

IN THE HIGH COURT OF ORISSA AT CUTTACK
STREV No. 69 of 2012

State of Odisha, represented by the *Petitioner*
Commissioner of Sales Tax

Mr. Sunil Mishra, Addl. Standing Counsel

-versus-

M/s. Chandrakanta Jayantilal, Cuttack *Opposite Parties*
and Another

Mr. P.K. Jena, Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIK

Order No.

ORDER
05.07.2022

Dr. S. Muralidhar, C.J.

04. 1. The present revision petition by the State is directed against an order dated 14th August, 2012 passed by the Orissa Sales Tax Tribunal, Cuttack (Tribunal) in Second Appeal No.150 (VAT) of 2010-11 partly allowing the appeal filed by the Opposite Party (dealer) against an order dated 17th June, 2011 passed by the Deputy Commissioner of Sales Tax (DCST), Cuttack-I Range, Cuttack in the dealer's appeal i.e. AA (OVAT) 25/CU I CU of 2010-11. The said appeal was in turn directed against the assessment order dated 28th April, 2011 framed by the Sales Tax Officer (STO) under Section 42 of the Odisha Value Added Tax Act, 2004 (OVAT Act) read with Rule 49 of the Odisha Value

Added Tax Rules, 2005 (OVAT Rules) for the tax periods 1st April, 2006 to 31st March, 2010.

2. On 29th September, 2015 on the oral prayer of Revenue, the Collector, Mayurbhanj District was permitted to be impleaded as Opposite Party No.2. Notice was issued to the parties. The Court further required the Standing Counsel for the Revenue to obtain instructions as to whether the Indian Red Cross Society (IRCS) had made any application for refund in terms of the notification dated 4th April, 2005 and whether the said refund had been effected or not.

3. Admit. The following question of law is framed for consideration by this Court:

“Whether on the facts and in the circumstances of the case, the Odisha Sales Tax Tribunal erred in law by deleting imposition of penalty under Section 42(5) of the OVAT Act, particularly when it has held that there is no illegality committed by the fora below in levying tax on the uncollected value added tax amount by the Opposite Party-dealer ?

4. The background facts are that the Assessee (dealer) is engaged in the business of purchase and sale of laboratory and scientific instruments, weighing scales, weights and measures. It also installs weigh bridges for different organizations. Pertaining to the tax periods 1st April, 2006 till 31st March, 2010 an audit team conducted a tax audit under Section 42(3) of the OVAT Act read with Rule 43 of the OVAT Rules. The STO, who headed the audit

team submitted an audit visit report (AVR) in VAT 303 in terms of Section 41(4) of the OVAT Act read with Rule 45(3) of the OVAT Rules on 30th October, 2010 before the Joint Commissioner of Sales Tax (JCST), Cuttack I Range. This was thereafter transferred to the Office of the Assistant Commissioner of Sales Tax, Cuttack I Circle for completion of the audit assessment.

5. Notice in Form VAT- 306 was issued to the dealer on 8th November, 2010 under Section 42(1) of the OVAT Act read with Rule 49(1) of the OVAT Rules. The dealer on 4th December, 2010 sought one month's time to produce the books of account. On 5th April, 2011 he again sought one month's time. On 20th April, 2011 the dealer produced relevant books of account for the said period for completion of the audit assessment. The AVR indicated that the dealer had not collected VAT on sales i.e. Rs.19,77,382/- to the IRCS by resorting to the Finance Department notification dated 4th April, 2005.

6. The dealer had claimed a sum of Rs.19,77,382/- towards VAT exempted sale pertaining to supply of weigh bridge spare parts to the IRCS during the period in question. A letter issued by the District Emergency Officer-cum-Secretary, IRCS, District Branch, Mayurbhanj was produced, which stated that the VAT amount had been excluded from the bill in terms of the FD notification dated 4th April, 2005.

7. The STO in the assessment order analyzed Section 58(2) of the OVAT Act with the aforementioned FD notification dated 4th April, 2005 and found that it revealed that in respect of sale transactions with the IRCS, the dealer had to first charge VAT on the body of the retail invoices raised in the name of the Collector-cum-Chairman, IRCS of the respective districts and the IRCS in respect of such transactions would be entitled for refund of tax paid for goods purchased in the State of Orissa subject to satisfaction of the conditions and restrictions as prescribed under sub-rule (4) of rule 65 of the OVAT Rules, 2005. Since the dealer had committed a gross irregularity in claiming the transaction of weigh bridges sales as exempted, the letter issued by the IRCS, District Branch, Mayurbhanj was found to be untenable. Consequently, the claim of the dealer of Rs.19,77,382/- towards VAT exempted sales was disallowed and the disallowed turnover was added to the taxable turnover and taxed accordingly.

8. Turning to the issue of penalty, the STO noted that the dealer had not revised its returns after detection of the lapses, in terms of Section 42 (5) of the OVAT Act, an amount being twice the tax assessed i.e. Rs.5,95,823.32 was imposed as penalty. This together with the taxed worked out to Rs.8,93,736/-.

9. The appeal filed by the Assessee to the JCST was dismissed by an order dated 17th June, 2011. Thereafter, the Assessee went before the Tribunal. Relying on the decision of the Supreme Court in *Sree Krishna Electricals v. State of Tamil Nadu (2009) 23*

VST 249 (SC), the Tribunal while upholding the orders of the STO and the JCST as regards the tax uncollected VAT amount held as under:

“6...Now coming to the penalty aspect u/s. 42(5) of the O.V.A.T. Act it is to be decided whether the act of the dealer was deliberate or not. Before this forum the learned counsel of the dealer revolved his argument towards the non-collection of VA amount and the penalty imposed u/s. 42(5) of the O.V.A.T. Act. We agree with the ratio decided in the above Sree Krishna Electricals supra case to delete the penalty amount as the dealer has disclosed the same in his books of accounts which were verified by the authority for which it cannot be said that the dealer was involved in evading tax. As discussed above it is a fit case to be remanded back to the learned ACST to make fresh assessment by levying tax on the uncollected VAT amount and not to impose penalty u/s. 42(5) of the O.V.A.T. Act.”

