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ORISSA HIGH COURT: CUTTACK

STREV NO. 53 OF 2017

In the matter of an application under Section 80
of the Odisha Value Added Tax Act, 2004.

M/s. Dhabaleswar Traders
Rajastreet, Berhampur ... Petitioner

-VERSUS-

State of Odisha,
represented by
Commissioner of Sales Tax,
Odissa ... Opposite Party

Counsel appeared for the parties:

For the Petitioner : M/s. Rudra Prasad Kar, Aditya Narayan Ray, Niranjan Paikray, and Bhabani Prasad Mohanty, Advocates

For the Opposite Party : Mr. Sunil Mishra, Additional Standing Counsel (CT & GST Organisation)

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R. SARANGI
AND
THE HONOURABLE MR. JUSTICE MURAHARI SRI RAMAN

Date of Hearing: 10.04.2023 :: Date of Judgment: 17.04.2023

MURAHARI SRI RAMAN, J.— M/s. Dhabaleswar Traders, a partnership firm, has approached this Court invoking

provisions of Section 80 of the Odisha Value Added Tax Act, 2004, assailing the Order dated 11.05.2017 passed by the Odisha Sales Tax Tribunal in Second Appeal bearing No. 80 (V) of 2016-17 partly allowing the appeal filed by the dealer-petitioner against the Order dated 22.04.2016 passed by the Additional Commissioner of Sales Tax (Appeal), South Zone, Berhampur in the first appeal bearing No. AA(VAT) 41 of 2015-16 arising out of Assessment framed *vide* Order dated 19.08.2015 under Section 43 of said Act, 2004 read with Rule 50 of the Odisha Value Added Tax Rules, 2005 by the Joint Commissioner of Sales Tax, Ganjam Range, Berhampur pertaining to the tax periods from 01.03.2009 to 31.03.2012.

FACTS OF THE CASE:

2. The assessee-petitioner being a registered dealer under the Odisha Value Added Tax Act, 2004 (for short referred to as "OVAT Act"), carries on its business in edible oil, pulses, dal, sugar, coconut oil, vanaspati ghee and wheat on wholesale-*cum*-retail basis. On the allegations contained in the Fraud Case Report bearing No.12/2011-12 submitted by the Assistant Commissioner of Sales Tax, Enforcement Range, Berhampur, proceeding for assessment under Section 43 of the OVAT Act was initiated. Consequent upon participation of the dealer in the said proceeding and

furnishing explanation(s) in respect of the objection/allegation, the Joint Commissioner of Sales Tax, Ganjam Range, Berhampur (for brevity referred to as "Assessing Authority") passed Assessment Order dated 19.08.2015 by raising demand to the tune of Rs.1,57,878/- comprising tax of Rs.52,626/- and penalty of Rs.1,05,252/- imposed under Section 43(2).

2.1. Aggrieved, the petitioner-firm availed the remedy under Section 77 of the OVAT Act by way of filing first appeal being No.AA (VAT) 41 of 2015-16. The Appellate Authority sustained the demand raised in the Assessment Order by observing thus:

*"*** Gone through the assessment order, grounds of appeal vis-à-vis the connected assessment record. At the time of hearing of appeal the dealer appellant is allowed opportunity to rebut or to refute the charges framed against the dealer appellant but could not be able to substantiate against the allegation of sales suppression of Rs.7,15,319/- arrived on account of seized slips pertaining to business transactions which were recovered from the business premises of the dealer and Rs.1,79,520/- towards out of account sale value of 10.56MT of yellow peas established by the learned Assessing Officer in the assessment order. Hence, in absence of supporting documentary evidences to the effect the contentions raised in the grounds of appeal is not convincing as true and correct. In this context the opinion of the forum is that the learned Assessing Officer has rightly assessed the dealer-appellant which needs no interference.*

In the result appeal fails and the assessment is confirmed."

2.2. Alleging the first appellate order is perverse being passed without assigning any plausible/cogent reason and outcome of non-application of independent mind, the petitioner carried the matter before the Odisha Sales Tax Tribunal under Section 78 of the OVAT Act which was registered as S.A. No.80 (VAT) of 2016-17.

2.3. The learned Sales Tax Tribunal, out of eight counts of allegations suggested on the basis of incriminating materials seized by the Investigating Officials, while accepting the explanation and arguments of the counsel for the petitioner-dealer, *vide* Order 11.05.2017 held that on account of following aspects the suppression has been established:

i. Hand written slips numbering 1 to 89 which involved an amount of Rs.4,20,812/-;

ii. One book containing 16 written pages of M/s. Sai Ram Enterprises, which involved amount of Rs.1,79,520/-.

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2.4. The learned Tribunal basing on the report of the visiting officials found that in respect of transactions relating to Rs.4,20,812/- there was evidence of procurement of orders through brokers and receipt of payments thereof. With respect to second allegation *qua* M/s. Sai Ram Enterprises, Antei the learned Sales Tax Tribunal observed that the dealer failed to produce delivery

challan for 10.56 MT of peas out of 50.56 MT of peas sent for cleaning purpose to M/s. Sai Ram Enterprises, which the petitioner claimed to have received by making own arrangement.

2.5. Upholding the allegations of suppression with regard to above counts, the learned Tribunal quantified total suppression to be of Rs.6,00,332/- and by applying rate of tax @ 4% tax was calculated to Rs.24,013/-.

2.6. Besides aforesaid amount of tax, the learned Tribunal also imposed penalty of Rs.48,027/- under Section 43(2) of the OVAT Act, which is equal to twice the amount of tax so determined.

2.7. Thus, the learned Odisha Sales Tax Tribunal interfered with the confirming order of the Appellate Authority and thereby reduced the demand accordingly.

3. Still aggrieved, the petitioner-dealer, with a prayer to set aside the Order-in-Second Appeal dated 11.05.2017 (Annexure-3) moved this Court by way of instant revision under Section 80 of the OVAT Act, and posited the following questions of law:

I. Whether on the facts and in the circumstances of the case, the learned Odisha Sales Tax Tribunal is correct to opine that there was suppression of sales to the tune of Rs.4,20,812/- having discarded the explanation of the petitioner-dealer and thereby fell in error in confirming the orders of the authorities below which is based on conjectures and surmises?

