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

P r e s e n t: **Shri A.K. Dalbehera, O.S.J.S.**
M.A., LL.M.
1st Judicial Member

S.A. No. 252(V) of 2017-18
(Arising out of the order of the learned Addl. CST (Appeal) Odisha, Cuttack, in Appeal Case No. AA-JCST/JR(V)/113/2014-15, disposed of on dtd.28.06.2017)

M/s. Ramesh Prasad Sao,
At:- Kamajoda, P.O.- Joda,
Keonjhar, Odisha. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. K.K. Kurmy, Advocate
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 12.02.2020 ******** Date of order: 03.03.2020

O R D E R

This appeal is directed against the order dtd.28.06.2017 passed by the learned Addl. Commissioner of Sales Tax (Appeal), Odisha, Cuttack (hereinafter referred to as, the learned ACST) in Appeal Case No. AA-JCST/JR(V)/113/2014-15, wherein he enhanced the demand from Rs.1,84,540.00 to Rs.1,93,693.00 as raised by the learned Joint Commissioner of Sales Tax, Jajpur Range, Jajpur Road (hereinafter referred to as, the JCST) for the assessment period 01.04.2011 to 31.03.2013 u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act).

2. The brief facts of the case are that, the appellant-dealer is a mining owner having an iron ore mines at Guali. The mining activities during the aforesaid period was done mainly through raising contractors. The iron ore lumps extracted from mines through raising contractors were crushed in the crusher of the dealer and the appellant-dealer effected sale of size iron ore and iron ore fines obtained through the aforesaid process. In the AVR submitted by the DCST, Barbil Circle, Barbil it was reported that the ground loss of 59.93 MT of size iron ore disclosed by the appellant-dealer should be treated as sale suppression of Rs.2,33,727.00 and to be taxed. In response to notice, the appellant-dealer appeared and explained that the ground los of iron ore of 59.93 MT during 2011-12 was due to shifting and loading of 7587.970 MT of material which was shifted from the mines to the siding and loaded into wagons. The loss equals to 0.78% of the total quantity and such loss should be admissible taking into account the nature of the material and the number of the handling points involved in such operation. The allegation of suppression of Rs.2,33,727.00 on account of the ground loss is not sustainable as no consideration for such sales has been received by the dealer. Regarding the suggestion for taxing Rs.2,36,402.00 u/s.12 of the OVAT Act the dealer admitted the purchase of RCC pillars, machinery spares and consumables for Rs.83,300.00 + Rs.1,40,250.00 = Rs.2,23,550.00. Accordingly, the GTO of the dealer was determined at Rs.680,16,60,128.00 and TTO at Rs.649,08,25,193.00. After allowing adjustment of tax paid of Rs.29,14,45,591.00, the balance tax payable was at Rs.61,513.20 and two times penalty u/s.42(5) of the OVAT Act was imposed which altogether came to Rs.1,84,540.00.

3. Being aggrieved by the order of the learned JCST, the appellant-dealer preferred an appeal before the learned ACST who

enhanced it to Rs.1,93,693.00. Being further aggrieved by the order of the learned ACST, the appellant-dealer preferred this second appeal.

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

5. Heard the learned Counsel for the appellant-dealer and the learned Standing Counsel for the Revenue. Perused the case record and the grounds of appeal. I also perused the materials available on record and the plea taken in the cross objection.

6. The appellant-dealer came up with this second appeal on the grounds that the impugned order imposing penalty of Rs.1,29,128.00 u/s.42(5) of the OVAT Act is ex facie illegal, arbitrary and invalid. The Addl. CST (Appeal) seriously erred in law by relying on the judgment of the Hon'ble Apex Court in the case of UOI Vs. Dharmendra Textile Processor & Other reported in [2008] 18 VST 180 (SC) and judgment of the Hon'ble Orissa High Court in the case of Jindal Stainless Ltd. Vs. State of Odisha reported in (2012) 54 VST 1 (Ori.). For levy of penalty u/s.42(5) of the OVAT Act existence of mens rea is an essential pre-requisite. Authorities under the Act acquires jurisdiction to conduct audit assessment u/s.42(5). The ingredients u/s.42(5) indicate that the liability u/s.42(5) is a criminal liability and element of mens rea is inbuilt in them. No proceeding for levy of penalty u/s.42(5) of the OVAT Act can be initiated and continued in the facts and circumstances of the case. The impugned order is otherwise erroneous on facts and also on law. It was prayed that the impugned order passed by the learned ACST imposing penalty be quashed and the appeal be allowed with consequential relief to the appellant.

7. Section 42(5) of the OVAT Act (as then was) reads 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."

A plain reading of the aforesaid provision indicates that once some amount of tax is assessed under sub-section (3) or sub-section (4) of Section 42, penalty equal to twice the amount of tax assessed shall be automatically imposed. It is not required to see whether the assessee had any malafide intention or not. Even if the assessee had no malafide intention, penalty under this provision will automatically be imposed.

