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

S.A. No. 166(V) of 2017-18

(From the order of the ld. JCST, Sambalpur Range, Sambalpur, in First Appeal Case No.AA 09/JSG/VAT/2015-16, dtd.29.04.2017)

P r e s e n t: **Shri S. Mohanty,**
1st Judicial Member

M/s. T.P. Sao and Sons Pvt. Ltd.,
(Formerly: M/s. Eastern Steel & Power Ltd.)
Lahandabudd, Kantapali,
Dist.- Jharsuguda. ... Appellant

- V e r s u s -

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

S.A. No. 143(V) of 2017-18

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

- V e r s u s -

M/s. T.P. Sao and Sons Pvt. Ltd.,
(Formerly: M/s. Eastern Steel & Power Ltd.)
Lahandabudd, Kantapali,
Dist.- Jharsuguda. ... Respondent

For the assessment period: 01.04.2007 to 31.03.2008

For the Dealer ... Mr. K. Kurmy, Advocate
For the State ... Mr. M.L. Agarwal, S.C.

Date of hearing: 30.07.2019 ******** Date of order: 03.08.2019

O R D E R

The dealer being aggrieved by the orders of both the fora below knocked the door of this Tribunal with a prayer to delete the demand towards tax and penalty raised against him by setting aside the order of first appellate authority, impugned in this second appeal. On the other hand, Revenue also questioned the impugned order as not sustainable by way of cross appeal with a prayer to restore the enhancement of suppressed turnover as determined by the learned assessing authority. Both the appeals are heard and decided by this common order.

2. The assessee-dealer had faced an escaped assessment u/s.43 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) for the tax period from 01.04.2007 to 31.03.2008 on the basis of allegations brought in, by the fraud case report bearing No.28/CT dtd.31.08.2009 from Deputy Commissioner of Commercial Tax, Enforcement Range, Sambalpur. The allegations are:- sale suppression and irregular claim of ITC on capital goods as well as inadmissible ITC on coal. In the reassessment, the assessing authority confronted the authorized agent/signatory of the dealer with the fraud case report and thereafter on verification of the books of account in the light of allegations in fraud case report vide its order dtd.31.03.2015 calculated the suppressed turnover at Rs.42,29,440.00 as per the incriminating document but, enhanced the turnover by ten times while adding it to the GTO for the purpose of determination of tax liabilities which was calculated at Rs.16,91,776.00. Similarly, the assessing officer disallowed the ITC of Rs.1,46,567.00 on iron and steel materials against which the dealer had raised a claim like, use of those as capital goods. Further, as against the claim of adjustment of ITC for Rs.1,61,80,938.00, the first appellate authority had allowed ITC adjustment of Rs.1,58,68,987.00 i.e. less by Rs.3,11,951.00. Thus, in total the balance tax payable by the dealer was calculated at Rs.9,88,661.40, penalty u/s.43(2) to the extent of double of the tax due was levied, resulting thereby the total

demand towards tax with penalty raised against the dealer at Rs.29,65,984.00.

3. Being aggrieved, the dealer carried the matter before the first appellate authority. Learned JCST, Samablpur Range, Sambalpur as first appellate authority reduced the enhancement of suppressed turnover from ten times to four times and also allowed ITC of Rs.1,46,567.00 claimed on iron and steel materials and as a result, the demand became reduced to Rs.29,65,984.00.

4. When the matter stood thus, adversary parties called the order of first appellate authority in question by way of appeal and cross appeal mentioned above.

5. The contention of the Revenue in its appeal is, reduction of enhancement of suppressed turnover from nine times to four times by the first appellate authority is erroneous, so to that effect, the findings of the assessing authority should be restored.

6. The contentions of the dealer in its appeal are:- the impugned order is an antedated one and being passed after the stipulated period given under the statute, it is barred by limitation. The suppression as determined by the assessing officer and thereafter by the first appellate authority are based on presumptions and surmises. The Revenue has not discharged the burden of proof rest on the department in case of escaped assessment and the determination of suppression is erroneous and whimsical. Similarly, it is contended that, the enhancement of the suppressed turnover at nine times by the assessing authority or at four times by the first appellate authority, are also illegal in absence of any material, hence illegal and arbitrary.

It is further contended that, in absence of any mens rea, penalty as imposed invoking provision u/s.43(2) of the OVAT Act is wrong and illegal in the case in hand.

7. From the rival contentions above, the substantive questions of law and facts raised for decision in these appeal and cross appeal are,

(i) whether the determination of suppression by the first appellate authority in impugned order is based on facts and conclusive proof;

(ii) whether the imposition of penalty is not warranted in the case in hand;

(iii) whether the assessment order is barred by limitation as it was prepared late but shown to have prepared on the last day of limitation;

(iv) whether the reduction of enhancement of the suppressed turnover from nine times to four times by the first appellate authority is not tenable in law basing on the facts and circumstance of the case;

(v) what order?

8. The allegation of suppression as per the AVR and the explanation by the dealer on each count is reproduced here for better appreciation-

(i) There was allegation of sale suppression (excess sale) of 110.970 MT of M.S. Billets on dated 12.02.2008. The contention of dealer is the allegation is baseless. The said goods were loaded into 06 nos. of lorries for export u/s.5(3) through merchant exporter M/s. Aztec Exim Pvt. Ltd., New Delhi but due to cancellation of the export orders, the lorries were unloaded and were never removed for export;

(ii) The dealer had detected loading and dispatch of goods unaccounted for 87.270 MT of MS Billets on 10.02.2008 and 15.02.2008 on the basis of certain entries in the "private diary". The dealer contended that the said entries related to removal of "Slags" generated as waste in the

process of manufacture of M.S. Billets from the factory for making of village road as part of the "Periphery Development Scheme". In the Tax Evasion Report the removal of 'Slag' is arbitrarily treated as removal 'M.S. Billets' without bringing any material whatsoever on record. in the said "private diary" the name of the item is not at all mentioned. The reporting authority has presumed it to be 'M.S. Billets' without disclosing any reason for drawing such inference;

(iii) Sales suppression of M.S. Billet of 16.350 MT on the ground that in the invoice No.SB07Y 04800 dated 28.01.2008 the vehicle No. is CG-04G-6210 whereas in the 'Despatch Register' the vehicle number for the said consignment is written CG-04G-6216. The dealer's explanation is. ss a matter of fact, it is a case of inadvertent human error and not a case of sales suppression. In the instant case in the 'Dispatch Register' the last digit '0' has been inadvertently written as '6';

(iv) The allegation of sale suppression of 17.640 MT of Coal Fines on dated 29.02.2008 on the basis of one loose slip "permitting" removal of the said quantity of Coal Fines from the factory is illegal and arbitrary. It is contended that the said slip merely speaks of "permission" to remove but the said goods were never removed from the factory due to cancellation of deal and for that reason in the "Gate Out Register" no entry for removal of the said quantity of Coal Fines is mentioned;

(v) The claim of ITC of Rs.1,46,567.00 on Iron & Steel materials like M.S. Plates, M.S. Round etc. treating those as capital goods is illegal. The explanation of the dealer is, the said Iron & Steel materials are used for "Patching Former" and "Deslagging Spoon" which satisfies the user

test under definition of "Capital Goods" as also "Input", used directly in the process of manufacture of M.S. Billets.

(vi) Inadmissible claim of ITC on purchase of coal.

9. **Findings:-**

Before delving into item-wise suppression on each count above is, it is necessary to read the relevant provision relating to the burden of proof in the case of suppression. Learned Standing Counsel gave much stress on the provision u/s.95 of the OVAT Act. The provision as per sec.95(1)(k) of the OVAT Act reads as follows:-

> "(k) any book, document or account kept or found in his business premises or any place including a godown, warehouse, vehicle or vessel over which he has ultimate control does not relate to his business."

Capitalizing his argument on the provision above, learned Standing Counsel vehemently argued that, when there was recovery and seizure of incriminating materials from dealer's premises, it is the dealer is to give explanation how these incriminating materials are either related to its business or if related why it is not related to suppressed turnover.

Per contra, learned Counsel for the dealer argued that, without disputing the mandate of the provision it is always incumbent upon the Revenue to establish the allegations brought against the dealer. So, the entry in the incriminating documents whether led to the dealer, the initial burden is always on the department who brought the allegation. Similarly, on the other hand, it is the dealer's duty to give explanation how these incriminating documents were came into his possession and any entry in those documents why will not be treated as related to the dealer's business. Law is no more res integra in view of the decision in Narayana Vrs. Gopala AIR 1960 SC 100 held that

> "the burden of proof is of importance only where by reason of not discharging the burden which was put upon

> it, a party must eventually fail, where however, parties have joined issue and have led evidence and the conflicting evidence can be way to determine which way issue can be decided, the abstract question of burden of proof becomes academic."

10. It to borne in mind, while deciding whether the initial evidential burden u/s.95(1)(k) of the OVAT Act has been discharged by the dealer or the presumption disappeared and whether, burden has been shifted and later the Revenue has discharged the legal burden after the same is restored. Some incriminating documents are recovered by the officials of the Revenue inside the premises of the dealer. It is open to the dealer, to explain the existence of documents in the dealer's possession by showing a preponderance of probability in its favour and against the Revenue, the provision itself gives to the dealer to produce or furnish such documents containing such particulars or such further evidence which is necessary to explain the circumstance and situation and the contents under which the incriminating documents were generated and came into possession. Rules of evidence pertaining to burden of proof are embodied in Chapter-VII of Evidence Act. The phrase "burden of proof" has two meaning, one, the burden of proof as a matter of law and pleading and the other, the burden of establishing a case. The former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the later is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be directed i.e. oral or documentary evidence or admissions made by Opp. Party, it may comprise circumstantial evidence or presumption of law or fact. Sec.101 of the Evidence Act says, whoever desires any court to give judgment as to any legal right or liability dependant on the existence of fact which he asserts, must prove that those facts exist therefore, burden initially rests on the Plaintiff/Revenue who has to prove that the documents are related to

Defendant. As soon as it is established that, the documents are related to defendant/dealer, the burden is rests on the dealer to explain the documents. Once the dealer has given some explanation against the documents which is found to be probable, then onus again shifted to the Revenue to establish that, the contents of the documents or proves that a particular fact of suppression. Thus, it can be summarized as follows that Sec.95 of the OVAT Act is always a rebuttable one.

The dealer can prove the non-existence of any incriminating contained in the document seized. Once the dealer has discharged this burden by any means like oral, documentary or circumstantial, then it is incumbent upon the Revenue to establish cogently that, the dealer's explanation is not believable, not probable and the contents of the documents are conclusive proof of sale suppression.

11. On the touchstone of the above principle relatable to Sec.95(1)(k) of the OVAT Act when we delve into the case in hand, it is found that, so far as the allegation No.(ii) relating suppression of M.S. Billets of 87.270 MT on 10.02.2008 and 15.02.2008 on the basis of certain entries in private diary, the dealer contention is, the said entries relates to removal of slags generated as waste in the process of manufacturing of M.S. Billet from the factory or making a village road as a part of the Periphery Development Scheme. In the tax evasion report, the slag is arbitrarily treated as M.S. Billets. The incriminating document does not contain the term "M.S. Billets". If that is, then necessarily, the dealer has successfully given a probable explanation and now it is the duty of the Revenue to explain that, the explanation of the dealer is not believable. When the incriminating document does not reveal that, in explicit terms M.S. Billets no presumption can be drawn that, only relates to M.S. Billet. When alternative possible theory can came out from an evidence, then the theory which will favour the dealer should be accepted.

12. It is also pertinent to mention here that, the dealer had produced another document like, letter of correspondence with local village for supply of slag for development of road under Peripheral Development Scheme which strengthens the explanation of the dealer. Thus, I am of the considered view that, both the fora below has committed wrong in holding the aforesaid sale suppression. The allegation of sale suppression under allegation No.4 i.e. for 17.640 MT of Coal Fines on dated 29.02.2008 discovered on the basis of one loose slip permitting, removal of said quantity of fines from the factory, the explanation of the dealer is, the slip only relates to permission to remove the goods but it was not crossed the factory gates due to permission of the deal and for that reason, the register maintained in the gate does not contain the removal.

13. So far as the allegation No.(i) regarding removal of 110.970 MT of M.S. Billets on dated 12.02.2008, the explanation of the dealer is, the said goods loaded in six nos. of lorries for export u/s.5(3) of the CST Act for merchant exporter M/s. Aztec Exim Pvt. Ltd., New Delhi but for cancellation of the deal, the merchant exporter cancelled the deal as a result there was no dispatch of goods to the merchant exporter which is revealed from the statement dispatches maintained by the dealer showing the goods purported to have dispatched were cancelled by the merchant exporter.

14. Learned Standing Counsel on the other hand, questioned the validity and genuineness of the documents and argued that, the document is an afterthought one. It cannot be relied upon. Perused the tax invoice-cum-Excise Invoice No.16075 dtd.06.03.2008, the statement of dispatch of the consignee, Eastern Steel & Power Ltd. filed in xerox, it reveals the goods under consignment dtd.08.02.2008 were received but the goods under consignment dtd.12.02.2008 were not received stated to have not received and delivered by merchant exporter. This statement needs further verification about its genuineness. So, it is believed that, the determination of suppression

needs to reassess on the materials available and produced before the assessing authority.

So far as the determination of suppression on the other counts, it is found that, the explanation by the dealer are not satisfactory. The inadvertent mistake in mentioning of vehicle No. with dispatch register as claimed against allegation No.(ii) is not cogently proved by rebuttal evidence. The suppression detected on the basis of loose slips as per allegation No.(iv) is also not sufficiently disproved by the dealer. Similarly, the claim of use of M.S. Plate, M.S. Rod etc. as capital goods was not established. The dealer has failed to discharge the initial burden. In consideration of the evidence for both the sides is is held that, the confirming findings of both the fora below relating to the alleged suppression as per allegation no.(i) and (ii) above need further investigation, whereas the determination of suppression as per allegation No.(iii), (iv) and (v) are hereby confirmed.