II. *Whether on the facts and in the circumstances of the case, the Odisha Sales Tax Tribunal committed material illegality by confirming the order of the authorities below to the effect that there was suppression of sales Rs.1,79,520.00, i.e. the estimated value of 10.56 MT of peas on account of which the assessing authority raised doubt and suspicion and based on such suspicion, the conclusion could not be arrived at?*

III. *Whether on the facts and in the circumstances of the case, the learned Odisha Sales Tax Tribunal came to sustain the finding of suppression of sales of the authorities below without ascribing any cogent reason and therefore, the order is perverse being outcome of non-application of mind?*

IV. *Whether on the facts and in the circumstances of the case, the assessing authority was justified in framing assessment on best of his judgment without rejecting the books of account and / or returns?*

V. *Whether on the facts and in the circumstances of the case, the order of the learned Odisha Sales Tax Tribunal sustaining penalty under Section 43(2) of the Odisha Value Added Tax Act, 2004 and the order of imposition of penalty is legally untenable as it has not ascribed any reason and mechanical in nature?*

VI. *Whether on the facts and in the circumstances of the case, the order of the learned Odisha Sales Tax Tribunal is not justified in confirming imposition of penalty under Section 43(2) the Odisha Value Added Tax Act, 2004, which is contrary to the amendment of sub-section (2) of Section 43 by virtue of the Odisha Value Added Tax (Amendment) Act, 2015?*

VII. *Whether on the facts and in the circumstances of the case, the order of the learned Odisha Sales Tax Tribunal is indicative of non-application of mind, unreasoned, cryptic and irrational?*

ARGUMENTS ADVANCED BY THE RESPECTIVE PARTIES:

4. Sri Rudra Prasad Kar, learned counsel for the petitioner submitted that the explanation of the petitioner that the orders placed by the customers were noted down in the written slips Nos.1 to 51 and for transportation the names of the transporters are mentioned therein. The corresponding invoices were prepared after the sale being materialized. Further, with regard to slip Nos.53 and 54, it was clarified before the authority by the petitioner that though amount of payments were reflected, since the petitioner did not receive full payments, the sales were not fructified and no despatches were made. As regards slip Nos.55 to 89, they are mere orders received from brokers and such transactions were taken into account books after sales got materialised with the customers. The learned Tribunal while discarding such explanation with regard to aforesaid 89 slips, determined the sale suppression to the tune of Rs.4,20,812/-. Sri Kar argued that such finding of fact is based on surmises and conjectures, as the said Tribunal in respect of Seizure No.4 relating to 19 numbers of written slips, wherein similar nature of transactions were recorded, has accepted that the allegation of suppression could not be established by the taxing authorities. He pressed into service the following

observation made by the Tribunal (paragraph-7 of its Order):

> *"*** As because the appellant-dealer did not produce the relevant documents before the visiting officials or failed to counter the allegation levelled by them, the same cannot be considered to be a valid ground to debar it from producing the documents or put forth its grievance subsequently before the Assessing Authority. On perusal of the order of the JCST in this regard, it appears that the allegation levelled against the appellant-dealer relating to sale suppression amounting to Rs.7,15,319.00 ascertained from the small bound book containing 19 written pages mentioned in Seizure No.4 is surrounded by serious doubt and thus the benefit of doubt will certainly go in favour of the appellant-dealer. Therefore, it can clearly be said that this allegation has not been established conclusively."*

4.1. Drawing analogy from the factual details, Sri Rudra Prasad Kar went on to contend that the learned Tribunal should have appreciated the explanation offered by the petitioner with respect to 89 slips amounting to Rs.4,20,812/-.

5. The learned counsel for the petitioner with regard to non-receipt of delivery of 10.56 MT of peas out of total 50.56 MT unclean peas sent to M/s. Sai Ram Enterprises submitted that through delivery challans on different dates the petitioner received back 40.00 MT of cleaned peas, but got back 10.56 MT peas on its own arrangement. In absence of any further material particulars brought on record by the Revenue, the plea of the petitioner could not have been doubted.

6. Refuting the allegations as held to be suppressed transactions by the learned Tribunal, Sri Rudra Prasad Kar, learned Advocate stated that the sale transactions which got materialized are recorded and the petitioner having accounted for 50.56 MT of peas, there was no scope for imposition of penalty under Section 43(2) of the OVAT Act inasmuch as it is discretionary. The learned Tribunal having not ascribed reason, the impugned Order-in-Second Appeal is not tenable in the eye of law and thereby the same is liable to be wiped off.

7. Sri Sunil Mishra, learned Additional Standing Counsel for the CT & GST Organisation, with his usual vehemence argued that the learned Tribunal, having shown indulgence with well-reasoned order, sustained two of the allegations out of eight objections suggested in the Fraud Case Report prepared by the Assistant Commissioner of Sales Tax, Enforcement Range, Berhampur. The amount of tax of Rs.24,013/- on the quantified suppression to the extent of Rs.6,00,332/- by the Tribunal being paltry, the matter does not deserve consideration. However, in reply to the contentions raised in the revision petition based on which the arguments were advanced by the counsel for the petitioner, Sri Sunil Mishra, learned Additional Standing Counsel brought to the notice of this Court that the assessee-dealer did not discharge its burden at the time

of inspection and in order to escape the rigours of penalty under Section 43(2) on account of tax liability determined in the assessment, the petitioner has taken false pleas before the taxing authorities. As against total demand of Rs.1,57,878/- inclusive of penalty raised in the assessment which was confirmed by the Appellate Authority, the learned Sales Tax Tribunal having intervened with concurrent finding, the impugned order needs no further consideration. Factual disputes settled by the learned Sales Tax Tribunal does not get attracted to be considered in the present proceeding under revisional jurisdiction of this Court under Section 80 of the OVAT Act.

QUESTIONS OF LAW POSED FOR ADJUDICATION:

8. At the time of hearing of the matter, Sri Rudra Prasad Kar, learned counsel confined his arguments with respect to the following questions of law:

I. *Whether on the facts and in the circumstances of the case, the learned Odisha Sales Tax Tribunal is correct to opine that there was suppression of sales to the tune of Rs.4,20,812/- having discarded the explanation of the petitioner-dealer and thereby fell in error in confirming the orders of the authorities below which is based on conjectures and surmises?*

II. *Whether on the facts and in the circumstances of the case, the Odisha Sales Tax Tribunal committed material illegality by confirming the order of the authorities below to the effect that there was suppression of sales Rs.1,79,520.00, i.e. the estimated value of 10.56 MT of peas on account of which the assessing authority raised doubt and suspicion and based on such suspicion, the conclusion could not be arrived at?*

III. *Whether on the facts and in the circumstances of the case, the assessing authority was justified in framing assessment on best of his judgment without rejecting the books of account and/or returns?*

IV. *Whether on the facts and in the circumstances of the case, the order of the learned Odisha Sales Tax Tribunal sustaining penalty under Section 43(2) of the Odisha Value Added Tax Act, 2004 and the order of imposition of penalty is legally untenable as it has not ascribed any reason and mechanical in nature?*

8.1. Accordingly, this Court framed the aforesaid questions and proceeded to hear the matter on the consent of both the counsel for the respective parties.

