

IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV Nos. 26 and 31 of 2016

M/s. Arun Steel Industries Pvt. Ltd., ***Petitioner***
Sundargarh

Mr. C.R. Das, Advocate

-versus-

State of Odisha, represented through ***Opposite Party***
Commissioner of Sales Tax

Mr. S.K. Pradhan, Additional Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE M.S. RAMAN

ORDER
08.12.2022

Order No.

07.

1. At the time of admission of the present revision petition on 19th October 2016, the following questions were framed for consideration by this Court:

“(i) Whether on the facts and circumstances of the case, the Division Bench-II, Odisha Sales Tax, Tribunal is right in law to hold the Electrical Goods, Electrodes, Pipes and Fittings, Weighing Machines, Nut and Bolts are not ‘Capital Goods’ as defined U/s.2(8) of the OVAT Act?

(ii) Whether, the facts and circumstances of the case, the Division Bench-II, Odisha Sales Tax, Tribunal, Cuttack is right in law and justified to impose penalty on the capital goods i.e., Electrical Goods, Electrodes, Pipes and Fittings, Weighing Machines, Nut and Bolts, when it is a point of interpretation, whether such goods are classifiable as ‘Capital Goods’ under Section-2(8) of the OVAT Act and the petitioner availed the credit on such

goods on the bonafide belief that such goods are qualifies to be 'capital goods'?

(iii) Whether, the Division Bench-II Odisha Sales Tax Tribunal, Cuttack is correct in law to impose penalty U/s-42(5) of the OVAT Act, when the petitioner has although taken/availed credit of the amount in the return but not utilized the input tax credit as defined under Section-2(27) of the OVAT Act, for discharging of tax liability under the OVAT Act?"

2. However, these questions did not include one relating to (i) non-submission of the Audit Visit Report (AVR) within seven days of the audit visit and (ii) the failure to pass an assessment order under Section 42 of the Orissa Value Added Tax Act, 2004 (OVAT Act) within six months of the date of receipt of the AVR.

3. However, on perusal of the impugned order of the Orissa Sales Tax Tribunal ('Tribunal') dated 6th April, 2015 in S.A. No.252(V) of 2012-13 filed by the present Petitioner/Dealer (STREV No.26 of 2016) and order dated 2nd February, 2016 in S.A. No.131(V) of 2012-13 filed by the Opposite Party/State (STREV No.31 of 2016), it is seen that one of the grounds raised there was specifically was on the above issue. Since this was an issue raised before the Tribunal and yet not decided by it and with this issue having been decided in favour of the Dealer by this Court in its judgment dated 29th July, 2021 in W.P.(C) No.15956 of 2013 (*M/s. Cobra Instalaciones Y Servicios, S.A. v. Commissioner of Sales Tax, Cuttack*), the Court considers it appropriate to frame the following additional questions of law for consideration by this Court:

(iv) Is not the assessment order liable to be invalidated since in terms of Section 41(4) of the OVAT Act, the

AVR was not submitted within seven days of the completion of the audit visit?

(v) Is not the assessment order liable to be invalidated since in terms of Section 42(6) of the OVAT Act, the assessment was not completed within a period of six months from the date of receipt of the AVR?

4. In *M/s. Cobra Instalaciones Y Servicios, S.A. (supra)* this Court has answered question (v) in favour of the Assessee/Dealer by holding that “the mandatory language of Section 42(6) of the OVAT Act, which states that an assessment “shall be completed within a period of six months from the date of receipt of the AVR Report gave the Assessing Authority no option but to hold his hands and wait for the order to be passed by the CST in terms of the proviso to Section 42(6) of the OVAT Act. Not having done so, clearly the assessment order was unsustainable in law.” In the present case, admittedly, the assessment was not completed within six months of the date of receipt of the AVR.

5. Further, it is seen that the AVR itself was submitted beyond the period of seven days from the completion of the audit. This Court has in *M/s. Pal Construction v. The Assessing Authority, Bhubaneswar I Circle, Bhubaneswar* (Order dated 18th April, 2022 in W.P.(C) No.16957 of 2009) held that this was contrary to the mandatory requirement of Section 41(4) of the OVAT Act and accordingly set aside the assessment order challenged in that case.

6. Accordingly, questions (iv) and (v) framed hereinbefore, are answered in favour of the Assessee/Dealer and against the Department and the impugned assessment order and the

corresponding orders of the First Appellate Authority and the Tribunal are hereby set aside.

7. In view of the answers to the questions (iv) and (v) framed herein above, the Court does not consider it necessary to answer the questions (i) to (iii) framed by the order dated 19th October, 2016.

8. The petitions are disposed of in the above terms.

9. An urgent certified copy of this order be issued as per rules.

S. Behera

