BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 262 (VAT) of 2018

(Arising out of order of the learned Addl. CST (Appeal), South Zone,
Berhampur in First Appeal Case No. AA (VAT) 46/2016-17
disposed of on dated 14.08.2018)

Present: Shri R.K. Pattanaik,
Chairman

M/s. Laxmi Traders,
At/Po: Rambha ... Appellant

-Versus-

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

For the Appellant : Sri B.B.Panda, Advocate
For the Respondent : Sri D. Behura, Standing Counsel (CT)

Date of hearing: 15.02.2021 ***** Date of order: 12.03.2021

O R D E R

Instant appeal in terms of Section 78(1) of the Odisha Value Added Tax Act, 2004 (hereinafter referred to as 'the Act') has been pressed into service by the dealer assessee assailing judicial propriety of the impugned order dated 14.08.2018 in Appeal Case No. AA (VAT) 46/2016-17 passed by the learned Additional Commissioner of Sales Tax (Appeal), South Zone, Berhampur (in short, 'FAA'), who while dismissing its claim, confirmed the assessment passed under Section 42 of the OVAT Act by the learned Deputy Commissioner of Sales

Tax, Ganjam Circle, Berhampur (hence called 'AA') on the grounds inter alia that it is not tenable in law and therefore, deserves to be set aside in the interest of justice.

2. The dealer assessee is a proprietorship concern engaged in trading of goods like cement, iron rods, etc. on wholesale-cum-retail basis. It effects purchase of goods as also the sales inside the State only. As against the dealer assessee, tax audit was held and an Audit Visit Report (in short, 'AVR') was submitted. On receipt of report, the AA initiated a proceeding under Section 42 of the Act for the tax periods 01.04.2003 to 31.03.2015 and served a notice on the dealer assessee in Form VAT 306 directing it to appear along with the books of account and other relevant documents for the purpose of verification. The books of account as well as return figures were verified on its production. Finally, at the end of assessment, the AA held purchase suppression of ₹6,23,412.00 in the category of goods under 13.5% for the period 2014-15 and likewise, sales suppression of ₹17,02,168.00 vis-a-vis goods of 5% category for the same year for being undisclosed in the return within the time; and reversal of ITC of ₹1,804.25; stock discrepancy of ₹21,828.00 along with ₹3,575.00 in respect of cement bags with a total at ₹25,403.00 and on a detailed analysis, added 5% profit margin to the purchase suppression and ultimately, raised additional demand of ₹5,35,411.00 including penalty levied under Section 42(5) of the Act. On being dissatisfied, the dealer assessee approached the FAA and disputed the purchase and sale suppressions besides the imposition of penalty. However, it did

not yield any result and consequently, the appeal by the dealer assessee filed under Section 77 of the Act was dismissed. On being unsuccessful, the dealer assessee, then knocked the doors of the Tribunal and reiterated the claim denying the alleged suppressions besides levy of penalty as unwarranted.

3. As per the dealer assessee's point of view: (i) whether the best judgment assessment was permissible in absence of any irregularity found in the books of accounts? (ii) if levy of further tax and penalty without rejecting the returns and refund of tax paid on the basis of revised and annual returns was justified? (iii) whether or not, there has been due compliance of provisions of Rule 49 of the Odisha Value Added Tax Rules, 2005 (in short, 'the Rules') for the purpose of audit assessment? (iv) and if at all, levy of penalty under Section 42(5) of the Act was warranted, in the facts and circumstances of the case, when the amount of tax due though not disclosed in the returns but was shown in the books of account? Other grounds were that the payment of advances was not duly accounted for despite the disclosures made by it in that respect was within time; and the voluntary deposits made under revised returns could be accomplished only after verifying the books of account for filling of IT return but in the meantime, it was intervened by the audit notice.

3.1. In response to the above, the State by way of cross-objection, justified the initiation of action under Section 42 of the Act for the alleged purchase and sale suppressions, reversal of ITC besides stock discrepancy as detected during audit inspection. It is also contended that rightly the plea of

reconciling figures during filling of IT return as was raised by the dealer assessee rejected. The profit margin by 5% according to the State seems quite reasonable, while calculating the sale value vis-a-vis the purchase suppression. With respect to the levy of penalty, as contended, its imposition is automatic by virtue of Section 42(5) of the Act since there lies no requirement or statutory obligation to look for mens rea.