ANALYSIS AND DISCUSSIONS:

9. As against the allegation contained in 89 slips, it is the argument of the counsel for the petitioner that slip Nos.1 to 51 contained the name of transporter(s), but that *ipso facto* would not lead to indicate that sales were effected and they are construed to be fructified sales. In this regard the Assessing Authority merely recorded that the signature of transporter(s) on these slips are "testimony of receipt of goods". But the department having not undertaken any further enquiry as to receipt of consideration in respect of concluded transaction(s), the same could not have been held to be suppression of turnover. With regard to Slip Nos.53 and 54 the Assessing Authority recorded the fact that Investigating Officials found that payments were received on different dates on these transactions. Further, as to slip Nos.55 to 89, the supply orders procured through brokers were accounted for as and when the sales were fructified.

9.1. Section 2(45) of the OVAT Act stipulates that it is "transfer of property in goods" for "cash, deferred payment or other valuable consideration" attracts attributes of "sale" and as per Section 2(46), "sale price" is the consideration received or receivable for the sale of any goods.

9.2. The learned Sales Tax Tribunal confirmed the finding of the Assessing Authority that the Investigating Officials on verification found signatures of transporters on the

slip Nos.1 to 51 and evidences of consideration being received on account of the transactions reflected in slip Nos.53 and 54 as also slip Nos.55 to 89 were on record. Such is the factual finding which seldom gives scope for this Court to re-appreciate the evidence.

9.3. Much emphasis has been laid by the learned counsel for the petitioner in connection with slip Nos.55 to 89 which contained alleged transactions of sale effected by procuring orders through brokers. It is submitted that the alleged suppression in the same course of conduct of inspection under similar context of procurement of orders for supply through brokers as contained in small bound book containing 19 written pages has been negatived by the learned Tribunal. In the same breath, it is contended, the learned Tribunal has committed gross error in coming to the conclusion that alleged transactions in slip Nos.55 to 89 were suppression. In the considered opinion of this Court such a contention of the learned counsel does not hold water as the distinction between two sets of transactions, *viz.,* 19 written pages of small bound book *vis-à-vis* slip Nos.55 to 89 is very much discernible from the following observation of the learned Tribunal:

*"*** On perusal of the order of the learned JCST in this regard, it appears that the allegation levelled against the appellant-dealer relating to sale suppression amounting to Rs.7,15,319.00 ascertained from* ***the small bound book***

***containing 19 written pages mentioned in Seizure No.4 is surrounded by serious doubt** and thus the benefit of doubt will certainly go in favour of the appellant-dealer. Therefore, it can clearly be said that this allegation has not been established conclusively."*

Per contra, with respect to transactions contained in slip Nos.55 to 89, the learned Tribunal has recorded the following finding:

*"*** But, the visiting officials found out that those slips indicate that **sales have been effected and payments have been made to the appellant-dealer on different dates**. As the appellant-dealer **has failed to adduce any convincing evidence contradictory to the allegation of sale suppression** amounting to Rs.4,20,812.00, i.e., the value of goods relating to the transactions with regard to those 89 hand written slips, the same has clearly been established."*

9.4. Such being the factual adjudication on due consideration of material available on record and the contentions of the advocate for the petitioner, this Court does not find force in the argument of Sri Kar. Interference in the facts settled by the learned Tribunal by this Court is not permissible in the revision under Section 80 of the OVAT Act.

10. With regard to plea of self-arrangement of taking back 10.56 MTs of peas out of total 50.56 MTs, the learned Tribunal found that while the dealer-assessee followed the method of issuing delivery challan(s) as proof of receipt of 40.00 MTs of peas, there was no plausible explanation put forth in not producing the delivery

challan with respect to 10.56 MTs of peas. The plea of self-arrangement (without delivery challan) has been disbelieved by the learned Tribunal.

10.1. It may be pertinent to say that aforesaid observations of the learned Odisha Sales Tax Tribunal are essentially facts based on analysis of material particulars on record. Having regard to the evidence on record, the learned Tribunal has interfered with the concurrent finding of the statutory authorities and reduced the demand of tax to Rs.24,013.28P.

10.2. The factual dispute before the statutory authorities including the Tribunal has been considered on the basis of material on record and the factum of receipt of consideration has also not been successfully dispelled by the petitioner. Therefore, the fact of suppression of turnover to the extent of Rs.6,00,332/- has been found to be established by all the fora below. Such questions of fact cannot be re-adjudicated in the revision proceeding before this Court, as they are not questions of law.

11. It is further contended that the best judgment assessment could not have been made by the Assessing Authority without rejecting books of account. A general statement of this nature has no bearing on the facts of the present case. On close scrutiny of the Orders of the Authorities below point at the fact that the value of goods found to be suppressed was supported by the

declaration made by the dealer. The basis of quantification of suppressed transactions has been clearly spelt out in the Assessment Order dated 19.08.2015 in the following manner:

> *"*** The ACST (Investigating Officer) has prepared a statement of goods sold and **their value estimated as per the declaration of the dealer**. ***"*

12. From bare reading of orders of authorities below, it is transpired that the alleged transactions contained in the seized documents are found to be suppressed transactions and the quantification has been made on the basis of value declared by the assessee itself, which has been clearly stated by the Assessing Authority in his order of assessment. Perusal of the assessment order indicates that the demand is raised by confining to transactions alleged to have been suppressed as contained in the Fraud Case Report submitted by the Assistant Commissioner of Sales Tax, Enforcement Range, Berhampur. Therefore, it cannot be said that there was no basis for quantification of the suppression of transactions.

12.1. It is well-nigh recognized *vide State of Andhra Pradesh Vrs. Repute Plastic Colours Ltd., (2002) 125 STC 282 (AP)* affirmed in *State of Andhra Pradesh Vrs. Repute Plastic Colours Ltd., (2008) 15 VST 1 (SC)*, that if the Court finds that the factual finding is based on some legally admissible evidence, there will not be any scope for the

Court to upset the factual finding. The Court cannot go into the question of adequacy or inadequacy of the evidence on the basis of which the Tribunal has recorded the finding.

12.2. It has been observed in *V.M. Mohan Vrs. Prabha Rajan Dwarka, (2006) 9 SCC 606* that the High Court had re-appreciated the evidence to come to the conclusion different from the trial Court as well as the appellate Court. As the conclusion was arrived at by taking into account concurrent finding of fact recorded by the original authority as well as the appellate authority, no interference by the High Court was called for.

12.3. Normally the High Court under revision does not interfere with concurrent findings of fact by the lower authority, unless the case involves any question of law. Traditionally, in exercise of revisional jurisdiction, High Court does not interfere with concurrent finding of fact, unless the findings recorded by the lower authorities are perverse or based on an apparently erroneous principles which are contrary to law or where the finding of the lower authority was arrived at by a flagrant abuse of the judicial process or it brings about a gross failure of justice. Refer, *Agarwal Oil Refinery Corporation Vrs. Commissioner of Trade Tax, (2011) 13 SCC 275*.

12.4. All the questions at issue had to be tried in the light of evidence, oral or otherwise, and surrounding

circumstances, before the lower authorities. Where High Court's jurisdiction is confined to questions of law, if appellate Court recorded definite findings, it is not open to the High Court to attempt to re-appreciate that evidence. See, *Raruha Singh Vrs. Achal Singh, AIR 1961 SC 1097*; *Commissioner of Sales Tax Vrs. Kumaon Tractors & Motors, (2002) 9 SCC 379; Commissioner of Sales Tax Vrs. Mohan Brickfield, (2006) 148 STC 638 (SC)*.

12.5. The position of law that issues of fact determined by the Tribunal are final and the High Court in exercise of its reference/revision jurisdiction should not act as an appellate Court to review such findings of fact arrived at by the Tribunal by a process of re-appreciation and re-appraisal of the evidence on record has consistently been laid down in *Karnani Properties Ltd. Vrs. CIT, (1971) 82 ITR 547 (SC); Rameshwar Prasad Bagla Vrs. CIT, (1973) 87 ITR 421 (SC); CIT Vrs. Greaves Cotton & Co. Ltd., (1968) 68 ITR 200 (SC)* and *K. Ravindranathan Nair Vrs. CIT, (2001) 247 ITR 178 (SC)*.

12.6. The conclusion arrived at by the learned Odisha Sales Tax Tribunal is matter of fact on appreciation of evidence on record. The learned Tribunal being final fact-finding authority analysed the evidence and set at rest the facts. Hence, no question of law does arise on facts. In exercise of power under Section 80 of the OVAT Act, this Court

may interfere with the finding of the statutory appellate authority/Tribunal if there is error apparent on the face of the record or miscarriage of justice, but cannot assume power of appellate Court for reversing fact finding by re-appreciating the evidence or the materials produced before the Tribunal. Reference may be had to *Laxmi Jewellers Vrs. State of Odisha, 2017 SCC OnLine Ori 95 = (2017) 100 VST 220 (Ori).*

12.7. The distinction between "appeal" and "revision" is glaringly clear and implicit in the said two expressions. Whereas right of appeal is a substantive right, there is no such substantive right in making an application for revision. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way. An appeal is a continuation of the proceedings; in effect the entire proceedings are before the Appellate Authority and it has power to review the evidence subject to the statutory limitations prescribed. On the contrary, in the case of revision, whatever powers the revisional authority may or may not have, he has no power to review the evidence unless the statute expressly confers on him that power. That limitation is implicit in the concept of revision.

12.8. There is no cavil with respect to the scope of interference by the High Court while exercising revisional jurisdiction

to adjudicate question of law in the concurrent findings. In such matters, re-appreciation of evidence is not the normal rule and the power thereunder would be sparingly exercised where the findings are absolutely perverse. A finding can be said to be perverse if it is founded on no evidence to support the same or totally against the weight of evidence. So also, it can be said to be perverse if material evidence was missed out for consideration or a totally irrelevant and immaterial aspect formed the foundation for such a finding. Regard may be had to *Hero Vinoth (Minor) Vrs. Seshamal, (2006) 5 SCC 545,* wherein the following principle has been laid down:

*"*** in a case where from a given set of circumstances two inferences of fact are possible, the one drawn by the lower appellate Court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. ***"*

12.9. On noticing above principles, this Court is of the view that interference with the finding of fact is not warranted if it involves re-appreciation of evidence. This Court, therefore, does not find perversity in concurrent finding of fact by the authorities including the learned Odisha Sales Tax Tribunal that the transactions recorded in the seized documents being supported by the evidence of signature of transporter(s) and consideration received on account of transactions to the extent discussed above.

Hence, this Court answers the question Nos. I to III accordingly.

13. Given the limited scope for this Court to intervene in the factual finding rendered by the learned Odisha Sales Tax Tribunal, having declined to interfere with the conclusion arrived at by the learned Tribunal, this Court is called upon to dwell on the issue as to imposition of penalty by the Assessing Authority in exercise of power under Section 43(2) of the OVAT Act which got confirmed in second appeal preferred by the petitioner-dealer, though the demand has been reduced by re-appreciation of evidence and overruling finding of the Assessing Authority as affirmed by the Appellate Authority.

13.1. This Court finds the question of law No. IV posed by the petitioner *supra* is very much relevant which deserves consideration in the circumstances of the instant case.

13.2. It is submitted by Sri Rudra Prasad Kar, learned counsel for the petitioner that though the learned Sales Tax Tribunal appreciated the fact in respect of certain transactions, other than those found established, that they are not suppressed transactions. Stemming on the statutory provision contained in Section 43(2) it is emphasized that penalty could not have been imposed mechanically without ascribing any reason for doing so. Merely because statute empowers the statutory authority to impose penalty, the same need not be

exercised in every circumstance as if the same is concomitant to tax assessed.

13.3. Sri Sunil Mishra, learned Additional Standing Counsel made valiant attempt to justify the imposition of penalty by the learned Tribunal while determining the tax liability by reducing the original demand. He urged that by analysing evidence on record the learned Odisha Sales Tax Tribunal has established that there has been suppression in respect of slip Nos.1 to 89 and 29 written pages contained in the small bound book, and, therefore, used discretion in favour of the Revenue by invoking power under Section 43(2) of the OVAT Act. No infirmity can be imputed for such action.

13.4. This Court is conscious of the decision rendered in the case of *National Aluminum Co. Ltd. Vrs. Deputy Commissioner of Commercial Taxes, 2013 (I) ILR-CUT 595 = (2012) 56 VST 68 (Ori)*, wherein in answering question as to whether imposition of penalty under Section 43(2) of the OVAT Act can only be levied if the escapement is without any reasonable cause, it has been held as follows:

> *"36. 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*

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penalty for infraction of any statutory provision. We are conscious that generally penalty proceedings are quasi judicial in nature. ***Quantification of penalty under Section 43 of the OVAT Act is dependent upon the tax assessed under that Section.*** *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. Penalty is not independent of the tax assessed.*** *If the tax is assessed, imposition of penalty under 42(5) is warranted.*

37. The matter may be looked at from different angle. Section 43 of the OVAT Act deals with escaped assessment. As stated above, imposition of penalty is dependent upon the quantum of tax assessed under Section 42 of OVAT Act. If such a penal provision is not provided then fraudulent dealers would seriously venture to evade tax and whenever they will be caught hold of they will simply pay the tax and escape. ***Therefore, the provision for imposing penalty twice the amount of tax assessed, under Section 43 of the OVAT Act has been made so that a dealer-assessee would refrain himself from taking any step to avoid payment of legitimate tax.*** *If, however, any dealer indulges himself in any fraudulent activities to evade tax, then in addition to tax assessed he would pay penalty which is twice the amount of tax assessed."*

13.5. Review of said Judgment on the said issue of imposition of penalty under Section 43(2) being sought for by the National Aluminium Co. Ltd., this Court allowed the review in *National Aluminium Co. Ltd. Vrs. Deputy*

Commissioner of Commercial Taxes), 2021 (I) OLR 828 by observing thus:

> "6. *While considering the second question viz., whether imposition of penalty under Section 43(2) of the Orissa Value Added Tax Act, 2004 (OVAT Act) can only be levied if the escapement is "without any reasonable cause", an observation was made in paragraph 36 of the judgment that "penalty is not independent of the tax assessed. If the tax is assessed, imposition of penalty under Section 42(5) is warranted.*
>
> ***
>
> 8. *Again in paragraph 39 of the judgment, it is observed as under:*
>
> *'*** once the Assessing Officer comes to the conclusion that the dealer is indulged in fraudulent activities and assesses him under Section 43 of the OVAT Act, there is no need for the Assessing Officer to make further investigation to find out whether the escapement is without reasonable cause for the purpose of imposition of penalty under Section 43(2) of the OVAT Act.*
>
> 9. *The grievance of the NALCO is to the limited extent of the manner in which the second question has been dealt with by this Court in the aforementioned judgment. Mr. Mishra, learned counsel for the NALCO points out that this Court has in the above judgment while placing reliance on the decision of the Supreme Court in Union of India Vrs. Dharamendra Textile Processors and others (2008) Volume-18 VST 180 (SC), not considered the subsequent decision of the Supreme Court in Union of India Vrs. Rajasthan Spinning and Weaving Mills 2009 (Vol.238) ELT Page-3, both of which were in the context of Section 11 AC of the Central Excise*

Act, 1944. The wording of the said provision was not on par with the wording of Section 43(2) of the OVAT Act. The further grievance is that there was no occasion for the Court to have made any observations as regards the imposition of penalty under Section 42 (5) of the OVAT Act as the said provision was in the context of audit assessment and differently worded from Section 43(2) of the OVAT Act.

****

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."

12. *It is seen under Section 43(2) of the OVAT Act the levy of penalty in the event of turnover escaping assessment, or under assessment, **is not automatic**. **The AO has to be satisfied that escapement** or under assessment of tax **"is without reasonable cause"**. Further upon arriving at such conclusion, the AO **'may direct the dealer to pay, by way of penalty, a sum equal to twice the amount of tax additionally assessed** under the Section.' The word 'may', in this context gives*

the AO a discretion, which is unavailable to him under Section 42(5) of the OVAT Act.

13. The Court, therefore, finds merit in the contention of the learned counsel for the Petitioner that the observation in the judgment dated 9th October 2012, on the aspect of penalty under Section 42 (5) of the OVAT Act was not warranted. All that was required to be observed was that since the question had been rendered academic in view of the finding on issue No.1, ***the imposition of penalty under Section 43(2) of the OVAT Act, was not automatic and that there is a discretion in the AO in this regard upon finding that there has been an escapement or under assessment of tax****."*

13.6. Faced with such situation with respect to legal position set at rest by interpreting the provisions provided in Section 43(2) *vis-à-vis* Section 42(5) of the OVAT Act, the argument of Sri Sunil Mishra though appeared attractive, this Court refuses to subscribe to such argument which is contrary to what has been laid in *National Aluminium Co. Ltd. Vrs. Deputy Commissioner of Commercial Taxes), 2021 (I) OLR 828.*

14. It is urged by the learned counsel for the petitioner that when the Tribunal sought to exercise discretion in imposing penalty under Section 43(2), it should have given cogent and germane reason for doing so. Sri Kar taken this Court to the following observation of the learned Tribunal:

"9. In view of the above discussion, the GTO and the TTO of the appellant-dealer is determined at

Rs.6,00,332.00 and the tax calculated @ 4% upon the same comes to Rs.24,013.28. Accordingly, penalty to the tune of Rs.48,026.56, twice the amount of tax demand is imposed under Section 43(2) of the OVAT Act and as such the appellant-dealer is required to pay the tax and penalty amounting to Rs.72,039.84 in total as per the provisions of law.

10. In the result, the appellant is allowed in part. The orders passed by the forums below are hereby set aside to the extent described above. The appellant-dealer is directed to pay the tax demand of Rs.24,013.28 along with penalty of Rs.48,026.56 in accordance with law. The cross-objection is disposed of accordingly."

14.1. Aforesaid conclusion as recorded by the learned Tribunal in its second appellate order does not reveal that the discretion conferred under Section 43(2) has been utilized by assigning reason. It is manifest from the said order that the Odisha Sales Tax Tribunal straightway imposed penalty after determining the tax component on recording the finding that the suppression of turnover was established to the tune of Rs.6,00,332/-

14.2. The discretionary exercise of power amounts to something that is not compulsory, but it is left to the discretion of the person or authority involved, such as a discretionary grant. It is opposite to "mandatory". Therefore, "discretionary" is a term which involves an alternative power, *i.e.*, a power to do or refrain from doing a certain thing. In other words, it would be power of free decision or choice within certain legal bounds.

14.3. Necessity, thus, arises to state from *K.K. Gopalan & Co. Vrs. Assistant Commissioner (Assessment), (2000) 118 STC 111 (Ker)*, that 'discretion' means use of private and independent thought. When anything is left to be done according to one's discretion the law intends it to be done with sound discretion and according to law. Discretion is discerning between right and wrong and one who has power to act at discretion is bound by rule of reason. Discretion must not be arbitrary. The very term itself stands unsupported by circumstances imports the exercise of judgment, wisdom and skill as contra-distinguished from unthinking folly, heady violence or rash injustice. When applied to a Court of Justice or Tribunal or *quasi*-judicial body, it means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague and fanciful but legal and regular. Discretion must be exercised honestly and in the spirit of the statute. It is the power given by a statute to make choice among competing considerations. It implies power to choose between alternative courses of action. It is not unconfined and vagrant. It is canalized within banks that keep it from overflowing.

14.4. In *S.P. Road Link Vrs. State of Tripura, (2006) 144 STC 380 (Gau)* reference has been made to *Kumaon Mandal Vikas Nigam Ltd. Vrs. Girja Shankar Pant, (2001) 1 SCC*

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182 to observe that “discretion” means when it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion, according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

14.5. May it is in general connotation the word “discretion” means ‘prudence’, ‘individual choice or judgment’, ‘power of free decision’ and ‘freedom to act according to one’s own judgment’, but in legal parlance, it is confined to the exercise of freedom to act; squeezes one’s individual choice. It prescribes direction to the authority upon whom discretion is vested to act in conformity with statutory provisions and rule of law. It follows that the judgment of the delegatee of power, who is vested with discretion, is his own application of reasonable, conscience mind and thought unguided and uncontrolled by opinion/judgment of others. Discretion is the power delegated specially or implied from the wordings of the statute is oft coupled with responsibility and duty.

14.6. The significant words employed in Section 43(2) of the OVAT Act are “he may direct the dealer to pay, by way of

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penalty". The language itself gives clear indication of application of discretion. Discretion, as it appears from generic sense, may be unrestricted, but in its application it demands certain rule of law to be followed and reposes conduct and application of mind, testing whether the delegates of it acted rationally, fairly without fear and favour taking all relevant fact and material considerations. Discretion conferred, if unqualified and untrammelled, it has to be exercised sparingly with abundant caution when facts and circumstances warrant. Absolute discretion of unbridled and unlimited discretion may create restraint in enforcing law. In its proper perspective discretion which is demonstrably groundless or exercised in ignorance or at random is not in the eye of law "discretion", but mere caprice. The Court, when feels the authority has exercised the power of discretion in capricious and arbitrary manner and decided the matter taking into consideration extraneous and irrelevant considerations, can compel the delegated authority to discharge his duty honestly and objectively.

14.7. To confer with wide discretion on any authority without any procedure would not meet test of fairness, justness and reasonableness envisaged under Articles 14 and 21 of the Constitution of India. The absence of arbitrariness is the essential of the rule of law upon which constitutional frame-work rests. The rule of law ordains

the decisions of the authorities conferred with discretion should be made by application of known principles and rules and, such decisions should be predictable and the citizen should know where he stands. Thus, discretion is fixed range within which any authority acts without violating legal obligation to act and refrain from acting. It is canalized within banks that keep it from overflowing.

14.8. In the case of *Patnaik and Co. (P.) Ltd. Vrs. The State of Odisha and Others, (1975) 36 STC 362 (Ori)* taking cognizance of the expression *"may direct that the dealer shall pay by way of penalty"* used in Section 13(5) of the Odisha Sales Tax Act, 1947, it has been observed that,

*"**The expression 'may direct that the dealer shall pay by way of penalty' takes within its sweep the power of the Commissioner not to direct payment of such penalty. As to how this discretion is to be exercised has not been indicated in the section. One thing is however clear that the discretion must be judiciously and not arbitrarily exercised.** The authority cannot impose the maximum penalty in all and every case. There may be cases where the authority may not impose any penalty. There may be cases calling for imposition of maximum penalty. In-between there may be cases where the quantum of penalty may be low or high. The ultimate decision to be taken by the taxing authority in the matter of imposition of penalty would depend upon the facts and circumstances of each case. There must be objective determination. *** Penalty proceedings are quasi-criminal in nature. Though the language of the section does not give any indication as to how the discretion of the taxing authority is to be exercised, the onus on the dealer would be discharged by*

*preponderance of probabilities as in a civil case and not beyond reasonable doubt. ***"*

14.9. It has been clarified in *K.L. Tripathi Vrs. SBI, (1984) 1 SCC 43* that exercise of discretionary power involves two elements— *(i)* objective, and *(ii)* subjective; and existence of the exercise of an objective element is a condition precedent for exercise of the subjective element.

14.10. Such being conceptual understanding of the term "discretion" based on well-settled dicta of different Courts and its application to fact-situation of given case, considering the present case in the said perspective, it seems that the learned Odisha Sales Tribunal, while considering certain allegations out of eight categories as reflected in the Assessment Order based on the contents of Fraud Case Report as unsustainable but for two, failed to apply its judicial discretion while imposing penalty by invoking powers under Section 43(2) of the OVAT Act. Discretion as applied by the Tribunal should have been supported by independent reason for exercise of said power.

14.11. "Reason", being heartbeat of every decision making process, it has been restated in *Nareshbhai Bhagubhai Vrs. Union of India, (2019) 15 SCC 1* as follows:

"In Kranti Associates (P) Ltd. Vrs. Masood Ahmed Khan, (2010) 9 SCC 496 this Court held that:

"12. The necessity of giving reason by a body or authority in support of its decision came up for consideration before this Court in several cases. Initially this Court recognised a sort of demarcation between administrative orders and quasi-judicial orders but with the passage of time the distinction between the two got blurred and thinned out and virtually reached a vanishing point in the judgment of this Court inA.K. Kraipak v. Union of India [A.K. Kraipak v. Union of India, (1969) 2 SCC 262] .

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47. Summarising the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of

natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) *Reasons facilitate the process of judicial review by superior courts.*

(h) *The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.*

(i) *Judicial or even quasi-judicial opinions these days can be as different as the Judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.*

(j) *Insistence on reason is a requirement for both judicial accountability and transparency.*

(k) *If a Judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.*

(l) *Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.*

(m) *It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the Judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. [See David Shapiro*

in "Defence of Judicial Candor", (1987) 100 Harvard Law Review 731-37].

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija Vrs. Spain [Ruiz Torija Vrs. Spain, (1994) 19 EHRR 553], EHRR, at p. 562 para 29 and Anya Vrs. University of Oxford [Anya v. University of Oxford, 2001 EWCA Civ 405 (CA)], wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, 'adequate and intelligent reasons must be given for judicial decisions'.

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process"."

14.12. Conceding the position that giving reasons facilitates the detection of errors of law by the Court, this Court in *Santosh Kumar Paikray Vrs. State of Odisha, 2016 (II) OLR 1131 (Ori)* discussed importance of assignment of reason in the following lines:

"8. The meaning of the expression 'reason' as stated by Franz Schubert:

'reason is nothing but analysis of belief.'

In Black's Law Dictionary, 5th Edition, 'reason' has been defined as:

'a faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts and from propositions.'

In other words, reason means the faculty of rational thought rather than some abstract relationship between propositions and by this faculty, it is meant the capacity to make correct inferences from propositions, to size up facts for what they are and what they imply, and to identify the best means to some end, and, in general, to distinguish what we should believe from what we merely do believe. The importance of giving reason, it reveals a rational nexus between facts considered and conclusions reached.

9. In Union of India Vrs. Madal Lal Capoor, AIR 1974 SC 87 and Uma Charan Vrs. State of MP, AIR 1981 SC 1915, the Apex Court held reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. The fair play requires recording of germane and relevant precise reasons when an order affects the right of a citizen or a person irrespective of the fact whether it is judicial, quasi-judicial or administrative. The recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record and it is vital for the purpose of showing a person that he is receiving justice."

14.13. It is stated by Hon'ble Supreme Court in *State Bank of India Vrs. Ajay Kumar Sood, 2022 SCC OnLine SC 1067* that individual judges can indeed have different

ways of writing judgments and continue to have variations in their styles of expression. The expression of a judge is an unfolding of the recesses of the mind. However, while recesses of the mind may be inscrutable, the reasoning in judgment cannot be. While judges may have their own style of judgment writing, they must ensure lucidity in writing across these styles.

14.14. Looking at the impugned Order in such perspective, it can be safely said that the learned Tribunal has missed to ascribe reason for the conclusion as to why it has chosen to exercise power under sub-section (2) of Section 43 of the OVAT Act for imposing penalty equal to the amount of tax determined under Section 43(1).

15. Glance at provisions of sub-section (1) and sub-section (2) of Section 43 of the OVAT Act indicate that both are distinct powers for exercise involving independent considerations. While sub-section (1) is relating to making assessment to the best of judgment of the Assessing Authority under certain contingencies specified therein, sub-section (2) empowers the said authority to decide whether to impose penalty or not after determination of "tax due" under sub-section (1). Out of the five situations enumerated under sub-section (1), *viz.* *(i)* turnover escaped assessment, *(ii)* turnover has been under-assessed, *(iii)* turnover has been assessed at

a rate lower than the rate at which it is assessable, *(iv)* dealer is allowed wrongly any deduction from his turnover, *(v)* dealer has been allowed input tax credit to which he is not eligible, it is under two circumstances, *viz.,* “escapement” or “under-assessment”, power to impose penalty is conferred under sub-section (2) by using discretion.

15.1. As is seen from the Order-in-Second Appeal that the learned Odisha Sales Tax Tribunal imposed penalty invoking provisions of Section 43(2) merely because it has found certain transactions as suppression of turnover and tax has been assessed under Section 43(1). On analysis of both the provisions contained in sub-section (1) and sub-section (2), it would be pertinent to say that Section 43(2) of the OVAT Act confers discretionary power on the Authority to approach judiciously. It needs to be emphasized that when a statute confers powers on an authority to apply a standard, as laid down in Section 43(2) of the OVAT Act, it is expected of him to apply it on case to case basis, and not to fetter his discretion by declaration of rules or policy to be followed uniformly in all the cases. Generalization on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrates the very purpose of conferring discretion. Any

order bereft of reason exposes it to be attacked on the ground of vulnerability.

15.2. In the case at hand, the learned Odisha Sales Tax Tribunal after computing the tax effect on establishing suppression of turnover to the tune of Rs.6,00,332/-, as if there is absence of discretion in invoking power under Section 43(2) and construing the provision as mandatory in every circumstance, without discussing anything more, simply imposed penalty equal to twice the amount of tax so determined. Such exercise of power, in the opinion of this Court, is arbitrary, illogical and indicative of non-application of mind. Apt here to refer to a decision rendered in *Shree Plastics Pvt. Ltd., Berhampur Vrs. State of Odisha, STREV No. 15 of 2013, vide Order dated 13.07.2022*, wherein while considering *pari materia* provision contained in Section 10(2) of the Odisha Entry Tax Act, 1999 *vis-à-vis* Section 43(2) of the OVAT Act, 2004, following interpretation in *National Aluminium Company Limited, 2021 (I) OLR 828,* this Court stated as follows:

"10. Section 10(2) of the OET Act reads as under:

> *'(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 in addition to the tax assessed under sub-section (1), by way of penalty, a sum equal to twice the*

amount of tax additionally assessed under this section.'

11. ***That can be no doubt that the levy of penalty does not have to be automatic. It is contingent on the STO being satisfied that the escapement of tax was 'without any reasonable cause'.*** ****"*

16. Applying the above ratio to the present context, the essential component of Section 43(2) of the OVAT Act for exercising power to impose penalty, *i.e.*, satisfaction of the Assessing Officer that the escapement of tax was without reasonable cause, is conspicuously absent in the order of the learned Tribunal. In absence of recording of such satisfaction, imposition of penalty cannot be sustained in the eye of law.

17. In *M/s. United Electricals & Engineering Pvt. Ltd. v. State of Odisha, STREV No. 17 of 2016 vide Order dated 07.12.2022*, this Court has come to the similar finding and answered the question in favour of the assessee and against the department. It is beneficial to extract the following observation of this Court appearing in the said Order:

"3. As explained by this Court in National Aluminium Co. Ltd. Vrs. 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. Vrs. Deputy Commissioner of Commercial Taxes), [reported at 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."*

18. Penalty is not prescribed for mechanical imposition because law permits such a levy. It is well-settled legal position that while interpreting the provisions of the statute, every part of the provisions of the statute has to be given effect to and one part cannot be interpreted in a manner inconsistent with another part of the statute that would defeat the object and purpose of the Act and rules framed thereunder. In *Mohammad Ali Khan and Others Vrs. Commissioner of Wealth Tax, AIR 1997 SC 1165*, the following lines have been quoted from *J.K. Cotton Spinning & Weaving Mills Co. Ltd. Vrs. State of Uttar Pradesh, AIR 1961 SC 1170:*

"The Courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of statute should have effect."

18.1. It is also well-established that where language of any provision in a statute is clear, it is impermissible to vary the language unless the plain and unambiguous

language leads to an absurd result. The language of Section 43(2) in unequivocal terms spells out that satisfaction of the Assessing Authority as to the reasonableness of the cause is imperative. In absence of such material borne on record, the very invocation of exercise of power to impose penalty is considered to be flawed.

18.2. In *Khemka and Co. (Agencies) Pvt. Ltd. Vrs. State of Maharashtra, (1975) 2 SCC 22* Constitution Bench (5-Judge) of the Hon'ble Supreme Court has been pleased to render the conceptual understanding of "penalty" *qua* Section 9(2) of the CST Act in the following manner:

> *"25. Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act. *** penalty is not a continuation of assessment proceedings and that penalty partakes of the character of additional tax.*
>
> ***
>
> *28. *** A penalty is a statutory liability. ***"*

18.3. Since penalty is a statutory liability and is substantive in nature, the provisions for imposition thereof are to be strictly construed. It is, therefore, pertinent to put forth the well-accepted principle with regard to strict interpretation. In a taxing statute one has to look at what is clearly said. There is no equity about a tax. There is no intendment. There is no presumption as to a

tax. Nothing is to be read in, nothing is to be implied. One can only look fairly on the language used. If the meaning of the provision is reasonably clear, Courts have no jurisdiction to mitigate harshness. A Court of law, has nothing to do with the reasonableness or unreasonableness of a provision of a statute except so far as it may hold it in interpreting what the Legislature has said. If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results. The Court is not to be concerned with the question whether the policy that the provision embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous. As long as there is no ambiguity in the statutory language, resort to any interpretative process to unfold the legislative intent becomes impermissible. The supposed intention of the Legislature cannot then be appealed to whittle down the statutory language which is otherwise unambiguous. If the intendment is not in the words used it is nowhere else. The need for interpretation arises when the words used in the statute are, on their own terms, ambivalent and do not manifest the intention of the Legislature. Artificial and unduly latitudinarian rules of construction which, with their general tendency to give the taxpayer

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the breaks are out of place where the legislation has a fiscal mission. Be it noted that individual cases of hardship and injustice do not and cannot have any bearing for rejecting the natural construction by attributing normal meanings to the words used since hard cases do not make bad laws. A fiscal statute shall have to be interpreted on the basis of the language used therein and not *de hors* the same. No words ought to be added and only the language used ought to be considered so as to ascertain the proper meaning and intent of the legislation. The Court is to ascribe the natural and ordinary meaning to the words used by the Legislature and the Court ought not, under any circumstances, to substitute its own impression and ideas in place of the legislative intent as is available from a plain reading of the statutory provisions. Reference be had to *Cooke Vrs. Charles A Vogeler Co., (1901) AC 102 (HL); Cape Brandi Syndicate Vrs. Inland Revenue Commrs., (1921) 1 KB 64; Canadian Eagle Oil Co. Vrs. King, (1945) 2 AllER 499 (HL); Inland Commrs. Vrs. Ross & Coulter, Re Bladnoch Distillery Co., (1948) 1 AllER 616 (HL); Keshavji Ravji & Co. Vrs. CIT, (1990) 183 ITR 1 (SC); Orissa State Warehousing Corporation Vrs. CIT, (1999) 4 SCC 197; State of Andhra Pradesh Vrs. Gouri Shankar Modern Rice Mill, (2006) 147 STC 370 (AP).*

19. This Court, at this juncture, wishes to take cognizance of well-settled proposition of law as restated in *Zuari Cement Limited Vrs. Regional Director, Employees' Insurance Corporation, Hyderabad and Others, (2015) 7 SCC 690.* It has been laid down in the said reported case that it is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. This Court in *Rudra Prasad Sarangi Vrs. State of Odisha and Others, 2021 (I) OLR 844* has observed as follows:

> *"10. In Nazir Ahmed Vrs. King Emperor, AIR 1936 PC 253, law is well settled 'where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.' The said principles have been followed subsequently State of Uttar Pradesh Vrs. Singhara Singh, AIR 1964 SC 358, Dhananjay Reddy Vrs. State of Karnataka, AIR 2001 SC 1512, Chandra Kishore Jha Vrs. Mahabir Prasad, AIR 1999 SC 3558, Gujrat Urja Vikas Nigam Ltd. Vrs. Essar Power Ltd., AIR 2008 SC 1921, Ram Deen Maurya Vrs. State of U.P., (2009) 6 SCC 735.*
>
> *11. It is apt to refer here the legal maxim 'Expressio unius est exclusion alterius i.e. if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and any other manner are barred. Similar question had come up for consideration before this Court in Subash Chandra Nayak Vrs. Union of India, 2016 (1) OLR 922 and this Court in paragraph-8 observed as follows:*
>
> *'*** the statute prescribed a thing to be done in a particular manner, the same has to adhered to in the*

same manner or not at all. The origin of the Rule is traceable to the decision in Taylor Vrs. Tailor, (1875) LR I Ch D 426, which was subsequently followed by Lord Roche in Nazir Ahmad Vrs. King Emperor, AIR 1936 PC 253(2). But the said principle has been well recognized and holds the field till today in Babu Verghese Vrs. Bar Council of Kerala (1999) 3 SCC 422, and Zuari Cement Limited Vrs. Regional Director, Employees' State insurance Corporation, Hyderabad and others, (2015) 7 SCC 690 and the said principles has been referred to by this Court in Manguli Behera Vrs. State of Odisha and Others, W.P.(C) No. 21999 of 2014 disposed of on 10.03.2016."

19.1. Aforesaid salutary principle has been noticed by this Court while dealing with assessment under the OVAT Act in the matters of *Patitapabana Bastralaya Vrs. Sales Tax Officer and Others, (2015) 79 VST 425 (Ori) = 2015 (I) OLR 183;* and *Balaji Tobacco Store Vrs. Sales Tax Officer, 2015 SCC OnLine Ori 85.*

19.2. Section 43(2) of the OVAT Act specifically requires satisfaction of the Assessing Authority to be recorded while proceeding to exercise said power to impose penalty. The authority has to determine whether a penalty should be imposed and if it decides to impose a penalty the extent of the penalty liable to be imposed has been fixed in the statutory provision under Section 43(2) of the OVAT Act. Sri Rudra Prasad Kar, learned counsel for the petitioner laid stress upon the fact that the learned Tribunal accepted the explanation proffered by the petitioner with respect to 29 written pages contained

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in small note book which related to transactions procured through brokers and held that the allegation in the Fraud Case Report is not established. Nonetheless, the learned Tribunal supported the concurrent finding of the authorities below in upholding suppression established in respect of similar transactions which formed part of slip Nos.1 to 89. In the former case the learned Tribunal observed that the allegation is shrouded with doubt. Agreeing with the contention of the learned counsel for the petitioner, there is no warrant for imposition of penalty under Section 43(2) of the OVAT Act.

DECISION AND CONCLUSION:

20. For the discussions made above and the reasons stated *supra*, since this Court held that there is little scope in interfering with the factual adjudication made by the learned Odisha Sales Tax Tribunal, Cuttack, question Nos. I, II and III are answered against the petitioner-assessee and in favour of the Revenue-opposite party. So far as question No.IV is concerned, this Court, having noticed infirmity in exercise of power and improper use of discretion to impose of penalty under Section 43(2) of the OVAT Act by the learned Odisha Sales Tax Tribunal, answers said question in the affirmative, *i.e.,* in favour of the assessee-dealer and against the opposite party-Revenue.

21. In the wake of above conspectus of the matter, the order dated 11.05.2017 passed by the Odisha Sales Tax Tribunal, Cuttack in S.A. No. 80 (V) of 2016-17 so far as it imposed penalty to the extent of Rs.48,026.56P. is set aside and the determination of tax liability to the tune of Rs.24,013.28P. is sustained.

22. As a sequel to the above observation, the sales tax revision petition succeeds to the extent indicated above, but, in the circumstances, with no order as to costs.

(MURAHARI SRI RAMAN)
JUDGE

DR. B.R. SARANGI, J. I agree.

(DR. B.R. SARANGI)
JUDGE

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Orissa High Court, Cuttack
The 17th April, 2023, Aks/Laxmikant