8. Penalty is imposed under many provisions of taxation law. However, the language is not the same in case of all such provisions of penalty. Therefore, whether imposition of penalty under particular provision is automatic or not is to be construed by the language of that provision. This has been clarified by the Hon'ble Apex Court in the case of **Guljag Industries Vrs. Commercial Tax Officer (2007) 9 VST 1 (SC)** and the relevant portion of the said decision is quoted below:-

> "xxx
> Existence of mensrea is an essential ingredient of an offence. However, it is a rule of construction. If there is a conflict between the common law and the statue law, one has to construe a statute in conformity with the common law. However, if it is plain from the statute that it intends to alter the course of the common law, then that plain meaning should be accepted. Existence of mensrea is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals. A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is different from the penalty for a crime.xxx"

9. Penalty provisions under taxation law vary; some are of the nature of civil liability and some are of the nature of criminal liability. If a penalty provision is of the nature of a civil liability,

existence of mens rea or malafide intention is not required to be seen for imposition of penalty as because, under such a civil liability, imposition of penalty is provided for as a remedy for loss of revenue. On other hand, where a penalty provision is of the nature of a criminal liability, existence of mens rea is an essential ingredient before imposition of penalty as because the provision of imposition of penalty in this case is to punish the assessee for a wrong doing with malafide intention. This has been clarified by the Hon'ble Apex Court in the case of **Union of India Vrs. Dharmendra Textile Processors (2008) 18 VST 180 (SC)**.

The constitutional validity of Section 42(5) of the OVAT Act was challenged by **M/s. Jindal Stinless Ltd.** which was answered by the Hon'ble High Court of Orissa vide W.P.(C) No.15962 of 2010 as quoted below:-

> "26. The constitutional validity of sub-section (5) of Section 42 of the OVAT Act is under challenge basically on two grounds:
>
> (i) this provision mandates imposition of penalty without prejudice to any penalty, or interest that may have been levied under any provisions of the Act; and
>
> (ii) without any show cause to the affected assessee.
>
> 27. VAT is indirect tax on consumption of goods. It is the form of collecting sales tax under which tax is collected in each stage on the value added to the goods. The basic object of VAT Scheme is to provide voluntary and self compliance. It goes without saying that to plug the leakage of revenue, the Legislature enacted law authorizing imposition of penalty for infraction of any statutory provision. We are conscious that generally penalty proceedings are quasi judicial in nature. Therefore, before imposing penalty, opportunity of hearing should be

provided to the affected assessee-dealer. In the OVAT Act, various Sections provide for imposition of penalty for infraction of statutory provisions. In most of those Sections opportunity of being heard is provided to a dealer before imposition of penalty. Those Sections are Section 28(1), Section 31(9), Section 34(3), Section 54(6), Section 61(5), Section 62(6), 65(2), Section 73(10), Section 73(12)(e), Section 73(13), Section 76(3), Section (76(8), Section 101(4) and Section 107(4). The present position is entirely different. Quantification of penalty is dependant on the tax assessed under Section 42 of the OVAT Act. For the purpose of assessing tax, opportunity of hearing was afforded to the assessee, the explanation of the assessee and its books of account were examined and considered. Penalty is only quantified on the basis of the tax assessed. No discretion is left with the Assessing Officer for levying any lesser amount of penalty. Therefore, even if further opportunity will be given to the assessee before imposing penalty that will be a futile exercise. Penalty is not independent of the tax assessed. If the tax is assessed, imposition of penalty under 42(5) is warranted.

28. The matter may be looked into from different angle. Section 42 of the OVAT Act deals with “Audit Assessment”. As stated above, imposition of penalty is dependent upon the quantum of tax assessed in audit assessment under Section 42 of OVAT Act. If such a penal provision is not provided then fraudulent dealers would seriously venture to evade tax and whenever they will be caught hold of they will simply pay the tax and escape. Therefore, the provision for imposing penalty twice the amount of tax

assessed, under Section 42 of the OVAT Act has been made so that a dealer-assessee would refrain himself from taking any step to avoid payment of legitimate tax. If, however, any dealer indulges himself in any fraudulent activities to evade tax, then in addition to tax assessed he would pay penalty which is twice the amount of tax assessed and therefore, it cannot be said that the provision in this regard is arbitrary and unreasonable.

29. Against the assessment of tax and penalty there is a provision for appeal. In appeal, if the amount of tax assessed under Section 42 of the OVAT Act is reduced, the quantum of penalty will also be reduced automatically.

30. In view of the above, we are of the considered view that Section 42(5) of the OVAT Act authorizing imposition of penalty equal to twice the amount of tax assessed under Section 42(3) or (4) of the OVAT Act is constitutionally valid. It is not arbitrary, unreasonable, oppressive, or hit by Article 14 or in any way ultra vires the Constitution of India."

10. From the aforesaid discussion it is clear that, the provision of penalty u/s.42(5) of the OVAT Act is of the nature of civil liability. Once a quantum of tax is assessed against an assessee under sub-section (3) or (4), penalty equal to twice the amount of tax assessed has to be imposed automatically. There is no requirement to examine the existence of mens rea or malafide intention. Hence, the stand taken by the appellant-dealer as regards the mens rea is baseless. The imposition of penalty u/s.42(5) of the OVAT Act has no element of criminality. It is consequential to assessment u/s.42 whenever more tax is assessed than what is returned. This is a pure civil liability. Hence, mens rea or criminal intention is absent in provisions u/s.42(5) of the Act. The suppression of tax amounts to

evasion of tax. The appellant-dealer had deliberately suppressed the tax and the same came to light only after conducting tax audit. Had the audit not been undertaken, the appellant-dealer would have evaded tax. As the appellant-dealer had suppressed the tax, penalty twice the amount of tax has been rightly imposed upon the appellant-dealer. Hence, the order of assessment is reasonable and the order of the learned JCST needs no interference who had corrected the error by raising the actual tax and imposing two times penalty.

11. In the net result, the appeal is dismissed and the impugned order is hereby confirmed. The cross-objection is disposed of accordingly.

Dictated & corrected by me,

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

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