10. This Court has heard the submissions of Mr. Sunil Mishra, learned Additional Standing Counsel appearing for the Petitioner (Revenue) and Mr. P.K. Jena, learned counsel appearing for the Opposite Party (dealer).

11. At the outset, it requires to be noticed that this Court in ***Jindal Stainless Limited v. State of Odisha (2012) 54 VST 1 (Orissa)*** upheld the constitutional validity of Section 42(5) of the OVAT Act. The observations of this Court in the said decision, which are relevant in the present context, were as under:

“31. 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.

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35. 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.”

12. The question is whether there is any discretion in the STO not to impose the penalty under Section 42 (5) of the OVAT Act? In this context, it may be noticed that this Court in *M/s. National Aluminium Company Ltd. v. Deputy Commissioner of Commercial Taxes 2021 (1) OLR 828* noticed the distinction between the penalty imposable under Section 43(2) of the OVAT Act and the default penalty that stands attracted under Section 42(5) of the OVAT Act. The discussion in this regard in the said decision reads as under:

“11. The Court notes that under Section 42(5) of the OVAT Act the penalty levied is “equal to twice the amount of tax assessed” under Section 42(3) or 42(4) pursuant to an audit assessment. There is no discretion with the Assessment Officer (AO) to reduce this amount of penalty. On the other hand, Section 43(2) of the OVAT Act is under the heading “Turnover escaping assessment” and is differently worded. It reads thus:

“43 (2) If the assessing authority is satisfied that the escapement or under assessment of tax on account of any reason(s) mentioned in sub-section (1) above is without any reasonable cause, he may direct the dealer to pay, by way of penalty, a sum equal to twice the amount of tax additionally assessed under this section.”

13. In the present case, there is no manner of doubt that the assessment was as a result of the AVR and was made under

Section 42(4) of the OVAT Act. The consequence of the penalty attracted under Section 42(5) of the OVAT Act was automatic. For ready reference, Section 42 of the OVAT Act reads as under:

“42. Audit assessment. - (1) Where the tax audit conducted under sub-section (3) of section 41 results in the detection of suppression of purchases or sales or both, erroneous claims of deductions including input tax credit evasion of tax or contravention of any provision of this Act affecting the tax liability of the dealer, the assessing authority may, notwithstanding the fact that the dealer may have been assessed under section 39 or section 40, serve on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report, requiring him to appear in person or through his authorised representative on a date and place specified therein and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.

(2) Where a notice is issued to a dealer under sub-section (1), he shall be allowed time for a period of not less than thirty days for production of relevant books of account and documents.

(3) If the dealer fails to appear or cause appearance, or fails to produce or cause production of the books of account and documents as required under sub-section (1), the assessing authority may proceed to complete the assessment to the best of his judgment basing on the materials available in the Audit Visit Report and such other materials as may be available and after causing such enquiry as he deems necessary.

(4) Where the dealer to whom a notice is issued under sub-section (1), produces the books of account and other documents, the assessing authority may, after examining all the materials as available with him in the record and those produced by the dealer and after causing such other enquiry as he deems necessary, assess the tax due from that dealer accordingly.

(5) 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.

(6) Notwithstanding anything contained to the contrary in any provision under this Act, an assessment under this section shall be completed within a period of six months from the date for receipt of the Audit Visit Report:

Provided that if, for any reason, the assessment is not completed within the time specified in this sub-section, the Commissioner may, on the merit of each such case, allow such further time not exceeding six months for completion of the assessment proceeding.

(7) No order of assessment shall be made under sub-section (3) or sub-section (4) after the expiry of one year from the date of receipt of the Audit Visit Report.”

14. It will be straightway noticed that the very wording of Section 42 (5) indicates that once as assessment is completed under Section 42(4) of the OVAT Act, the penalty leviable under Section

42(5) automatically follows. There is no discretion in the STO unlike the penalty imposable under Section 43(2) of the OVAT Act. This was what explained by this Court in *M/s. National Aluminium Company Limited (supra)*.

15. Turning to the decision in *Sree Krishna Electricals (supra)* it must be noticed that in the first place it was a case arising under the Tamil Nadu General Sales Tax Act, 1959 (TNGST Act) and there was no occasion for the Supreme Court to discuss, in the context of the facts of that case, any corresponding provision of the TNGST Act pertaining to tax audit assessment. Therefore, the observations in that case which justified the deletion of the penalty may not be relevant in the present context. In other words, in an assessment which is not a tax audit assessment while it may be possible to entertain an element of discretion in levying penalty in the facts of a particular case, it may not hold good in a situation where the assessment is a tax audit assessment governed by separate provisions in the statute in question. Therefore, the Court is not persuaded that the decision in *Sree Krishna Electricals (supra)* is of assistance to the Assessee in the present case.

16. For the aforementioned reasons, the Court is of the view that in the present case the Tribunal erred in deleting the penalty imposable on the dealer under Section 42(5) of the OVAT Act, particularly since it came to the conclusion that the levy of tax on the uncollected VAT amount by the dealer was not excusable and upholding the orders of the STO and the JCST in that regard.

Consequently, the question framed is answered in the affirmative i.e. in favour of the Department and against the Dealer. The impugned order of the Tribunal is to the above extent, hereby set aside.

17. The revision petition is allowed in the above terms.

S.K. Jena/Secy.



(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge