

**BEFORE THE SINGLE BENCH: ODISHA SALES TAX
TRIBUNAL, CUTTACK.
S.A.No. 229(V)/2018**

(Arising out of order of the Id. JCST (Appeal), Ganjam Range,
Berhampur, in First Appeal Case No. AAV.28/2014-15,
disposed of on dtd.10.08.2018)

**Present: Smt. Sweta Mishra
2nd Judicial Member**

M/s. Vikash Enterprises,
Pani Tanki Road,
Berhampur.

.... Appellant

-Versus-

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

.... Respondent

For the Appellant : Mr. B.B. Panda, Advocate

For the Respondent : Mr. S.K. Pradhan, A.S.C. (C.T.)

(Assessment Period : 01.04.2011 to 31.03.2014)

Date of Hearing: 23.02.2021 *** Date of Order: 26.02.2021

ORDER

This appeal is directed against the order of the learned First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Ganjam Range, Berhampur (in short, FAA/JCST) in First Appeal No. AAV.28/2014-15 dtd.10.08.2018 in confirming the assessment order passed by the learned Sales Tax Officer/Assessing Authority (in short, STO/AA) for the assessment period from 01.04.2011 to 31.03.2014 u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act).

2. The facts of this case can be briefly stated thus :

The dealer-appellant, in the instant case, carries on business in wooden furniture like cots, sofa sets, dining sets, cushion chairs, computer tables, centre tables etc. on retail

basis only. The dealer-appellant used to purchase the business goods from both inside and outside the State of Odisha. The dealer filed the returns as self-assessed in compliance to the Sec.33 read with Sec.39 of the OVAT Act, 2004. The dealer-appellant used to maintain the purchase register and sale register supported with purchase invoices and sale invoices, retail invoices and tax invoices to keep the business records. On receipt of the AVR in Form VAT-303 from the Tax Audit Team, the LAO initiated a proceeding u/s.42 of the OVAT Act against the dealer for the said assessment period and issued statutory notice in Form VAT-306 for hearing. However, despite issuance of several intimations, the dealer neither appeared in person nor through his counsel at the time of hearing of the case. Resultantly, the LAO passed the assessment order in absence of the dealer on ex-parte basis basing on the materials available on record. Ultimately, the LAO raised demand of Rs.2,47,959/- inclusive of penalty basing upon the findings of the Tax Audit Team.

3. Being aggrieved with the order of assessment, the dealer preferred first appeal before the learned First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Ganjam Range, Berhampur (in short, FAA/JCST), who in turn, rejected the appeal preferred by the dealer and confirmed the assessment order passed by the learned AO.

4. Being further aggrieved with the order of the learned FAA/JCST, Ganajm Range, Berhampur, the dealer knocked the door of this Tribunal by way of filing this second appeal with the contention that, the order passed by the learned FAA/DCST is unjust, improper and not based on the facts and law.

5. Cross objection has been filed by the State-respondent in this case.

6. Learned Advocate appearing on behalf of the dealer has challenged the order passed by the learned FAA. He has vehemently argued that, the order of the learned FAA is quite improper and prejudice to the very principle of natural justice. The grounds taken before the learned FAA that at Sl.No.3, 4 & 5, that the learned AO has exceeded his statutory power to issue notice and proceed for audit visit assessment for the tax period that is for the quarter ending March, 2014 (3 months) where the due date of return for the appellant was dt.21.05.2014, therefore, the assessment for post periods facts without giving statutory mandate to disclose is an act of want of statutory power. These grounds have not been acted upon by the learned FAA and no reason was given for non-acceptance of the same in his order of appeal. The learned FAA has not considered the facts and grounds available in the records of proceedings and taking plea of non-appearance entire grounds and explanation available in the records of appeal and assessment has been rejected in a mechanical manner, which is not permissible in law. The average profit margin should not be factor for establishment of any kind of suppression ignoring the profit margin disclosed and accepted by the IT Department, which varies from year to year. In a number of appeals, the Tribunal has settled this issue and the same has been accepted by the Revenue. Nowhere in the AVR and audit assessment, the figures disclosed for the tax periods January to March, 2014 has been considered in order to arrive the actual sales and purchases, the submission and grounds taken by the dealer-appellant that, the Assessing Officer has no authority to

accept and proceed for the audit assessment for any part tax periods without examining the returns, which is a mandatory provision for the VAT Rules for audit and assessment. Therefore, the order is completely silent to consider this ground, which is nothing but non-application of judicial mind. Outside soft wood furniture were lost its saleable/marketable quality due to water and moisture during the time of super cyclone and for this the valuation has been reduced, therefore, the learned Assessing Officer and Audit Visit Officer were aware about the explanation and supporting documentary evidence that the claim of loss was intimated to the insurance authority, this explanation has not been accepted without giving any reason, therefore, the loss of value of outside purchased goods should be deducted from the turnover in order to arrive at a just judicial conclusion. The learned Assessing Officer has issued notice for the Audit visit in Form VAT-305 on dt.05.05.2014 (due date return for the Quarter Ending March, 21.05.2014) for the tax period 01.04.2011 to 17.02.2014). The Audit report was prepared on dt.10.03.2014, therefore, issue notice on premature audit report up to 17.2.2014 before the end of the financial power is want of statutory jurisdiction for any kind of audit visit assessment. The learned Advocate for the dealer has cited one order passed by the Full Bench in S.A.No. 48(VAT) of 2012-13 dt.8.4.2019 and also cited judgment passed in case of Asst. Commercial Taxes Officer Vrs. Eagle Rubber Industries reported in Vol.64 VST 510 (Raj) and order passed by the Single Bench in S.A.No. 94(V)/2013-14 dtd.28.7.2013. The learned Advocate for the dealer has submitted that, there is clear cut violation of principle of natural justice for which assessment is not

sustainable, liable to be annulled in the interest of justice. So the learned Advocate for the dealer has prayed to allow the appeal filed by the dealer and to set-aside the order of the learned FAA.

7. On the other hand, during the course of hearing, learned Addl. Standing Counsel, Mr. Pradhan for the State argued that, the grounds raised in the appeal petition are misconceived and liable to be dismissed in toto. The order of the learned FAA appears to be just and proper. There is no reasonable merit in the second appeal filed by the dealer, which is not sustainable in the eyes of law. Basing on audit visit report, the learned Assessing Officer issued notice to the dealer and initiated assessment proceedings. But the dealer neither appeared nor produced any books of account. The dealer was given sufficient opportunity to produce the documentary evidence, but the dealer failed to produce the same. Similarly the dealer could not produce any satisfactory documents in support of his contention before the learned FAA. Hence, the order of the learned FAA is fully justified in confirming the demand raised by the AO. Without appearance and submission of proper books of accounts by the dealer-appellant in the assessment and appeal stage in spite of getting sufficient opportunities, the completion of assessment to the best of judgment and further confirmation by the learned FAA is quite proper. The provision of penalty u/s42(5) of the OVAT Act is of the nature of civil liability. There is no requirement to examine existence of *mens rea* or malafide intention. The order of the learned FAA is crystal clear with respect to the other points raised by the dealer. He has dealt each and every item which is self-explanatory and requires no

further interference. No natural justice has been violated in the instant case. So, he has prayed to dismiss the appeal filed by the dealer and to confirm the order of the learned FAA.

8. Heard the learned Advocate, Mr. B.B. Panda appearing on behalf of the dealer and learned Addl. Standing Counsel, Mr. Pradhan on behalf of the State. Gone through the grounds of appeal, impugned orders of appeal and assessment and arguments of both the sides at the time of hearing. In view of the facts and circumstances of the case and after analysing the points raised in this appeal, I am of the considered opinion that, the points raised by the learned Advocate for the dealer is quite satisfactory and this is a fit case where the matter should be remanded back to the learned FAA to re-compute the tax liability of the dealer. Accordingly, it is ordered.

9. The appeal filed by the dealer is allowed on contest. The order of the learned FAA is hereby set-aside. The matter is remanded back to the learned FAA and he is directed to re-compute the tax liability of the dealer after giving the dealer a reasonable opportunity of being heard within a period of three months from the date of receipt of this order. Cross objection filed by the State-respondent is disposed of accordingly.

Dictated and Corrected by me,

Sd/-
(S. Mishra)
2nd Judicial Member

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