

(2012) 08 OHC CK 0012

In the Orissa High Court

Case No : Writ Petition (C) No. 15962 of 2010

Jindal Stainless Ltd. (now JSL Ltd.)

APPELLANT

Vs

State of Orissa and others

RESPONDENT

Date of Decision : 07-08-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1)(g), 21, 265
Orissa Value Added Tax Act, 2004 — Section 101(4), 107(4), 17, 28(1), 31(9)

Citation : (2012) 54 VST 1

Hon'ble Judges : V. Gopala Gowda, C.J; B.N. Mahapatra, J

Bench : Division Bench

Advocate : B.K. Mahanti, M/s. A.N. Das, N. Sarkar and E.A. Das, for the Appellant; R.P. Kar, Standing Counsel (Revenue), for the Respondent

Judgement

B.N. Mahapatra, J.—This writ petition has been filed with the following prayers :

(i) Admit and allow the present writ petition,

(ii) Strike down section 77(4) of the Orissa Value Added Tax Act, 2004 read with the proviso to rule 87 of the Orissa Value Added Tax Rules, 2005 as ultra vires the Constitution of India and declare it as unconstitutional and violative of articles 14, 19, 21 and 265 of the Constitution of India.

(iii) Strike down section 42(5) of the Orissa Value Added Tax Act, 2004 read with rule 49(6) of the Orissa Value Added Tax Rules, 2005 as ultra vires the Constitution of India and declare it as unconstitutional and violative of articles 14, 19, 21 and 265 of the Constitution of India.

(iv) Quash the impugned audit assessment order dated October 20, 2008 for the assessment year 2005-06 and consequent demand notice(s) under the Orissa Value Added Tax Act, 2004.

(v) Quash the impugned communication notice No. 2177 dated May 16, 2008 under the OVAT in form VAT 306 issued by the assessing authority and the enclosed audit visit report dated March 31, 2008.

The petitioner's case in a nutshell is that it is a company incorporated and registered under the Companies Act, 1956, having its registered office at O. P. Jindal Marg, Hisar-125 005 (Haryana) and its unit within the State of Orissa at Kalinganagar Industrial Complex, Duburi, P. O. Danagadi, Dist : Jajpur, Odisha State. The petitioner is engaged in setting up of an integrated stainless steel plant as well as manufacture of ferro alloys. It is a registered dealer under the Odisha Value Added Tax Act, 2004 (for short, "the OVAT Act"). It is paying substantial amount of tax and is listed as a Large Tax Unit (LTU).

2. The officers of the Investigation Wing of the Commercial Taxes Department visited the business premises of the petitioner on October 1, 2007 without disclosing their identity and authorization. On objection and protest, the petitioner was threatened with various coercive actions. The petitioner therefore, under duress, protest and compulsion, rendered necessary assistance to the said persons and provided all informations and documents sought for from it. Documents and files were seized and removed from the petitioner's premises. No seizure list of documents and files seized and removed from the petitioner's premises was prepared and a copy thereof was handed over to the petitioner. Audit was completed on the same day. On or about first week of January, 2008, the petitioner received a notice in VAT 306 enclosing copy of audit visit report indicating the date of appearance before the Assistant Commissioner of Sales Tax, Jajpur Range, Jajpur Road on June 10, 2008. Pursuant to the above notice, the petitioner appeared and provided details required under the notice. The details were provided on various dates and last most important dates being October 24, 2008 and November 15, 2008. On or about November 19/20, 2008, the petitioner received the assessment order dated October 20, 2008 (annexure 2). Being aggrieved by the said assessment order, the petitioner has filed the present writ petition.