4. As per the AA, the dealer assessee disclosed 5% and 13.5% basic purchases of goods in its periodical return at ₹16,07,90,609.00 and ₹5,58,89,542.00 respectively for the financial year 01.04.2013 to 31.03.2015 and claimed input VAT paid thereon and besides that, MRP purchase of fertilizers was effected during the year 2013-14 and 2014-15 but as per the books of account, discrepancy to the tune of ₹6,23,412.00 in basic purchase value vis-a-vis transaction with respect to goods in the category of 13.5% for the year 2014-15 was revealed, however, later on, revised return was filed, which was beyond time and was not acceptable in view of proviso to Section 33(5) of the Act and for that, entire transaction of ₹6,23,412.00 under 13.5% category for the period 2014-15 having not been disclosed in the periodical return was treated as a purchase suppression. Similarly, an amount of ₹17,02,168.00 was held as the sale suppression in respect of 5% category goods for the year 2014-15. According to the learned counsel for the dealer assessee, the amounts shown in the revised returns could not have been rejected, inasmuch as, proviso to Section 33(5) of the Act has been misinterpreted. The learned Counsel (CT), on the other hand,

contended that since the revised returns were filed on 07.10.2015 after receiving the audit notice fixed to 09.10.2015, the AA, in view of bar contained in sub-Section (5) of Section 33 of the Act could not have accepted the voluntary disclosures. It is apprised to the Tribunal that the dealer assessee paid in advance an amount of ₹76,956.00 as VAT payable after reconciliation of purchase and sale figures, which was a disclosure, made in time. As per the proviso to sub-Section (5) of Section 33 of the Act, any such voluntary disclosure shall not be accepted, where it is made or intended to be made after receipt of the notice for tax audit under the Act 'or as a result of such audit', an expression which was later substituted by the Odisha Value Added Tax (Amendment) Act, 2015 w.e.f. 01.10.2015. The voluntary disclosures so made was on 07.10.2015, whereas, it seems that tax audit notice had been issued prior and tax audit visit was fixed to 09.10.2015. In view of said proviso to Section 33(5) of the Act, the AA did not accept the voluntary disclosures and it was rightly so for the fact that the revised returns were filed not within the time stipulated under the Act. The filing of annual returns was again beyond time. In under the above circumstances, such voluntary disclosures made by the dealer assessee could not have been accepted by the AA. But, insofar as the deposit of ₹76,470.00 made by the dealer assessee is concerned, it was well before receiving the tax audit notice which ought to have been accounted for. In fact, considering the discrepancies, assessment for the tax period 01.04.2013 to 31.03.2015 was taken up on best judgement basis with addition of 5% profit margin, which according to the Tribunal, does not suffer

from any serious infirmity. As per Rule 49 of the Rules, apart from books of account, such other records and documents are required to be examined and if necessary, enquiry is to be conducted for the purpose of assessment under Section 42 of the Act and the assessing authority, after hearing the dealer in the manner specified therein, is to assess to the best of judgement, the amount of tax payable by such dealer in respect of a tax period or tax periods for which the assessment proceeding has been initiated. In the instant case, considering the returns filed by the dealer assessee and discrepancies noted down, assessment was made on best judgement basis and accordingly, the tax turnover was determined and in the considered view of the Tribunal, it does not really require any interference. As regards the reversal of ITC of ₹1,804.25 on damaged stock, again no illegality can be attributed for the fact that it was impermissible, in view of Section 20(8)(f) of the Act which clearly stipulates that no such credit shall be claimed or be allowed in favour of a dealer in respect of goods purchased on payment of tax, if such goods are not sold due to any theft, damage and destruction. With respect to the stock discrepancy of ₹25,403.00, it needs no intervention due to the fact that physical stock of selected items was noted at the time of audit inspection and was verified from the stock account maintained by the dealer assessee. Therefore, no real justification lies in order to interfere with the finding of the authorities below on the stock discrepancy which has rightly been added to the turnover.

