IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV No.17 of 2016

M/s. United Electricals & Engineering Pvt. Ltd.	....	***Petitioner***
		Mr. C.R. Das, Advocate
	-versus-	
State of Odisha	....	***Opposite Party***
		Mr. S.K. Pradhan, ASC

CORAM:
THE CHIEF JUSTICE
JUSTICE M. S. RAMAN

<u>ORDER</u>
07.12.2022

<u>Order No.</u>

10. 1. While admitting the present revision petition of the Petitioner-Assessee against the impugned order dated 7th October, 2015 of the Odisha Sales Tax Tribunal (Tribunal) dismissing S.A. No.353 (VAT) of 2013-14 filed by the Assessee, this Court framed the following questions for consideration vide order dated 31st August, 2016:

> *"I. Whether, the Division Bench-II, Odisha Sales Tax, Tribunal is right in law in holding the imposition of penalty equal to two times of tax assessed under Section 43-(2) of the OVAT Act in absence of observation by the Assessing authority that the underassessment tax is without any reasonable cause?*
>
> *II. Whether, the facts and circumstances of the case, the Division Bench-II, Odisha Sales Tax Tribunal, Cuttack, is right in law to hold Section-43 provides for best judgment assessment, whose part and parcel is imposition of penalty. If the use of word "may" is*

liberally used then the purpose of escape assessment under VAT regime would disappear?"

2. As far as question I is concerned, it is seen that in the assessment order dated 5th February, 2013 while raising a demand on the basis 'erroneous claim of Input Tax Credit (ITC)', the Sales Tax Officer (STO), Ganjam-I Circle, Berhampur proceeded to impose penalty under Section 43(2) of the Odisha Value Added Tax Act, 2004 (OVAT Act) without actually coming to any conclusion that ITC with differential tax wrongly availed by the Petitioner-Assessee was "without reasonable cause".

3. As explained by this Court in ***National Aluminium Co. Ltd. v. Deputy Commissioner of Commercial Taxes, (2012) 56 VST 68 (Ori)*** read with clarificatory order dated 8th March, 2021 in RVWPET Nos.211, 212 & 213 of 2013 (***National Aluminium Co. Ltd. v. Deputy Commissioner of Commercial Taxes), 2021 (I) OLR 828***, there is a discretion in the Assessing Officer under Section 43(2) of the OVAT Act to impose penalty. It is imperative for the Assessing Officer to be satisfied that the escapement of under assessment of tax "is without any reasonable cause".

4. As far as present case is concerned, the assessment order of the Assessing Officer does not record the satisfaction of the Assessing Officer that wrongful availment of ITC by the Petitioner was "without reasonable cause". Thus, the essential component of Section 43(2) of the OVAT Act for attracting the penalty, viz., the satisfaction of the Assessing Officer that the escapement of tax was without reasonable cause, is absent in the present case.

5. Accordingly, the question I is answered in the negative, i.e., in favour of the Petitioner and against the Department and the impugned order of the Tribunal and the corresponding orders of the First Appellate Authority and the Assessing Officer levying penalty on the Petitioner under Section 43 (2) of the OVAT Act are hereby set aside.

6. In view of the answer to question I, question II need not be answered.

7. The STREV is, accordingly, disposed of.

(Dr. S. Muralidhar)
Chief Justice

(M. S. Raman)
Judge

MRS/Laxmikant