3. Mr. B. K. Mahanti, learned senior advocate appearing on behalf of the petitioner, challenging the vires of section 77(4) of the OVAT Act read with the proviso to rule 87 of the Orissa Value Added Tax Rules, 2005 (for short, "the OVAT Rules") submitted that the condition precedent of pre-deposit of 20 per cent of the tax or interest or both, in dispute, is ab initio void for entertaining an appeal (which effectively is the first available opportunity to approach the adjudicating authority) under the Scheme of the OVAT Act is unreasonable, oppressive and violative of and ultra vires article 14 of the Constitution of India. Lack of any provision in the statute and lack of any power in the hands of the statutory authority for relieving the assessee of the burdensome and onerous provision of pre-deposit (especially when the tax amount in full is deposited at the time of filing the return), renders the provision of pre-deposit unreasonable and hit by and ultra vires article 14 of the Constitution of India. The scheme of the assessment under the OVAT Act being that of self-assessment and the entire admitted tax being deposited for acceptance of the return and the return to be valid, the stage of the first appeal is the first available opportunity to the petitioner to agitate against and raise any grievance against an impugned

assessment order like in the present case wherein an audit assessment u/s 42 of the OVAT Act has been done. A condition of deposit of admitted tax in full and twenty per centum of tax or interest or both, in dispute, at the threshold bereft of any relieving provision renders the provision as oppressive and onerous, unreasonable and unsustainable in law. Such situation militates against the very spirit and concept of the OVAT Act and defeats the very purpose of the statute. Such a provision especially in cases of unsustainable demands makes the provision unreasonable, illegal and ultra vires articles 14, 19, 21 and 265 of the Constitution of India. The workability of the statute is defeated and the entire appeal provision is rendered illusory and nugatory as the opposite parties artificially and on flimsy grounds inflate the assessed amount and thereby burden the assessee and realize twenty per cent of the inflated tax or interest or both through the provision of pre-deposit in appeal and the balance of tax, interest and penalty for conditional stay at the stage of hearing of the interim stay petition. Such provision circumvents and defeats the very spirit and legislative intent of introducing the OVAT Act and repealing the Orissa Sales Tax Act. The provision thwarts, defeats, obliterates and eclipses a substantive right of appeal of the petitioner by imposing such an unreasonable and oppressive provision. The concept of pre-deposit and artificially inflated demand in cases like the present militates against and defeats the fiscal regime and causes severe harm to perspective planning and defeats any fiscal discipline causing severe harm to the economy.

4. Mr. Mahanti, further submitted that the petitioner challenges the constitutional validity of sub-section (5) of section 42 of the OVAT Act read with sub-rule (6) of rule 49 of the OVAT Rules being arbitrary, unreasonable, fatally hit by gross and flagrant violation of the principles of natural justice. Section 42(5) of the OVAT Act and rule 49(6) of the OVAT Rules are ultra vires the Constitution of India and also hit by doctrine of double jeopardy. Section 42(5) of the OVAT Act provides that 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 subsection (3) or sub-section (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-sections. There is no provision to show cause as to whether penalty should be imposed or not and therefore, this provision is rendered illegal, unconstitutional and ultra vires the Constitution.

5. Challenging the impugned notice dated May 16, 2008 (annexure 1) vide communication No. 1677, the enclosed audit visit report dated March 31, 2008 and the consequent audit assessment order dated October 20, 2008 (annexure 2) for the assessment year 2005-06 and issuance of the demand notice to the petitioner, Mr. Mahanti, submitted that those notices and orders issued/passed by the opposite-parties are not sustainable in law. No notice intimating the date of audit visit in terms of rule 42 of the OVAT Rules was issued to the petitioner. Such fatal infirmity vitiates the entire audit proceedings rendered unsustainable in law and the same is without jurisdiction and non est in law. Lack of any notice

to the petitioner has rendered the opposite party No. 5 lack of the jurisdiction to proceed with and take steps for making audit assessment. There exists no case for satisfaction of the mandate of rule 41(3) of the OVAT Rules and no case can possibly be made out for dispensing with prior notice of tax audit u/s 42 of the OVAT Act read with rule 41 of the OVAT Rules. There exists no revenue risk either on the basis of objective analysis or on the basis of any intelligence report. The petitioner verily believed that no prior approval of the next higher authority has been taken in terms of rule 44(3) of the OVAT Rules. The condition precedent for acquisition of jurisdiction under rule 41 of the OVAT Rules does not exist and therefore, exercise of jurisdiction to dispense with the pre-requisite notice of audit visit is an arbitrary exercise of power and is grossly vitiated and fatally hit by inherent lack of jurisdiction in the hands of opposite party No. 6. The contents, findings and prejudicial material in the audit visit report and lack of any opportunity to the petitioner to contend, rebut and reply to the allegations in the said materials clearly violate the principles of natural justice and render the consequent prejudicial finding leading to the audit visit report and the assessment order unsustainable in law.

6. The notice in form VAT-306 itself is contrary to the provisions of section 42(2) of the OVAT Act insofar as the mandatory statutorily prescribed period of thirty days granted therein illegally and in gross violation of the principles of natural justice has been reduced to around twenty five days. The audit visit report has been submitted by a person who was neither a part of nor is the head of the team of audit visit on October 1, 2007. The approval of the audit visit report has been given by the Assistant Commissioner of Sales Tax, Enforcement Range, Berhampur on a report submitted by the Sales Tax Officer, Investigation unit, Bhubaneswar as head of the audit team.

7. Section 41(4) of the OVAT Act provides a period of seven days to the authorized officer to submit the audit report to the assessing authority. But in the instant case, the audit report was submitted on March 31, 2008, i.e., after a period of six months from the date of completion of the audit. Therefore, audit report and consequential assessment order are unreasonable, unsustainable, non est and void ab initio in law. The time period provided u/s 42(6) of the OVAT Act is six months from the date of receipt of the audit report. Section 41(4) of the OVAT Act having been clearly violated, the authorized officer signed the audit report on March 31, 2008, i.e., exactly on completion of six months. The impugned audit assessment order dated October 20, 2008 would also be barred by limitation and the statutory bar would be fatal to the order/proceedings. Therefore, there exists no jurisdiction in the hands of the assessing officer to proceed with the assessment order u/s 42 of the OVAT Act. The assessment order travels beyond the materials available in the audit visit report. The said assessment officer also relies on extraneous and irrelevant material which is neither on record nor is a part of the audit visit report. He has also conveniently ignored materials on record. Hence the impugned assessment order is liable to be quashed and the assessing officer has no jurisdiction to travel beyond the

mandate of the audit visit report and cannot rely on any material which is extraneous and alien to the audit visit report.

8. Mr. Mahanti, further submitted that the petitioner strongly believes that after completion of six months as provided u/s 42(6) of the OVAT Act, no extension of time for completion of assessment has been granted by the Commissioner. The audit visit dated October 1, 2007 was followed by a report dated March 31, 2008. The report reveals that the entire audit was for the period April, 2005 till March, 2006. The notice in form 306 enclosing the audit visit report is for the period April 1, 2005 to March 31, 2007, (i.e., 2005-06, 2006-07 and 2007-08) (up to September 30, 2007). The notice thus travels/transgresses beyond the period in the audit visit report and it is therefore, ab initio void and non est in the eye of law and without jurisdiction. This clearly demonstrates that the order has been antedated and the assessment order dated October 20, 2008 is fabricated document inasmuch as in the order dated October 20, 2008 the materials submitted on October 24, 2008 and November 15, 2008 are incorporated. The interpretation of the provisions relating to the input-tax credit and disallowance thereof are wholly misconceived and are based on an erroneous interpretation of law and therefore the same ought to be deleted. The impugned assessment order ignores the details submitted to opposite party No. 6 which clearly favours the petitioner and proceeded contrary to the materials available on record and reaches a perverse and unsustainable conclusion and saddles the petitioner with the extra demand and therefore, learned senior advocate Mr. Mahanti, prays to allow this writ petition by granting the reliefs as prayed in this writ petition.

