BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 89 (VAT) of 2014-15

(Arising out of order of the learned Addl. CST (Appeal), South Zone, Berhampur in First Appeal No. AA (VAT) – 15/2012-13, disposed of on 31.01.2014)

Present: **Shri G.C. Behera, Chairman**
Shri S.K. Rout, 2nd Judicial Member &
Shri M. Harichandan, Accounts Member-I

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

-Versus-

M/s. HCL Infosystem Ltd., Plot No. A-9, Ashok Nagar, Bhubaneswar ... Respondent

For the Appellant : Sri M.L. Agarwal, S.C. (CT)
For the Respondent : Sri B.P. Mohanty, Advocate &
Sri S.P. Bhuyan, Advocate

Date of hearing : 03.11.2022 *** Date of order : 21.11.2022

O R D E R

State is in appeal against the order dated 31.01.2014 of the Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (hereinafter called as 'First Appellate Authority') in F A No. AA (VAT) – 15/2012-13 quashing the assessment order of the Deputy Commissioner Sales Tax, Bhubaneswar-II Circle, Bhubaneswar (in short, 'Assessing Authority).

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

M/s. HCL Infosystem Ltd. is a Private Limited Company and engaged in trading of computers, computer spare parts, their peripherals, accessories, cell phone, their spare parts and accessories. The assessment period relates to 01.04.2005 to 30.09.2008. The Assessing Authority raised

tax demand of ₹47,90,160.00 u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') basing on A.G. (Audit) objection.

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority allowed the appeal and quashed the assessment. Being aggrieved with the order of the First Appellate Authority, the State prefers this appeal. Hence, this appeal.

The Dealer files cross-objection supporting the order of the First Appellate Authority as just and proper. The Dealer took a ground in cross-objection that the amalgamation of M/s. HCL Infosystem Ltd., M/s. Microcomp Ltd. and M/s. HCL Infinet Ltd. was effected as per the judgment of the Hon'ble High Court of Delhi w.e.f. 01.04.2006. He further took a plea that M/s. HCL Infosystem Ltd. has reflected opening ITC of ₹16,39,781.00 at Sl. No. 5 of VAT return in VAT-201.

3. The learned Standing Counsel (CT) for the State submits that the order of the First Appellate Authority in quashing the order of the Assessing Authority is illegal and improper. He further submits that law does not permit a Company to avail ITC of other Company after its takeover. The Company has to file the final return in Form VAT-202 by disclosing the value of closing stock at the time of closure/dissolution u/s. 33(3) of the OVAT Act r/w Rule 34(10) of the OVAT Rules as per the provisions of Section 20(9) of the said Act. The First Appellate Authority went wrong by giving adjustment in granting refund to some other Company after amalgamation. He further submits that amalgamation leads to complete destruction of the amalgamated Company from the date of amalgamation in view of the decision in the cases of ***Saraswati Industrial Syndicate Ltd. v. CIT,*** reported in **AIR 1991 SC 70** and ***General Radio & Appliance Co. Ltd.,*** **[1986] Company Case 1013 (SC)**. He further submits that the tax will be assessed as per Section 71(7) of the OVAT Act in the case of amalgamation of companies. So, he submits that the order of the First

Appellate Authority is contrary to the provisions of law and requires interference in appeal.

4. On the other hand, learned Counsel for the Dealer vehemently objects the contention of learned Standing Counsel (CT) of the State and submits that the ITC shall be guided as per the provisions of Section 20(8) and 20(9) of the OVAT Act in the case of closure of business entity. He further submits that the First Appellate Authority rightly relied on the affidavit of M/s. HCL Infosystem Ltd. to takeover the liabilities and assets of M/s. HCL Infinet Ltd. while allowing credit. He further submits that Hon'ble Delhi High Court have issued the guidelines relating to the right and powers of the remaining business of the demerged Company to the transferee Company. He further submits that the transferee Company, i.e. M/s. HCL Infosystem Ltd., has reflected ITC of ₹16,39,781.00 at Sl. No. 5 of VAT return in Form VAT-201 relating to the business of M/s. HCL Infinet Ltd. The learned Counsel for the Dealer supports the finding of the First Appellate Authority and submits that the First Appellate Authority has passed a reasoned order and the same calls for no interference in appeal.

5. On hearing the rival submissions and on careful scrutiny of the materials on record, it apparent from the order of the Assessing Authority that the resulting company after amalgamation, i.e. M/s. HCL Infosystem Ltd., has filed return in Form VAT-201 for the period 01.04.2007 to 30.04.2007 showing carry forwarded ITC of ₹16,39,781.00.

The Assessing Authority further observed that the Dealer, i.e. M/s. HCL Infosystem Ltd. has not shown the sale transaction in Col. 4 of Form VAT-108. So, the Assessing Authority recorded a finding that the Dealer has not disclosed the approximate value of stock carried forward to its amalgamated business. The Assessing Authority specifically recorded a finding that the Dealer could not produce any stock details in support of the claim of ITC for ₹16,39,781.00 in its return for the period 01.04.2007 to 30.04.2007. So, the Assessing Authority disallowed the claim of ITC.

6. First Appellate Authority in the impugned order observed that the Dealer has mentioned in Col. 4 of Form VAT-108 – "In case of disposal or sale or business or any part thereof the date of such disposal or sale and the extent of sale" and its opposite side, the date has been mentioned. The First Appellate Authority further observed that the Dealer has not mentioned the details thereon, but details fact has been mentioned below the empty space of the application. First Appellate Authority further observed that the learned Counsel for the Dealer furnished copy of closing stock showing the value of detail closing of goods for ₹4,09,94,525.00 having excess ITC for ₹16,39,781.00 by the end of 30.03.2007 of M/s. HCL Infinet Ltd., Bhubaneswar and a copy of statement of stock and ITC as on 01.04.2007 of the instant appellant-Company due to amalgamation with M/s. HCL Infinet Ltd. on the basis of judgment rendered by the Hon'ble Delhi High Court. First Appellate Authority observing so, allowed the ITC of ₹16,39,781.00 on the closing stock of goods of ₹4,09,94,525.00 from M/s. HCL Infinet Ltd. due to amalgamation of the firm with the present Dealer on the basis of the order of the Hon'ble High Court of Delhi.

7. It is also not in dispute that the Dealer has mentioned the ITC amount of ₹16,39,781.00, but the Dealer has not specifically mentioned the amount of stock in Form VAT-108. On perusal of the assessment order, it is found that the Assessing Authority has also enclosed the scanned copy of Form VAT-108 containing entries. The details of entries is extracted herein below for better appreciation :-

> "HCL Infinet Ltd. has been amalgamated with M/s. HCL Infosystems Ltd. on the basis of scheme of arrangement w.e.f. 01.04.2007. Copy of judgment passed by the Hon'ble High Court of Delhi at New Delhi vide ... (ineligible)."

It shows that Section 20(9)(c) of the OVAT Act provides the provision relating to ITC and Section 20(8)(e) provides the restrictions of ITC in case of closure of business of a Company. The provisions are quoted herein below for better appreciation :-

> ***"20. Input tax credit –***
>
> *xx xx xx*
>
> *(8) No input tax credit shall be claimed by or be allowed to a registered dealer –*
>
> *xx xx xx*
>
> *(e) in respect of stock of goods remaining unsold at the time of closure of business;.*
>
> *xx xx xx"*
>
> *(9) If goods purchased –*
>
> *xx xx xx*
>
> *(c) remain unsold at the time of closure of business.*
>
> *xx xx xx*

8. In the case of ***Saraswati Industrial Syndicate Ltd.*** cited supra, Hon'ble Apex Court have been pleased to observe in para-5 as follows :-

> "5. The true effect and character of the amalgamation largely depends on the terms of the scheme of merger. But there can be no doubt that when two companies amalgamate and merge into one, the transferor company loses its entity as it ceases to have its business. However, their respective rights or liabilities are determined under the scheme of amalgamation but the corporate entity of the transferor company ceases to exist with effect from the date the amalgamation is made effective."

9. Conjoint reading of Section 20(8) and Section 20(9) of the OVAT Act shows that ordinarily no ITC shall be claimed by or be allowed to a registered dealer in respect of stock of goods remaining unsold at the time of closure of business. But, the Dealer can avail the ITC of the merged Company as per Section 20(9)(c) of the OVAT Act subject to filing return. In view of the decision cited supra, the amalgamated Company is a separate entity and can avail the rights and liabilities as per the scheme of amalgamation.

10. It is not in dispute that M/s. HCL Infinet Ltd. merged with M/s. HCL Infosystem Ltd. basing on the judgment of the Hon'ble Delhi High Court passed in Company Petition No. 268 of 2006 on 20.03.2007.

In course of hearing, the learned Counsel for the Dealer placed a copy of the judgment of the Hon'ble Delhi High Court passed in Company Petition No.268 of 2006 decided on 20.03.2007. In the said judgment, the

Hon'ble Delhi High Court have been pleased to allow the petition for amalgamation of the Company. Further, Hon'ble Delhi High Court were pleased to grant the sanction to the propose scheme of demerger/ arrangement and amalgamation u/s. 391(2) and 394 of the Company Act, 1956. Hon'ble Delhi High Court have been further pleased to observe that consequent upon the amalgamation, M/s. HCL Infinet Ltd. shall stand dissolved without the process of winding up and the resulting Company shall comply with the statutory requirements. The relevant portion of the judgment is extracted herein below for better appreciation:-

> "53. ...I do not find any legal impediment in order to sanction the scheme of demerger and amalgamation. Consequently, the sanction is hereby granted to the proposed scheme of demerger/arrangement and amalgamation under Section 391(2) and 394 of the Companies Act, 1956. Consequent upon the amalgamation, the HCL Infinet Limited shall stand dissolved without the process of winding up. The resulting company shall comply with the statutory requirements..."

11. The categorical finding of the Hon'ble Delhi High Court shows that the Hon'ble Delhi High Court has sanctioned the scheme of demerger and amalgamation. Hon'ble Delhi High Court have categorically observed that M/s. HCL Infinet Ltd. shall stand dissolved without the process of winding up and the resulting company shall comply with the statutory requirement. The observation of the Hon'ble Delhi High Court, i.e. "without the process of winding up." and "The resulting company shall comply with the statutory requirements" implies that the merged company lost its entity and is not required at all to take any further steps in any forum whereas the resulting company, i.e. the Dealer, shall take all steps as required under the statute. So, the submission of the learned Standing Counsel (CT) for the State that the merged company has not filed the return in Form VAT-202 does not merit for consideration.

It is also not in dispute that the Dealer has filed an affidavit to avail the benefits as well as liabilities, if any, of the amalgamated Company

in compliance to the above judgment of the Hon'ble Delhi High Court. So, in compliance to the judgment of the Hon'ble Delhi High Court, the resulting company, i.e. the Dealer, filed the return disclosing ITC amounting to ₹16,39,781.00 of the dissolving company, i.e. M/s. HCL Infinet Ltd. The return in Form VAT-108 shows that the Dealer has specifically mentioned the reason in the bottom of the form and the circumstances of amalgamation as per the judgment of the Hon'ble Delhi High Court. The record of the First Appellate Authority shows that the Dealer has also filed the statement relating to closing stock DMS-31.03.2007 along with the return in Form VAT-201. Therefore, the resulting company is entitled to avail the benefit of ITC of the merged company. The First Appellate Authority considering the above backgrounds rightly allowed the claim of the Dealer on this score.

12. On the foregoing discussions, we are of the unanimous view that the First Appellate Authority has rightly allowed the ITC claimed by setting aside the order of the Assessing Authority and the same warrants no inference in appal. Hence, it is ordered.

13. In the result, the appeal stands dismissed and the impugned order of the First Appellate Authority is hereby confirmed. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member

I agree,

Sd/-
(M. Harichandan)
Accounts Member-I