

purchases from outside worth of Rs.27,50,370.72 but had shown it in return at Rs.25,29,216.00. In the assessment, learned STO as assessing officer accepted the suggestion of the audit team like, there was purchase suppression of Rs.2,21,154.72. As the dealer remained absent, he passed the assessment setting the dealer *exparte* and in the result, he determined the GTO/TTO at Rs.20,72,658.00, the tax liability was calculated at Rs.2,59,082.25, the dealer having paid tax of Rs.1,96,533.00 along with the return, the balance amount of Rs.62,549.25 was raised along with the balance tax due, further an amount of Rs.10,633.33 was charged towards interest u/s.34(1) of the OVAT Act. Further, penalty u/s.42(5) of the OVAT Act at twice of the tax due was imposed thereby, the total demand against the dealer towards tax, interest and penalty was raised at Rs.1,98,281.00.

3. The dealer being aggrieved, knocked the door of first appellate authority. There also, the first appellate authority disposed of the appeal before him setting the dealer *exparte* for his non-appearance and in the impugned order the first appellate authority just reiterated the pleas of the assessing authority and confirmed the demand, hence as a result the tax due, interest and penalty as raised by assessing authority remained undisturbed.

4. Being unsuccessful before both the fora below, the dealer filed this second appeal. The main contention of the dealer are, the assessing officer having no jurisdiction under law had assessed the dealer. The original assessment was passed *exparte* without offering proper opportunity of being heard to the dealer. Similarly, the impugned passed by the first appellate authority was also an *exparte* order thereby not allowing the dealer a proper opportunity of being heard, causing violation of principle of natural justice in the case in hand. The suppression as suggested by the audit team was baseless and enhancement of the suppression by Rs.5 lakhs as calculated by the assessing authority is groundless, so the dealer is not liable to pay any tax.

5. The appeal is heard with Cross Objection from the side of the Revenue. Revenue has supported the findings of first appellate authority in the cross objection.

6. The questions raised for decision in this appeal are-

- (i) whether the authority below has not afforded proper opportunity of being heard to the dealer and thereby there was violation of principle of natural justice to the dealer;
- (ii) whether the authority below has committed wrong in not deleting the tax due and penalty by treating the assessment passed by the assessing authority having no jurisdiction;
- (iii) whether the first appellate authority is wrong in confirming the order of determination of suppression as well as enhancement of the turnover as held by the assessing authority;
- (iv) what order?

7. Here in this case, we found that both the fora below have passed order setting the dealer *exparte*. The order of assessing authority as it revealed, the dealer did not appear in spite of repeated notice and on the other hand the assessment was to be completed within a stipulated time, so for that reason the assessing authority passed the *exparte* order. Similarly, the order of the first appellate authority as it revealed, opportunities were given to the dealer time to time but the dealer remained callous, as a result, the impugned order was also passed in absence of the dealer setting him *exparte*. In the second appeal, the dealer has raised the questions like jurisdiction of the STO, the determination of suppression and enhancement of suppression as baseless. The assessing authority had assessed the dealer as per provision u/s.42(3) of the OVAT Act as the dealer had not produced the registers and connected documents before him. The order of the first appellate authority was also without scrutiny of the details of books of account and connected documents of the dealer.

Now, before this forum the dealer has stated that he was attending the fora below but the fora below had ignored his presence. The allegation of purchase suppression as found established was on the basis of AVR and the enhancement of the turnover as held by the assessing authority was on application of the best judgment principle in the case in hand. However, once the dealer is able to produce all his documents with registers, in that case the assessing authority will be able to determine the actual amount of suppression in the light of AVR.

8. Learned Counsel for the dealer strenuously argued that, there is no scope for the assessing authority to go beyond the AVR when the audit team had suggested for suppression upto Rs.2,21,154.72, there was no occasion for the dealer to go beyond the audit visit report and to determine the suppression at a higher amount. In the audit assessment, the assessing authority cannot travel beyond the dealer, it is the well settled principle as laid down by the Hon'ble Court. So, even though it is established that, the dealer was guilty of suppression, then the suppression must be confined to the amount as suggested by the audit team. If the assessing authority in course of the assessment found some new materials for enhancement of the GTO, he is to give separate notice to the dealer for such enhancement. So, any enhancement without notice and without giving proper opportunity of being heard to the dealer cannot withstand in law. The first appellate authority while confirming the order of assessing authority has ignored the mandate of the law as above. So, in the case in hand, it can be said that, the first appellate authority has committed wrong in confirming the order of assessing authority so far as the enhancement is concerned.

9. When on the question of enhancement, it is felt that, the matter need to be re-inquired to by the assessing authority and for that purpose the matter is to be remitted back to the assessing authority. I am of the considered view that, there is no need to enter into the other grounds like jurisdiction of the assessing authority or

sustainability of imposition of penalty and interest as levied. It is the assessing authority in the remand assessment on the materials available before him by offering a proper opportunity to contest the case by the dealer then, will decide the tax liability, penalty and interest, if any to be paid by the dealer.

10. In the result, it is ordered.

11. The appeal is allowed on contest. The matter is remitted back to the assessing authority for assessment afresh in the light of observation hereinabove. The impugned order and consequentially the order of assessment are hereby set aside.

Dictated & corrected by me,

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

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