15. As regards the imposition of penalty u/s.43(2) of the OVAT Act, the submission of the learned Counsel for the dealer is in absence of *mens rea* levied in this case is unlawful. The dealer is guilty of clandestine business transaction, no question of bonafideness on the part of the dealer behind the suppression or wrong claim of concession in tax rate. So, it never can be said that, there is no *mens rea* on the part of the dealer against intentional sale suppression. Moreover, the penalty under the OVAT Act levied in an assessment is civil in nature, hence *mens rea* as a pre-condition is not a must in all cases of tax evasion. Thus, it is held that, the dealer being guilty of suppression is liable to pay penalty as per sec.43(2) of the OVAT Act in the case in hand.

16. The claim of the dealer is, the assessment order was not passed within the period of limitation though it was shown to have passed within time and the inference in favour of the argument is gathered from the date of dispatch of the assessment order and the

date of receipt of the same by the dealer. Learned Counsel for the dealer submitted that, the assessment order was purported to have passed on 02.02.2015. As per the issue No. affixed to assessment order it was issued on 20.02.2015, whereas served on the dealer on 19.05.2015. There is a gap of sixty days from the date of dispatch to the date of receipt. So, it should have treated that the order of assessment was not passed within time. The period under assessment is from 01.04.2007 to 31.03.2008. Sec.43(3) of the OVAT Act has mandates seven years as the period of limitation for completion of the escaped assessment. The period was supposed to have expired on 30.02.2015. The dispatch date of the assessment order is reflected as 25.02.2015. In that case no definite presumption can be gathered from it that, the order was not passed before 30.02.2015. The order was sent through Regd. Post. The dealer could have obtained documentary evidence from Postal Department to prove his plea that, the order was actually not dispatched before 30.02.2015. From above, it only can be said that, the evidence is not ample to accept the plea of the dealer. This being a mixed question of law and fact in absence of any definite cogent/trustworthy evidence, an act of public officer like assessing authority cannot be doubted on mere hypothetical assertion. If that be, it is held that, the plea taken by the dealer such as assessment order was antedated one and the assessment is barred by limitation is not established.

17. Revenue's contention before the Tribunal is, the first appellate authority though has upheld the suppression but is not justified in reducing the enhancement from ten times to four times. The assessing authority had enhanced the suppressed turnover by ten times, whereas the first appellate authority reduced it to four times.

Gone through the assessment order. The order as it revealed, the assessing authority has taken note of the suggestion given by the investigating officer. The investigating officer has

recommended enhancement for ten times of the actual suppression detected and the assessing authority just accepted the suggestion and enhanced the suppressed turnover by ten times. This is a mechanical application of mind without remaining conscious to the facts and circumstances of the case in hand. The authority is required to estimate the actual suppression looking into consideration of the fact as like, the period over which such assessment is established, the nature of trade of the dealer, the volume of transaction of the dealer throughout the year etc. so as to determine what should be the reasonable amount of enhancement in case of detection of suppression, unless the enhancement is nothing but a sweet whim or based on assumption or presumption only. On the other hand, when the impugned is perused, it is also noticed that, the first appellate authority has reduced the enhancement but has not given any conceivable reason for reduction. One best judgment assessment cannot be replaced by another without any reason. The first appellate authority here found to be wrong in not following the judicial precedents laid down by authorities. However, on careful scrutiny of the findings of suppression as determined by the first appellate authority, it is found that, the first appellate authority has gone into a threadbare discussion into the details of the suppression reported, the order of the assessing authority and the pleas of the dealer raised in detail before him. So, it is believed that, enhancement as decided by the first appellate authority is quite reasonable and it is an opinion independent of the suggestion given by the vigilance team. The assessing authority has sewed away by the suggestion of the vigilance team, whereas the first appellate authority has applied his mind conscious to the facts and circumstances of the case. So, I am of the considered view that, the enhancement of suppressed turnover by four times as held by the first appellate authority should prevail upon the order of assessing authority and it is held that, the quantum of

enhancement by the first appellate authority need not to be disturbed but confirmed.

18. In the result, it is held that, the matter need to be remitted back to the assessing authority for reconsideration of the allegation of suppression as a part of allegation No.(i) and (ii) after affording an opportunity of being heard to the dealer.

In the result, it is ordered.

The appeal of the dealer is allowed in part. The matter is remitted to the assessing authority for assessment afresh as per the observation above. All endeavor should be make to dispose of the remand assessment within a period of four months hence. The cross appeal by the Revenue is dismissed as of no merit.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

Sd/-
(S. Mohanty)
1st Judicial Member