

**BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL:
CUTTACK**

S.A. No. 212 (VAT) of 2018

(Arising out of order of the learned Addl. CST (Appeal), South Zone,
Berhampur in Appeal No. AA(VAT) – 04/2017-18,
disposed of on 09.07.2018)

Present: **Shri G.C. Behera, Chairman**

M/s. Swastik Auto Syndicate,
Gandhinagar, Berhampur ... Appellant

-Versus-

State of Odisha, represented by the
Commissioner of Sales Tax, Odisha,
Cuttack ... Respondent

For the Appellant : Sri R.P. Sahu, Advocate &
Sri R.K. Sahu, Advocate
For the Respondent : Sri D. Behura, S.C. (CT)

Date of hearing : 13.03.2023 *** Date of order : 31.03.2023

ORDER

Dealer is in appeal against the order dated 09.07.2018 of the Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (hereinafter called as ‘First Appellate Authority’) in F A No. AA(VAT) – 04/2017-18 confirming the assessment order of the Deputy Commissioner of Sales Tax, Ganjam I Circle, Berhampur (in short, ‘Assessing Authority’).

2. The facts of the case, in short, are that –

M/s. Swastik Auto Syndicate is engaged in purchase and sale of automobile parts and accessories, lubricants etc. on retail basis. The assessments relate to the period 01.04.2013 to 31.03.2015. The Assessing Authority raised tax and penalty of ₹3,41,820.00 in assessment proceeding

u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') basing on the Audit Visit Report (AVR).

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority confirmed the tax demand and dismissed the appeal. Being aggrieved with the order of the First Appellate Authority, the Dealer prefers the appeal. Hence, the appeal.

The State files cross-objection supporting the impugned order of the First Appellate Authority confirming the order of assessment to be just and proper in the facts and circumstances of the case.

3. The learned Counsel for the Dealer submits that the Department cannot deny the claim of ITC merely on the ground of mismatch due to default on account of selling dealer. He further submits that the order of the First Appellate Authority is otherwise bad in law and same requires interference in appeal.

4. On the contrary, learned Standing Counsel (CT) for the State supports the finding of the First Appellate Authority and submits that the order of the First Appellate Authority is correct in its perspective and the State should not suffer any loss of revenue. So, he submits that the order of the First Appellate Authority requires no interference in appeal.

5. Heard the rival submissions and gone through the orders of the Assessing Authority and First Appellate Authority vis-a-vis the materials on record. The Assessing Authority disallowed the ITC of ₹1,13,198.09 as the Dealer could not give any satisfactory compliance. The Assessing Authority added the sale suppression of ₹5,500.00 to the declared turnover after rejecting the books of account. The Assessing Authority determined the GTO and TTO at ₹1,38,09,667.00. He computed the tax liability and raised demand of ₹3,41,820.00 along with penalty, besides interest of ₹1,614.00

was levied u/s. 34(3) of the OVAT Act. The First Appellate Authority confirmed the finding of disallowance of ITC by the Assessing Authority.

6. Learned Counsel for the Dealer claimed that the Dealer has discharged his onus as per the provision of Section 20 of the OVAT Act and the Assessing Authority as well as First Appellate Authority disallowed the ITC on the ground of mismatch.

In the case of *On Quest Merchandising India Pvt. v. Government of NCT of Delhi and others* in batch appeal decided on 26.10.2017 in **WP (C) No. 6093 of 2017**, wherein the Hon'ble Delhi High Court have been pleased to observe as under :-

“54. The result of such reading down would be that the Department is precluded from invoking Section 9 (2) (g) of the DVAT to deny ITC to a purchasing dealer who has bona fide entered into a purchase transaction with a registered selling dealer who has issued a tax invoice reflecting the TIN number. In the event that the selling dealer has failed to deposit the tax www.taxguru.in W.P.(C) 6093/2017 & connected matters Page 40 of 40 collected by him from the purchasing dealer, the remedy for the Department would be to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC. Where, however, the Department is able to come across material to show that the purchasing dealer and the selling dealer acted in collusion then the Department can proceed under Section 40A of the DVAT Act.”

The aforesaid decision of the Hon'ble Delhi High Court have been confirmed by the Hon'ble Apex Court in SLP in the case of *Commissioner of Trade & Taxes, Delhi and others Vs. Arise India Limited and others*, [TS-2-SC-2018-VAT], has dismissed the Special Leave Petition filed by the Revenue against the decision of the Hon'ble High Court of Delhi in the case of *Arise India Limited and others Vs. Commissioner of Trade & Taxes, Delhi and others*, [TS-314-HC-2017(Del)-VAT] (“Arise India case”).

7. In view of the ratio decided by the Hon'ble Delhi High Court, the State cannot deny the ITC of the Dealer merely on the ground that the selling dealer failed to deposit the tax. So, the First Appellate Authority and the Assessing Authority went wrong in disallowing the claim of ITC of the

Dealer, which warrants interference in appeal. The Department, however, is at liberty to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC. Further, the Department is able to come across material to show that the purchasing dealer and the selling dealer acted in collusion then the Department can proceed in accordance with law. Hence, it is ordered.

8. Resultantly, the appeal stands allowed and the impugned order of the First Appellate Authority is hereby set aside. The matter is remanded to the Assessing Authority for computation of tax liability afresh as per law keeping in view the observations made supra within a period of three months from the date of receipt of this order.

The Department, however, is at liberty to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC. Further, if the Department is able to come across material to show that the purchasing dealer and the selling dealer acted in collusion then the Department can proceed in accordance with law.

Cross-objection is disposed of accordingly.

Dictated & Corrected by me

**Sd/-
(G.C. Behera)
Chairman**

**Sd/-
(G.C. Behera)
Chairman**