

**BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL:
CUTTACK.**

S.A.No.173(VAT) of 2014-15

(From the order of the learned JCST, Cuttack I Range,
Cuttack, in Appeal case No.AA-(VAT)63/CUIE/2013-14,
Dated 07.06.2014)

Present: ... **Sri Subrat Mohanty, Judicial Member**

... **Sri R.K.Pattnaik, Accounts. Member**

M/s.Bhagyalaxmi Store,
Malgodown, 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.B.P.Mohanty, Advocate.

For the Respondent

...Mr.M.L.Agarwal. S.C.(C.T.).

Period of Assessment:-01.04.2007 to 31.03.2012

Date of hearing:10.09.2019 * Date of Order:10.09.2019

O R D E R

A confirming order of assessment under Section-42(4) of the OVAT Act for the tax period 01.04.2007 to 31.03.2012 relating to the assessee-dealer is under challenge in this appeal for the prayer of deletion of demand towards tax and penalty.

2. The assessee-appellant has questioned the legality and sustainability of the impugned order on following questions:

- (i) Whether, the determination of suppression of turnover is erroneous?
- (ii) Whether, enhancement of the GTO by Rs.20 Lakhs on the basis of determination of suppression is whimsical and exorbitant?
- (iii) Whether, penalty as imposed is unwarranted in the case in hand?

3. The instant dealer/appellant is a proprietorship concern registered under the Act engaged in wholesale business of rice, Atta, Maida, Suji, Broken Rice, Bran and Chokad. It effects purchase and sale within the State. Audit Team duly situated under the provision of Section-41 of OVAT Act on visit to the dealer's unit prepared and submitted the audit report suggesting audit assessment for the tax period 01.04.2007 to 31.03.2012 with the allegations of stock discrepancy detected while comparing the C.A. Report 2007-08 with the books of accounts. As per C.A. report for 2007-08 the opening stock as on 01.04.2007 was Rs.22,10,386.20 and closing stock on 31.03.2008 was Rs.34,13,539.00. The same is much higher than the figure shown in the books of accounts such as opening balance of Rs.8,16,886.89 and closing balance of Rs.513539.00.

On the basis of audit visit report the STO, Cuttack I Circle assessed the dealer under Section 42(4) of the OVAT Act. The dealer plea is the CA report was a rough copy prepared to submit before the bank for loan purpose and that is why inflated figure was mentioned in the CA report. The aforesaid submission found not trust worthy to the satisfaction of the assessing authority, as a result the assessing authority did not accept the books of accounts treating it not containing true and correct statements. Consequently, he enhanced the GTO suitably by Rs.20 lakhs and assessed dealer. In the end,

the dealer was asked to pay balance tax due of Rs.81921.43 with penalty of Rs.163842.86, totalling the demand at Rs.245764.00.

4. Felt aggrieved, the dealer knocked the door of the first appellate authority. The learned DCST (Appeal), Cuttack I Range, Cuttack as first appellate authority vide impugned order dated 07.06.2014 confirmed the demand as raised by learned Assessing Officer. The order of first appellate authority is an ex parte order.

5. When the matter stood thus, the dealer being further aggrieved preferred this second appeal with the contentions like the enhancement of the turnover by Rs.20 lakhs is exorbitant, the calculation of suppression is erroneous, the CA report was a rough calculation showing higher amount of closing stock relating to higher amount of turnover for the purpose of obtaining loan, the CA report containing actual figure being produced before the authorities only which should have been accepted and since the dealer is not guilty of suppression is not liable to pay penalty.

6. The appeal is heard with cross objection. The revenue has supported the findings of fora below in the cross objection.

7. In the argument, the learned Counsel for the dealer placed his reliance in the matter of M/s.Utkal Metals Vrs. State of Orissa in STREV No. 127/2004 final order dated 20.03.2019 wherein and whereby the Hon'ble Court while placing reliance in the matter of Commissioner of Income Tax Vrs. Patel Proteins (P) Ltd. reported in (2017) 88 taxmann.com 506 (Gujarat) and in the case of Commissioner of Income Tax I V. Vrundavan Roller Floor Mill, reported in (2016) 72 taxmann. Com 250 (Gujarat) has held that the inflated statement

furnished to the bank authorities for the purpose of availing larger credit facilities cannot be added to the turnover.

8. As mentioned above, the claim of the dealer in this appeal are calculation of suppression basing on the rough CA the audit report is erroneous and enhancement being by Rs.20 lakhs is exorbitant.

9. Per contra, the learned Standing Counsel strenuously argued that there cannot be CA report called rough CA report. In the absence of any evidence that the dealer had actually prepared inflated CA report which was presented before the bank. The dealer's plea cannot be believable. Further, without examining the CA who has prepared a inflated report and a actual report the dealer's plea cannot be said to be duly established or proved.

10. It is a treat in law that when the taxing authority found prima-facie materials indicating suppression by the dealer is initial burden to proof has been duly discharged on the basis of the entries in those documents . Now, it is the burden is shifted to the dealer to establish why and how these documents should not be considered to be contained the corrected figure. By saying only, the documents were prepared for other purpose, the dealer cannot be escaped from the burden rest on him in law to disprove the facts gathered from the incriminating documents.

11. Reverting to the case in hand, it is found that the assessing authority has discarded the theory advanced by the dealer while dis-believing the entries in the books of accounts whereas the first appellate authority has accepted the findings of the assessing authority mechanically. The impugned order is an exparte order where the dealer could not avail opportunity to adduce evidence to establish his plea. It is not worthy to mention here that the first appellate

authority is broadly an extended forum of assessment. In that view of the mater, in the case in hand, it is believed that the matter should be remitted back to the first appellate authority for disposal afresh in consideration of the plea of the dealer with necessary documents/oral or documental produced by the dealer. It is further made clear that burden is rest on a dealer to establish that the CA report considered by the audit team or the assessing authority content inflated figure and to that extent in my considered view the submission of the learned Standing Counsel is quite conceivable that the dealer should produce oral or documentary evidence from the bank authority or from the CA.

12. So far as the enhancement by Rs.20 lakhs, the plea of the dealer is the same is exorbitant. In an assessment under Section-42(4) of the OVAT Act if the books of accounts is not rejected then there is not scope for the revenue to apply best judgment principle and once where best judgment principle is not applied as per law, enhancement cannot withstand. The enhancement must have reasonable nexus to the suppression detected and it must be a reasonable one basing on many factors like volume of transaction over the period, nature of transaction, nature of business and the goods in trade etc. However, it is made clear that there cannot be application of best judgment principle and enhancement to the GTO unless the books of accounts is specifically rejected in express terms. It is pertinent to mention here that in the case in hand, it is not done. Similarly, the books of accounts has not been rejected by the first appellate authority so in the remand case the first appellate authority will do well decide this question afresh.

13. The question of penalty as disputed by the dealer is remained open for decision afresh as it is

consequential to the determination of suppression and balance tax liability, if any. With the observation here in above, it is ordered.

14. The appeal is allowed in part on contest. The impugned order is set-aside. The matter is remanded back to the first appellate authority for disposal afresh as per the direction herein above.

Dictated and Corrected by me,

(Sri Subrat Mohanty)
Judicial Member.

(Sri Subrat Mohanty)
Judicial Member.

I agree,

(Sri R.K.Pattnaik)
Accounts Member-III.