9. Mr. R. P. Kar, learned standing counsel appearing for the Revenue, submitted that an alternative and efficacious remedy by way of appeal is available to the petitioner and the petitioner itself admits that it has filed appeal against the impugned order of assessment before the first appellate authority. Therefore, the petitioner cannot avail of parallel proceedings against the impugned order of assessment passed under annexure 1.

10. Mr. Kar further submitted that the assertion of the petitioner that the audit assessment order has been passed without giving opportunity of hearing to the petitioner and thereby principles of natural justice is violated is contrary to its own averments made in paragraph 2(t) of writ petition, wherein it is averred that the petitioner appeared, assisted and complied with the direction of opposite party No. 6 and provided all material data for the purpose of assessment.

11. Placing reliance on the judgment of the honourable Supreme Court in the case of Smt. Har Devi Asnani v. State of Rajasthan [2011] 6 Supreme 596, Mr. Kar submitted that the provisions of pre-condition to deposit 20 per cent of the tax or penalty or both in dispute to maintain appeal is constitutionally valid. Provision of section 42(5) of the OVAT Act authorizing imposition of penalty equal to twice the amount of tax assessed is constitutionally valid. Therefore, Mr. Kar, prays for dismissal of the writ petition.

12. On the rival, factual and legal contentions urged on behalf of the parties, with reference to prayer made in the writ petition the following questions fall for consideration of this court :

(i) Whether the condition precedent for pre-deposit of 20 per cent of tax or interest or both in dispute in addition to payment of admitted tax for entertaining an appeal as provided u/s 77(4) of the OVAT Act read with proviso to rule 87 of the OVAT Rules is unreasonable, oppressive, violative and ultra vires of article 14 of the Constitution of India ?

(ii) Whether the provisions of sub-section (5) of section 42 of the OVAT Act, 2004 read with sub-rule (6) of rule 49 of the OVAT Rules, 2005 authorizing imposition of penalty equal to twice the amount of tax assessed u/s 42(3) and (4) of the OVAT Act are arbitrary, unreasonable, oppressive and ultra vires the Constitution of India ?

(iii) Whether the authorized officer has not submitted audit visit report to the assessing authority within seven days from the date of audit as provided u/s 41(4) of the OVAT Act and thereby the impugned audit report dated March 31, 2008 and audit assessment dated August 20, 2008 would be non est/ unsustainable in the eye of law ?

(iv) Whether the audit visit report is vitiated on the ground that the same has been submitted by an officer who was neither a part of nor is the head of the team of audit ?

(v) Whether statutory period of 30 days allowed in section 42(2) of the OVAT Act, 2005 has not been extended to the petitioner in form VAT 306 and thereby the audit assessment proceedings are vitiated ?

(vi) Whether the Investigation Wing of the Commercial Taxes Department without disclosing their identity and authorization in their favour visited the business premises of the petitioner on October 1, 2007 and on objection and protest the petitioner was threatened with various coercive actions as a result of which the petitioner under duress, protest and compulsion rendered necessary assistance to the investigating officer and provided all materials and documents sought for from him ?

(vii) Whether the documents filed were seized and removed by the investigating officials from the business premises of the petitioner without preparing and handing over any seizure list to the petitioner ?

(viii) Whether there exists no case for dispensing with prior notice on tax audit u/s 42 of the OVAT Act, 2004 read with rule 42 of the OVAT Rules, 2005 ?

(ix) Whether the pre-condition of an intelligence or information regarding evasion of tax was not satisfied as required under rule 41(3) of the OVAT Rules before an order was passed by the Commissioner for audit under that rule ?

(x) Whether no prior or post facto approval of the next higher authority as

provided under rule 44(3) of the Rules has been taken for directing audit under rule 41(3) of the OVAT Rules.

(xi) Whether approval of the report by the Assistant Commissioner of Sales Tax, Enforcement Range, Berhampur renders the approval of report to be vulnerable and a case of mechanical exercise of power without any application of mind ?

(xii) Whether AVR reveals that the entire audit is for the period April, 2005 till March, 2006, but the notice is for the period from April 1, 2005 to March 31, 2007 and thus the notice travels/transgresses beyond the period in audit visit report and therefore without jurisdiction and non est in the eye of law ?

