BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 222 (VAT) of 2019
&
S.A. No. 223 (VAT) of 2019

(Arising out of orders of the learned Joint Commissioner of CT&GST (Appeal), Sundargarh Territorial Range, Rourkela, in Appeal No. AA V 57 of 2015-16 & AA V 88 of 2017-18, disposed of on 29.07.2019)

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

M/s. Raasi Refractories Limited,
Plot No. 1008, Kuarmunda,
Dist. Sundargarh ... Appellant

-Versus-

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

For the Appellant : Sri S.C. Agarwal, Advocate
For the Respondent : Sri D. Behura, S.C. (CT)
Sri S.K. Pradhan, Addl. SC (CT)

Date of hearing : 01.06.2023 *** Date of order : 30.06.2023

O R D E R

Both these appeals relate to the same party and for the same period involving common question of facts and law. So, they are heard analogously and disposed of in this common order for the sake of convenience.

S.A. No. 222 (VAT) of 2019 :

2. Dealer assails the order dated 29.07.2019 of the Joint Commissioner of CT & CST (Appeal), Sundargarh Territorial Range,

Rourkela, (hereinafter called as 'First Appellate Authority') in F.A. No. AA V 57 of 2015-16 enhancing the demand raised in assessment order of the Sales Tax Officer, Rourkela-II Circle, Panposh (in short, 'Assessing Authority').

S.A. No. 223 (VAT) of 2019 :

3. Dealer is also in appeal against the order dated 29.07.2019 of the First Appellate Authority in F.A. No. AA V 88 of 2017-18 reducing the demand raised in the assessment order of the Assessing Authority.

4. Briefly stated, the facts of the cases are that –

M/s. Raasi Refractories Limited carries on business in refractory bricks, blocks and tiles. The assessment period relates to 01.04.2012 to 31.03.2014. The Assessing Authority raised tax and penalty of ₹25,43,044.00 u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') on the basis of Audit Visit Report (AVR). Similarly, the Assessing Authority raised tax and penalty of ₹21,45,147.00 u/s. 43 of the OVAT Act basing on the objected raised by the A.G. Audit.

The dealer preferred first appeals against the orders of the Assessing Authority before the First Appellate Authority. The First Appellate Authority enhanced the tax demand to ₹46,87,107.00 for the assessment completed U/s. 42 of the OVAT Act. But, the First Appellate Authority reduced the demand to 'Nil' for the assessment completed u/s. 43 of the OVAT Act. Being aggrieved with the orders of the First Appellate Authority, the Dealer prefers these appeals. Hence, these appeals.

The State files cross-objections supporting the orders of the First Appellate Authority to be just and proper.

5. Learned Counsel for the Dealer submits that he had taken same grounds for both the appeals. He further submits that the orders of the First Appellate Authorities are otherwise bad in law and the same are not

sustainable in the eyes of law. He further submits that the opening ITC has not been taken into account by the First Appellate Authority and quarterly computation of ITC should be done instead of yearly basis. He further submits that the First Appellate Authority should not impose twice penalty in view of amended provisions of Section 42(5) of the OVAT Act. He further submits that the orders of the First Appellate Authority are erroneous and contrary to the provisions of law and facts involved and require interference in appeal. He relies on the decision of the Hon'ble Apex Court in case of ***Commissioner of Income Tax v. Calcutta Export Company***, reported in **(2018) 404 ITR 654 (SC)**; and orders of this Tribunal in ***S.A. Nos. 93 (VAT) and 57 (ET) of 2019***, decided on 10.03.2021 and ***S.A. No. 12 (VAT) of 2019*** decided on 30.07.2022.

6. On the contrary, the learned Standing Counsel (CT) for the State submits that there is no illegality or impropriety in the orders of the First Appellate Authority. He further submits that the First Appellate Authority has computed the reversal ITC on quarterly basis as per the returns. He further submits that the opening balance of ITC is not required at all for the reversal of ITC on CST payable. He further submits that the First Appellate Authority has served the notice during the appeal proceeding as per provisions. He further submits that imposition of penalty is mandatory in nature as per the provision of Section 42(5) of the OVAT Act. He further submits that twice penalty is substituted w.e.f. 01.10.2015 and this has no application to the present proceeding. He further submits that the orders of the First Appellate Authority require no interference in appeal. He relies on the decisions in cases of ***Union of India v. Dharmendra Textile Processors***, **(2008) 18 VST 180 (SC)**; ***Guljag Industries v. Commercial Tax Officer***, **9 VST 1 SC**; and M/s. ***Jindal Stainless Steel v. State of Orissa*** in **WP (C) No. 15962 of 2010** dated 07.08.2012.

7. Heard the submissions of both parties, gone through the orders of the First Appellate Authority and the Assessing Authority vis-a-vis the materials on record. Record reveals that there were two proceedings u/s. 42 and 43 of the OVAT Act for the self-same period of the instant Dealer.

During course of hearing, the learned Counsel for the Dealer files a memo with an averment to consider also the grounds of appeal of S.A. No. 223 (VAT) of 2019 in S.A. No. 222 (VAT) of 2019. The proceeding u/s. 42 of the OVAT Act reveals that the First Appellate Authority enhanced the tax liability to ₹46,87,107.00 instead of ₹25,43,044.00 including penalty whereas in the proceeding u/s. 43 of the OVAT Act for the self-same period, the First Appellate Authority reduced the demand to ‘nil’ with an observation that there was reduction of ITC enhanced to ₹63,67,709.00 in excess of CST payable as per clause (d) to proviso in Section 20(3) of the OVAT Act. So, it is not necessary to adjudicate the matter in S.A. No. 223 (VAT) of 2019 relating to the assessment u/s. 43 of the OVAT Act for the self-same period as the demand raised therein has already been reduced to ‘nil’ by the First Appellate Authority and the Dealer has not taken any other specific ground other than the grounds in S.A. No. 222 (VAT) of 2019.

8. Now, coming to the issue raised in S.A. No. 222 (VAT) of 2019, the Dealer has challenged the impugned order mainly on the grounds that the First Appellate Authority has not considered the opening ITC and the closing ITC and calculated the tax on the yearly basis, whereas the same is required to be calculated on quarterly basis as the Dealer has filed the tax return on quarterly basis and that the penalty imposed u/s. 42(5) of the OVAT Act in contrary to the amended provision of Section 42(5) of the OVAT Act and that serving the show-cause notice in course of hearing of appeal to enhance the assessment and enhanced the assessment with twice penalty without considering the submissions of the Dealer.

9. As regards the contention raised relating to reduction of ITC in excess of CST payable for the year 2012-13, the Assessing Authority reduced the ITC amount of ₹22,81,468.00 and assessed the balance ITC to be reversed at ₹6,24,509.00. Similarly, for the year 2013-14, the Assessing Authority reduced the ITC amount of ₹23,49,034.00 and assessed the balance reversal ITC at ₹1,52,657.00. The Assessing Authority computed the reversal ITC on quarterly basis and he has taken the opening ITC as '0'.

The Assessing Authority determined the GTO and TTO and allowed ITC of ₹20,13,813.00. The tax liability was computed at ₹8,17,699.00, besides penalty and interest of ₹8,17,699.00 and ₹89,947.00 respectively. So, the Assessing Authority raised the demand of ₹17,25,345.00. Subsequently, the penalty was rectified to twice penalty and the Assessing Authority revised the tax demand to ₹25,43,044.00 as per corrigendum order.

The First Appellate Authority enhanced the ITC reduction for CST sales and accordingly recalculated the tax demand to ₹46,87,107.00, but deleted the interest levied by the Assessing Authority.

10. Annexure-II of Form VAT-201 deals in the situation if the CST is less than the corresponding ITC on the corresponding purchase of goods, the input tax creditable for the period shall be reduced as per the provision of sub-rule (3) of Rule 11 of the OVAT Rules. Col. 5 of Annexure-II prescribes for calculation of reduced ITC by taking the difference from the total ITC as per Table-II to total CST payable as per Table-I by taking recourse of the provision of Sl. No. 21(ii) of Part-B.

Sl. No. 21 of Part-B of Form VAT-201 prescribes calculation of reduction of ITC in excess of CST payable as per clause (d) to the proviso in sub-section (3) of Section 20 of the OVAT Act. Proviso to Section 20(3) of the OVAT Act provides that the ITC on purchase when sold in course of

inter-State trade or commerce shall be allowed only to the extent of CST payable. The phrase 'in course of inter-State trade or commerce' and the word 'only' used in the clause (d) to the proviso in sub-section (3) of Section 20 of the OVAT Act reveals that the CST payable and the total ITC of the period (quarterly) shall only be taken. The opening balance is not required to be taken for computation of reversal ITC as per Sl. No. 5 of Annexure-II.

The impugned order as per Table-1 for the both the years reveals that the CST paid is less than the proportionate ITC. So, the First Appellate Authority rightly took the difference of ITC and CST paid for calculation of reduced ITC quarterly basis for both the years and the same came to a sum of ₹63,67,709.00. As the Assessing Authority had already reduced the ITC of ₹38,53,336.00 in assessment, the First Appellate Authority computed the balance ITC to be reduced at ₹25,14,373.00 as per the impugned order.

11. With regard to imposition of penalty u/s. 42(5) of the OVAT Act, Section 42(5) of the said Act mandates twice penalty till the date of amendment, i.e. 01.10.2015. So, the First Appellate Authority commits no wrong in imposing twice penalty.

12. As regards the service of show-cause notice in course of appeal proceeding for enhancement of reduced ITC, Rule 89(3) of the OVAT Rules provides that the First Appellate Authority shall not enhance the assessment or a penalty without giving the appellant a reasonable opportunity of being heard against such enhancement. The impugned order reveals that the First Appellate Authority has issued a notice to the Dealer during hearing of the appeal vide letter No. 1717/CT dated 03.07.2009 to show-cause why the tax liability should not be enhanced. The Dealer also does not dispute in the grounds of appeal that the First Appellate Authority had not served a notice for enhancement in course of appeal proceeding. But, he only disputes that

the First Appellate Authority lacks jurisdiction to issue such notice to the Dealer during hearing of the appeal. The said submission merits no consideration in view of mandatory provision of Rule 89(3) of the OVAT Rules.

13. So, for the foregoing discussions, I do not find any illegality in the impugned order of the First Appellate Authority regarding enhancement of reversal ITC, service of show-cause notice in course of hearing and imposition of penalty for the period under assessment to call for any interference in appeal. Similarly, the Dealer has not taken any specific ground challenging the impugned order of the First Appellate Authority for the assessment u/s. 43 of the OVAT Act other than the grounds taken in the appeal relating to assessment u/s. 42 of the OVAT Act. Moreover, the First Appellate Authority has reduced the demand to 'nil' in respect of the assessment u/s. 43 of the OVAT Act for the self-same period. So, this forum feels it proper not to interfere with the finding of the First Appellate Authority on this score. Hence, it is ordered.

14. Resultantly, both the second appeals stand dismissed and the impugned orders of the First Appellate Authority are hereby confirmed. Cross-objections are disposed of accordingly.

Dictated & Corrected by me

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