

IN THE HIGH COURT OF ORISSA AT CUTTACK**STREV No. 47 of 2015 and STREV No. 33 of 2016****STREV No.47 of 2015*****M/s. Aryan Ispat & Power Pvt. Ltd.***

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

....

Opposite Party**AND****STREV No. 33 of 2016*****M/s. Aryan Ispat & Power Pvt. Ltd.***

....

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

....

Opposite Party**Advocates, appeared in these cases:*****For Petitioner***

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Mr. Kartik Kurmy, Advocate***For Opposite Party***

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**Mr. S.K. Pradhan
Addl. Standing Counsel****CORAM:****THE CHIEF JUSTICE****JUSTICE M.S. RAMAN****JUDGMENT****06.12.2022****Dr. S. Muralidhar, CJ.**

1. These two revision petitions arise out of similar set of facts involving the same parties and identical questions of law and are, accordingly, being disposed of by this common judgment.

2. STREV No. 47 of 2015 by the Petitioner-Assessee arises from an order dated 22nd August, 2015 passed by the Odisha Sales Tax Tribunal, Cuttack (Tribunal) in S.A. No.154(V) of 2014-15 for the period 1st April, 2007 to 30th June, 2010 whereby the Tribunal dismissed the Assessee's appeal against the order dated 19th August, 2014 of the Additional Commissioner Sales Tax, North Zone (Addl. CST) reducing the assessment from Rs.96,67,096/- to Rs.7,56,975/- including penalty under Section 42 (5) of the Orissa Value Added Tax Act, 2004 (OVAT Act).

3. STREV No.33 of 2016 arises from the order dated 27th February, 2016 of the Tribunal dismissing the Petitioner's S.A. No.158(V) of 2014-15 for the period 1st April, 2005 to 31st March, 2007. By the said impugned order, the Tribunal disposed of the Petitioner-Assessee's appeal by setting aside the 1st appellate order and remanding to the ACST, Sambalpur Range for the limited purpose of conducting necessary enquiry in respect of the input tax credit (ITC) claim. However, the order of the Addl. CST as far as the penalty under Section 42 (5) of the OVAT Act was concerned, was upheld.

4. By the orders dated 5th April, 2016 in STREV No.47 of 2015 and 9th September, 2016 in STREV No.33 of 2016 while admitting both the petitions, this Court framed the following question of law for consideration:

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“Whether in the facts and in the circumstances of the case, penalty under Section 42(5) of the OVAT Act is imposable?”

5. While no interim order was passed by this Court in STREV No.47 of 2015, an interim order was passed on 9th September, 2016 in STREV No.33 of 2016 to the effect that the penalty amount imposed shall kept in abeyance till the next date. That interim order has continued.

6. This Court has heard the submissions of Mr. Kartik Kurmy, learned counsel appearing for the Petitioner and Mr. S.K. Pradhan, learned Additional Standing Counsel (ASC) for the Opposite Party-Department.

7. Although the question framed is limited to the penalty under Section 42 (5) of the OVAT Act, it is necessary to advert to the facts in brief. In both the petitions, it is contended by the Petitioner is that the ineligible ITC should have been permitted to be deducted from the surplus ITC available with the Petitioner and if so adjusted the tax due would be ‘NIL’. The 1st Appellate Authority, however, rejected this contention and treated the disallowed ITC as tax due/tax payable and thereupon imposed penalty under Section 42 (5) of the OVAT Act. The contention of the Petitioner that no penalty under Section 42(5) of the OVAT Act can be imposed for disallowance of ineligible ITC when the surplus ITC is available with the Petitioner-Assessee was rejected by both the First Appellate Authority as well as the Tribunal.

8. In the above context of Section 42 (5) of the OVAT Act, it was contended by Mr. Kurmy, learned counsel for the Petitioner, that on the strength of the judgment of this Court in ***Jindal Stainless Limited v. State of Odisha (2012) 54 VST 1 (Orissa)***, this Court ought to hold that unless there was an element of *mens rea* and it was shown that there was a suppression of purchase or sales, the no penalty ought to be imposed under Section 42(5) of the OVAT Act. Reliance was also placed on the decision in ***M/s. National Aluminium Company Ltd. v. Deputy Commissioner of Commercial Taxes (2012) 56 VST 68 (Ori)***. It was submitted that unless there was an intention to evade tax, penalty could not be levied. In support of this contention, reliance was placed on the decision in ***State of Gujarat v. Jay Steel and Tubes Traders [2015] 80 VST 530 (Guj)***. Relying on the decision in the ***State of Gujarat v. Nishi Communication (2015) 80 VST 535 (Guj)*** it was submitted that as long as the dealer had sufficient ITC to be adjusted against the tax demand, there was no reason to levy interest or penalty.

9. Mr. S.K. Pradhan, learned ASC for the Department on the other hand submitted that this Court had recently in its judgment dated 5th July, 2022 in STREV No.69 of 2012 (***State of Odisha v. Chandrakanta Jayantilal, Cuttack***), dealt with this very issue regarding the mandatory nature of Section 42 (5) of the OVAT Act. It was held therein that there was no discretion available to Assessing Officer in the matter of levying penalty under Section

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42 (5) of the OVAT Act. In this context, a distinction was drawn between Section 43(2) and Section 43(5) of the OVAT Act.

10. The above submissions have been considered. Section 42 of the OVAT Act talks of ‘audit assessment’ and 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.”

11. In *Jindal Stainless Limited (supra)* while upholding the constitutional validity of the above provision i.e. Section 42(5) of the OVAT Act, this Court had observed 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.

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. In *M/s. National Aluminium Company Ltd. v. Deputy Commissioner of Commercial Taxes 2021 (1) OLR 828* the distinction between Section 43(2) of the OVAT Act and the default penalty under Section 42(5) of the OVAT Act was drawn and it was observed 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. Both the above decisions of the Co-ordinate Bench of this Court were noticed by this Court in its judgment in ***State of Odisha v. Chandrakanta Jayantilal (supra)***, where it was observed as under:

“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)***.”

14. Consequently, as far as this Court is concerned, the consistent view is that the penalty under Section 42(5) OVAT Act is straightway attracted once the determination of the tax payable takes place pursuant to an audit assessment under Section 42 of the OVAT Act.

15. The contention of the Petitioner that upon adjustment of the ineligible ITC from the surplus ITC available, no tax would be due is to no avail since the treatment by the 1st Appellate Authority of the surplus ineligible ITC as tax due by the Petitioner has affirmed by the Tribunal and no question in that regard has been framed by this Court.

16. The decisions in ***State of Gujarat v. Jay Steel and Tubes Traders (supra)*** and ***State of Gujarat v. Nishi Communication***

(supra) are clearly distinguishable in view of the wording of Section 42(5) of the OVAT Act when compared to Section 34(7) of Gujarat Value Added Tax Act which beings the expression “if the Commissioner is satisfied that the dealer in order to evade or avoid payment of tax”. In other words, under Section 34 (7) of the GVAT Act an element of discretion is available to the Assessing Authority while imposing penalty, Section 42(5) of the OVAT Act does not.

17. For all of the aforesaid reasons, this Court answers the question framed in the affirmative i.e. in favour of the Department and against the Petitioner-Assessee. The revision petitions are accordingly dismissed, but in the circumstances, with no other as to costs. The interim order passed in STREV No.33 of 2016 is hereby vacated.

(S. Muralidhar)
Chief Justice

(M.S. Raman)
Judge

S.K.Jena/Secy.