(xiii) Whether the contents, findings and materials in the audit visit report were not disclosed to the petitioner and reasonable opportunity of hearing was not afforded to him to rebut the same ?

(xiv) Whether the impugned order of assessment dated October 20, 2008 has been antedated and materials submitted by the petitioner on October 24, 2008 and November 15, 2008 are incorporated in the said order of assessment dated October 20, 2008 and the impugned audit assessment order ignores the details submitted by the petitioner to opposite party No. 6 which clearly favours the petitioner and therefore the assessment order is not sustainable in law ?

(xv) Whether assessment order relies on extraneous and irrelevant materials which are neither on record nor as a part of audit visit report and it also ignores the materials on record, therefore, the impugned order of assessment is liable to be quashed ?

(xvi) Whether in response to notice/direction given by the assessing officer, the petitioner appeared and complied with the direction of opposite party No. 6 and provided all materials/data for the purpose of assessment and therefore, in law the best judgment cannot be permissible ?

13. Many points have been urged on behalf of the petitioner and many decisions have also been cited in the written argument submitted on behalf of the petitioner. It is not necessary to burden this judgment by referring to all the decisions cited.

14. Question No. (i) is with regard to requirement of pre-deposit of 20 per cent of tax or interest or both in dispute in addition to payment of admitted tax for entertaining the appeal. Section 77(4) of the OVAT Act provides that no appeal against any order shall be entertained by the appellate authority, unless it is accompanied by satisfactory proof of payment of admitted tax in full and twenty per centum of the tax or interest or both in dispute.

15. According to Mr. Mahanti, learned senior advocate, this provision is very harsh. There is no relieving provision as no power is vested with the appellate authority to grant any relaxation in the matter of pre-deposit of 20 per cent of tax or interest or both in dispute. In case of raising arbitrary demand, it is

difficult to maintain an appeal as it is mandatory as per the existing provision to deposit of 20 per cent of the tax or interest or both in dispute to maintain appeal. According to Mr. Mahanti, such a provision is arbitrary, unreasonable and hit by articles 14 and 19(1)(g) of the Constitution of India. Placing reliance on the judgment of the honourable Supreme Court in the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., , Mr. Mahanti submitted that the honourable Supreme Court declared that the provision of section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 requiring deposit of 75 per cent of the demand is constitutionally invalid. The honourable Supreme Court has further held that the amount of deposit of 75 per cent of the demand, at the initial proceeding itself sounds unreasonable and oppressive, more particularly when the secured assets/ the management thereof along with the right to transfer such interest has been taken over by the secured creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on the basis of one-sided claim alone cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute.

16. Situation is different in case of filing of an appeal before the first appellate authority u/s 77 of the OVAT Act. Under the OVAT Act, the first appeal is preferred only after the assessment under the OVAT Act is completed. Thus, the first adjudicating authority is the assessing officer where ample scope was given to the assessee to defend its case. Only against the assessment order, the appeal is preferred before the first appellate authority. Therefore, the payment of 20 per cent of the tax or interest or both in dispute is not a requirement at the initial stage but is a requirement at the appellate stage. Hence, the decision of the honourable Supreme Court in the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., is distinguishable so far as maintaining appeal before the first appellate authority under the OVAT Act is concerned.

17. According to Mr. Kar, in view of the judgment of the honourable Supreme Court in the case of Smt. Har Devi Asnani [2011] 6 Supreme 596 that right of appeal or right of revision is not an absolute right and it is a statutory right which can be circumscribed by the conditions in the grant made by the statute. Therefore, precondition of depositing 20 per cent of tax or interest or both in dispute is constitutionally valid.

18. Needless to say that appeal is a creation of the statute and it cannot be created by acquiescence of the parties or by order of court.

19. Law is well-settled that right of appeal/revision cannot be absolute and the Legislature can put conditions for maintaining the same.

20. In Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay, Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay, the honourable Supreme Court held as under :

Right to appeal is neither an absolute right nor an ingredient of natural justice

the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant.

. . . The purpose of the section is to act in terrorem to make the people comply with the provisions of law.

21. In *Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others*, , the honourable Supreme Court held as under :

It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigant being a substantive statutory right it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before an appeal can be maintained and no court has the power to add to or enlarge those grounds. The appeal cannot be decided on merit on merely equitable jurisdiction.

22. In *The Gujarat Agro Industries Co. Ltd. Vs. The Municipal Corporation of the City of Ahmedabad and Others Etc. Etc.*, the honourable Supreme Court held that right of appeal, though statutory, can be conditional/qualified and such a law cannot be held to be violative of article 14 of the Constitution. An appeal cannot be filed unless so provided under the statute and when a law authorizes filing of an appeal, it can impose conditions as well.

23. The honourable Supreme Court in the case of *Smt. Har Devi Asnani* [2011] 6 S 596, referring to its earlier decision held that.

10. . . this court has taken a consistent view that the right of appeal or right of revision is not an absolute right and it is a statutory right which can be circumscribed by the conditions in the grant made by the statute. Following this consistent view of this court, we hold that the proviso to section 65(1) of the Act, requiring deposit of 50 per cent of the demand before a revision is entertained against the demand is only a condition for the grant of the right of revision and the proviso does not render the right of revision illusory and is within the legislative power of the State Legislature.

24. Therefore, it becomes crystal clear that appeal is a statutory remedy and the same is maintainable provided that the statute enacted by a competent Legislature provides for it. Further, there can be no quarrel that the right of appeal cannot be absolute and the Legislature can put conditions for maintaining the same.

25. For the reasons stated above, the decisions relied upon by the petitioner are of no help to the petitioner as those decisions are rendered in respect of particular facts of that case.

26. In view of the above, we are of the considered view that the provisions of section 77(4) of the OVAT Act requiring deposit of 20 per cent of the tax or interest or both in dispute as a precondition for entertaining an appeal against

the order enumerated u/s 77(1) of the OVAT Act does not make the right of appeal illusory and such a condition is within the legislative power of the State Legislature and cannot be held to be unreasonable and violative of article 14 of the Constitution.

27. Question No. (ii) is with regard to imposition of penalty u/s 42(5) which is equal to twice the amount of tax assessed under sub-section (3) or sub-section (4) of section 42 of the OVAT Act which according to the petitioner is arbitrary, unreasonable, oppressive and ultra vires the provisions of articles 14, 19(1)(g), 21 and 265 of the Constitution of India.

28. Section 42 of the OVAT Act deals with "audit assessment".

29. Section 42(5) provides that 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 subsection (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-sections.

30. The constitutional validity of sub-section (5) of section 42 of the OVAT Act is under challenge basically on two grounds :

(i) this provision mandates imposition of penalty without prejudice to any penalty, or interest that may have been levied under any provisions of the Act ; and

(ii) without any show cause to the affected assessee.

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), section 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 u/s 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 u/s 42(5) is warranted.

32. Mr. Mahanti, learned senior advocate has not brought to our notice any other provision of the OVAT Act authorizing imposition of penalty in the nature of penalty envisaged u/s 42(5). If the nature of the penalty elsewhere provided under the Statute that is different from the nature of penalty envisaged u/s 42(5) of the OVAT Act. Therefore, the question of double jeopardy does not arise.

33. The matter may be looked into from different angle. Section 42 of the OVAT Act deals with "audit assessment". As stated above, imposition of penalty is dependent upon the quantum of tax assessed in audit assessment u/s 42 of the 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, u/s 42 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 and therefore, it cannot be said that the provision in this regard is arbitrary and unreasonable.

34. Against the assessment of tax and penalty there is a provision for appeal. In appeal, if the amount of tax assessed u/s 42 of the OVAT Act is reduced, the quantum of penalty will also be reduced automatically. Therefore, it is not an unreasonable provision as contended by Mr. Mahanti, learned senior advocate appearing for the petitioner.