4.1 The learned counsel for the dealer assessee cited a ruling of the Hon'ble Apex Court in the case of State of Kerala Vrs. K.T.Shaduli Yusuff reported in (1977) 39 STC 478 (SC), while contending that in so far as the present case is concerned, best judgement assessment was not made as per the procedure prescribed in Rule 49(5) of the Rules. The decision ibid was with reference to Section 17(3) of the Kerala General Sales Tax Act, 1963, wherein, it was held and observed that best judgement assessment was only permissible after examining the books of account and making such enquiry. According to the learned counsel for the dealer assessee, the above decision is applicable as Rule 49 (5) of the Rules is a similar provision. In the case at hand, the AA, as against the fact that there were discrepancies while comparing the returns in juxtaposition of the books of accounts,, proceeded to determine the tax due vis-a-vis the dealer assessee after examining all the materials available in the record and then, deemed it just and proper to make the assessment to the best of judgment, which is more or less in compliance of Rule 49(6) of the Rules. Moreover, the revised returns were not accepted for being filed belatedly i.e. on 07.10.2015 just a couple of days before the tax audit visit dated 09.10.2015. In absence of any serious illegality being committed, the Tribunal is not inclined to hold that best judgement assessment was outrightly impermissible. One more decision in the case of Kollanur Agencies Vrs. Asst. Commissioner (Assessment), Sales Tax Office, Special Circle, Trichur and Others reported in (1991) 80 STC 177 (Kerala) was referred to while challenging the imposition of penalty. According to the Tribunal,

unless, there is suppression established or one or more of other conditions of Section 42(1) of the Act is/are fulfilled, penalty is not to be levied. If a transaction is not disclosed in the return but apparently finds place in the books of account, in true sense, cannot be said as suppression. In the present case, it is not that the transactions alleged to be purchase and sale suppressions had not been a part and parcel of the books of account. The dealer assessee rather is guiltily of not disclosing it in return which was filed few days before the date fixed for audit inspection. The voluntarily disclosures were made on 07.10.2015 apparently after receipt of the tax audit notice. In view of Section 33(5) of the Act, a voluntary disclosure shall not been accepted either when it is made or intended to be made after receipt of the audit notice, or as a result of such audit conducted against the dealer assessee as it stood then until 30.09.2015. As such, it may be claimed that a voluntary disclosure which was made before the result of such audit arrived to be permissible and thus, could be accepted by way of a revised return filed under Section 33(5) of the Act. As earlier discussed, the alleged suppressions were found in the books of account not being reconciled with the returns filed. In such view of the matter and having regard to the expression 'or as a result of such audit', then contained in proviso to sub- Section (5) of Section 33 of the Act, the Tribunal is of the humble opinion that the dealer assessee, since filed revised returns albeit with some amount of delay and not in time, considering the peculiarity of the facts and circumstances of the case, ought not to have been levied with penalty. It is reiterated that the levy of penalty does depend on real suppression being

established or on the satisfaction of one or more conditions of Section 42(1) of the Act. Furthermore, it has been the recent view of the Tribunal that some element of discretion is involved to consider whether to levy penalty or not and for that, the term 'shall' appearing in sub-Section (5) of Section 42 of the Act does not take away such discretionary power especially against the background of voluntarily disclosures made under certain circumstances. Having concluded so, the Tribunal arrives at a final decision that the assessment under Section 42 of the Act vis-a-vis the dealer assessee though not to be interfered with but levy of penalty was certainly uncalled for.

5. Hence, it is ordered.

6. In the result, the appeal stands partly allowed. As a logical sequitur, the impugned order dated 14.08.2018 passed in Appeal No. AA (VAT) 46/2016-17 is hereby set aside to the extent indicated above. Consequently, the AA is directed to recompute the tax liability vis-a-vis the dealer assessee for the tax periods 01.04.2013 to 31.03.2015 and pass appropriate order according to law in the light of the observations of the Tribunal, preferably, within a period of three months from the date of receipt of a copy of the above order. The cross-objection filed by the State is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman