BEFORE THE JUDICIAL MEMBER-I: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 330 (V) of 2013-14

(Arising out of the order of the learned DCST (Appeal), Cuttack I Range, Cuttack, in First Appeal Case No. AA-(VAT)26/CUIC/2013-14, disposed of on dtd.16.12.2013)

P r e s e n t: Shri A.K. Panda,
1st Judicial Member

M/s. Maruti Glass & Ply,
Buxi Bazar, Cuttack. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. H.R. Kedia, Advocate
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 19.04.2018 **** Date of order: 20.11.2018

O R D E R

This appeal is directed against the order dtd.16.12.2013 passed by the learned Deputy Commissioner of Sales Tax (Appeal), Cuttack I Range, Cuttack (hereinafter referred to as, the learned DCST) in First Appeal Case No. AA-(VAT)26/CUIC/2013-14, wherein and whereby he has dismissed the first appeal by confirming the order of the learned Sales Tax Officer, Cuttack I West Circle, Cuttack (hereinafter referred to as, the learned STO) passed 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 appellant-dealer for the assessment period from 01.07.2007 to 31.03.2012 raising a balance tax demand of Rs.10,850.00 and a penalty of Rs.21,700.00.

2. The appellant-dealer bearing TIN-21861204411 is a trader of glass sheets and in course of business transaction it used to purchase and sale the goods only inside the State of Odisha. Basing upon an Audit Visit

Report (in short, the AVR), the learned STO initiated a proceeding u/s.42 of the OVAT Act against the appellant-dealer for its assessment for the period from 01.07.2007 to 31.03.2012 and issued a notice to appear and to produce the books of account and in response to the notice, the proprietor of the appellant-dealer firm appeared and produced the books of account which were duly been examined. On examination of the books of account and the other relevant documents, the learned STO found out some of the allegations leveled in the AVR to be true and genuine and accordingly determined the turnover in that respect and added it to the GTO and TTO. Similarly, on confrontation of the allegation of the AVR relating to the sale suppression amounting to Rs.1,00,000.00, though the appellant-dealer took the plea of bonafide mistake on its part and submitted that, it had no malafide intention as because it had sufficient ITC which has been carried forward to the next tax period, the learned STO did not accept such contention and determined the sale suppression to be Rs.1,00,000.00 and added it to the GTO and TTO. Finally, on consideration of all the transactions, the learned STO determined the GTO and TTO at Rs.1,43,59,816.42 and levied tax thereon at the appropriate rates which came to be Rs.17,10,595.48. After allowing the admissible ITC as claimed by the appellant-dealer after carry forward of the same to the next tax period and on consideration of the payment of tax made earlier amounting to Rs.1,650.00, the learned STO raised the balance tax demand of Rs.10,850.00. Then, he also imposed a penalty of Rs.21,700.00, 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.32,550.00 in total, to be paid by the appellant-dealer.

3. After the assessment, being aggrieved with the order of the learned STO, the appellant-dealer preferred an appeal before the learned DCST bearing First Appeal Case No. AA-(VAT)26/CUIC/2013-14. On hearing and on consideration of the materials on record, the learned DCST found no merit in any of the contentions of the appellant-dealer and accordingly dismissed the appeal by confirming the order of the learned STO.

Thus, again being aggrieved with the order of the learned DCST, the appellant-dealer has preferred this second appeal.

4. Cross objection has been filed by the respondent-Revenue supporting the order of the learned forums below.

5. Heard both the sides. The learned Counsel appearing for the appellant-dealer submitted that, the suppression as pointed out in the AVR is not at all a suppression rather is a bonafide clerical mistake on the part of the appellant-dealer and as the appellant-dealer has sufficient ITC to its credit, the learned forums below should have adjusted the same instead of raising the tax demand. He further submitted that, as the appellant-dealer had no malafide intention of suppression as revealed from the fact of the case, the imposition of penalty at the rate of equal to twice of the balance tax demand u/s.42(5) of the OVAT Act is quite improper and unjustified and is liable to be deleted. On the other hand, the learned Standing Counsel appearing for the respondent-Revenue submitted that, the claim of adjustment of the carry forward ITC to the next tax period as claimed by the appellant-dealer is not possible in the fact situation of the present case and as such the order passed by the learned forums below being proper and justified needs no interference of this forum.

6. Perused the orders of both the learned forums below and the other materials on record. From the materials on record, it is seen that, the appellant-dealer has admitted the discrepancy found out in the books of account and the periodical returns relating to sale suppression amounting to Rs.1,00,000.00. Of course, it has taken the plea that, the same is a bonafide mistake on its part and the tax liability arising out of such transaction should have been adjusted from its excess ITC carried forward to the next tax period. But, this contention of the appellant-dealer bears no merit in view of the fact that the appellant-dealer has carried forward the ITC u/s.21 of the OVAT Act and the same cannot be reversed. Further, the discrepancy relating to transaction of Rs.1,00,000.00 has not been pointed out by the appellant-dealer on its own motion at a subsequent stage, rather the same was found out by the audit team after a due audit. Therefore, the

plea of adjustment of ITC as taken by the appellant-dealer bears no substance and the tax demand as raised by the learned forums below needs no interference.

7. But, so far as the imposition of penalty u/s.42(5) of the OVAT Act is concerned, the contention raised by the appellant-dealer needs a consideration. The plea of the appellant-dealer is that, the non-disclosure of the alleged turnover was not intentional rather the same has been caused due to some bonafide clerical mistake. Further, it has excess ITC and the same should have been adjusted after ascertain of its tax liability. Considering similar facts, the Hon'ble High Court of Gujarat in the cases of **State of Gujarat v. Jay Steel and Tubes Traders (2015) 80 VST 530 (Guj.)**, **State of Gujarat v. Dasmesh Hydraulic Machinery (2015) 80 VST 532 (Guj.)** and **State of Gujarat v. Nishi Communication (2015) 80 VST 535 (Guj.)** has deleted the interest and penalty levied upon the dealer.

8. 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 ……"

9. On consideration of the entire facts situation, it can clearly be said that, both the learned forums have not considered the entire facts and circumstances while imposing penalty upon the appellant-dealer u/s.42(5)

of the OVAT Act and as such the order passed by them in this regard is required to be interfered and is also required to be deleted.

10. In the result, the appeal is allowed in part. The order of imposition of penalty u/s.42(5) of the OVAT Act upon the appellant-dealer is hereby set aside. However, the rest of the order is confirmed. The cross objection is disposed of accordingly.

Dictated & corrected by me,

Sd/-
(A.K. Panda)
1st Judicial Member

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