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 u/s 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.

36. Question No. (iii) is whether the authorized officer has not submitted audit visit report to the assessing authority within seven days from the date of audit as contemplated u/s 41(4) of the OVAT Act and thereby the impugned audit visit report dated March 31, 2008 and audit assessment dated August 20, 2008 would be non est/unsustainable in the eye of law. Normally, it is a mixed question of fact and law. But the documents annexed to the writ petition reveal that there is infraction of the provision and time provided u/s 41(4) has not been adhered to. Section 41(4) provides that after completion of tax audit of any dealer under subsection (3), the officer authorized to conduct such audit shall, within seven days from the date of completion of the audit, submit the audit report to the assessing authority in the prescribed form along with the statements recorded and documents obtained evidencing suppression of purchases or sales, or both,

erroneous claims of deductions including input-tax credit and evasion of tax, if any, relevant for the purpose of investigation, assessment or such other purposes.

37. In the instant case, notice issued in form VAT 306 and the accompanying audit visit report reveal that the audit of the business of the petitioner was undertaken by the officers of the audit unit on October 1, 2007 and audit visit report was to be submitted within seven days from October 1, 2007 as contemplated in section 41(4). But the audit visit report was submitted on March 31, 2008, i.e., after six months of the completion of the audit. This is in clear violation of the statutory provision contained in section 41(4) since there is a time-limit prescribed for submission of audit visit report and the same has not been complied with. Therefore, the said audit visit report has no validity.

38. It is unfortunate that while under OVAT Act section 41(4) provides for submission of audit visit report within seven days from the date of audit and audit assessment is to be completed within six months from the date of receipt of AVR by the assessing authority, the action of the authorised officer in submitting the AVR to the assessing authority after six months from the date of audit visit not only violates the statutory provisions contained in section 41(4) but also is against the scheme and spirit of audit visit and audit assessment provided under the OVAT Act.

39. Question No. (iv) is whether the audit visit report is vitiated on the ground that the same has been submitted by an officer who was neither a part of nor is the head of the team of audit.

40. Mr. Mahanti, learned senior advocate submitted that the audit visit report has been submitted by a person who was neither a part of nor is the head of the team of audit visit on October 1, 2007. The audit visit report has been submitted under the seal and signature of the Sales Tax Officer, Investigation Unit, Bhubaneswar as head of the audit team. But as a matter of fact the said officer was never a part of the audit team and the audit visit report also does not disclose the said officer to be a part of the audit visit team. Therefore, the Sales Tax Officer, Investigation Unit, Bhubaneswar cannot be the head of the audit team and has no jurisdiction and competence to sign the audit visit report. Moreover, the approval of the audit visit report has been given by the Assistant Commissioner of Sales Tax on a report submitted by the Sales Tax Officer, Investigation Unit, Bhubaneswar as head of the audit team. It is a matter of record that the audit at Bhubaneswar office of the petitioner was under the supervision of the Assistant Commissioner of Sales Tax, Enforcement Range, Balasore whereas the report has been approved by the Assistant Commissioner, Enforcement Range, Berhampur. This renders the approval of the report vulnerable and a case of mechanical exercise of power without application of mind by an incompetent and unauthorized officer. Therefore, the report and their approval are void and non est in the eye of law ; therefore liable to be quashed.

41. To deal with the above question, it is necessary to refer section 41(4) of the OVAT Act read with rule 45(3) of the OVAT Rules. Section 41(4) envisages that after completion of tax audit of any dealer, the officer authorized to conduct such audit shall within seven days from the date of completion of the audit, submit the audit visit report. Rule 45(3) says audit report in form VAT-303 shall be submitted by the officer in-charge of the audit team conducting audit to the assessing authority within seven days of completion of the audit. Conjoint reading of section 41(4) of the OVAT Act and rule 45(3) of the OVAT Rules makes it clear that after completion of the tax audit of any dealer, the officer in-charge authorized to conduct such audit shall within seven days from the date of completion of the audit submit the audit visit report in form VAT-303 to the assessing authority.

