal preferred by the Revenue lacks merit. But, so far as the appeal preferred by the dealer-assessee is concerned, the contention raised with regard to the imposition of penalty u/s.42(5) of the OVAT Act relating to the Annual maintenance contract (AMC) bears merit and as such the same is required to be accepted.

13. In the result, the appeal bearing S.A. No.76(V) of 2017-18 preferred by the Revenue is dismissed being devoid of merit. At the same time, the appeal preferred by the dealer-assessee bearing S.A. No.21(V) of 2017-18 is allowed partly. The penalty imposed upon the dealer-assessee in connection with the works contract (AMC) is hereby deleted and as such the

balance demand is reduced to Rs.72,707.00, to be paid by the dealer-assessee. The demand notice be issued accordingly. The cross objections are disposed of accordingly.

Dictated & corrected by me,

Sd/-
1st Judicial Member,
Odisha Sales Tax Tribunal

Sd/-
1st Judicial Member,
Odisha Sales Tax Tribunal

I agree,

Sd/-
Accounts Member-III,
Odisha Sales Tax Tribunal