42. Therefore, an audit visit report if submitted by an officer, who is neither a part of nor is the head of the team of audit, is vitiated in law.

43. The audit visit report attached to the writ petition under annexure 1 reveals that on October 1, 2007, an investigation audit under rule 41(3) of the OVAT Rules was preferred by the Enforcement Wing of Commercial Taxes, Government of Odisha, simultaneously, at both the factory premises as well as the registered office premises of the company located at Jajpur and Bhubaneswar. While a team of officials led by ACST-Enforcement Range, Berhampur visited the factory premises, the registered office premises was visited by STO(I), Berhampur and ASTOs of Investigation Unit of Bhubaneswar under the supervision of the ACST, Enforcement Range, Balasore. Thus, the ACST, Enforcement Range, Berhampur was in-charge of the audit team conducting audit in factory premises. But the audit visit report reveals that the same has been submitted by the S. T. O., Investigation Unit, Bhubaneswar as head of the audit team. Thus, the audit visit report has not been submitted by the officer in-charge of the audit team authorized to conduct the audit in the factory premises as required u/s 41(4) of the OVAT Act read with rule 45(3) of the OVAT Rules. Therefore, the said report is vitiated in law.

44. Further, irregularity noticed from the audit visit report is that while the registered office premises was visited by STO (I), Berhampur and ASTO's of Investigation Unit, Bhubaneswar under the supervision of ACST, Enforcement Range, Balasore, the said audit visit report has been approved by the Assistant Commissioner of Sales Tax, Enforcement Range, Berhampur. This is also not permissible under the law.

45. Question No. (v) is as to whether statutory period of 30 days allowed in section 42(2) of the OVAT Act, 2005 has not been extended to the petitioner in form VAT 306 and thereby the audit assessment proceedings are vitiated. Section 42(1) provides that 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 provisions of this Act affecting the tax liability of the dealer,

the assessing authority may, notwithstanding the fact that the dealer may have been assessed u/s 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 authorized 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.

46. Section 42(2) provides that where a notice is issued to a dealer under subsection (1) he shall be allowed time for a period not less than 30 days for production of relevant books of account and documents. In the instant case, notice in form VAT 306, which has been attached to the writ petition as annexure 1 reveals that such notice though was dated April 30, 2008 has been issued vide issue No. 2177 dated May 16, 2008 fixing date of appearance and production of the books of account on June 10, 2008. Thus, the notice in form VAT 306 itself shows that 30 days time as provided u/s 42(2) has not been allowed to the petitioner. The petitioner's case is that the notice in form VAT 306 was served in first week of June, 2008 and thus the petitioner barely had 4-5 days to appear and comply with the direction in the notice and thereby the cardinal principle of natural justice is violated. Thus, this is a case of clear violation/infracture of the mandatory provisions of section 42(2) of the OVAT Act.

47. Law is well-settled that when the statute requires to do certain thing in certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressio unius est exclusion alteris", meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible. (See *Taylor v. Taylor* [1876] 1 Ch. D. 426, AIR 1936 253 (Privy Council) *Ram Phal Kundu Vs. Kamal Sharma*, and *Indian Banks' Association, Bombay and Others Vs. Devkala Consultancy Service and Others*, .

48. In the fact situation, completion of audit assessment on the basis of AVR which has been submitted in violation of statutory provisions of section 41(4) of the OVAT Act read with rule 45(3) of the OVAT Rules and upon issuance of notice in form VAT 306 in violation of section 42(2) is not sustainable in law. Accordingly, we set aside the impugned assessment order dated October 20, 2008 and the consequent demand notice.

49. In view of the answer to question Nos. (iii), (iv) and (v) there is no need to answer other questions.

50. In the result the writ petition is allowed in part to the extent indicated above. V. Gopala Gowda C. J.,

I agree.