BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 65 (V) of 2014-15
&
S.A. No. 198 (V) of 2014-15

(Arising out of orders of the learned Addl. CST (Revenue)
in Appeal No. AA- 177/VAT/ACST/Assmt./Puri/BH-II/2012-13,
disposed of on 28.03.2014)

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

S.A. No. 65 (V) of 2014-15

M/s. Trupti Enterprises (P) Ltd.,
Plot No. 575/10, NH-5, Patrapada,
Bhubaneswar, Dist. Khurda ... Appellant

-Versus-

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

S.A. No. 198 (V) of 2014-15

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

-Versus-

M/s. Trupti Enterprises (P) Ltd.,
Plot No. 575/10, NH-5, Patrapada,
Bhubaneswar, Dist. Khurda ... Respondent

For the Dealer : Sri T.K. Satpathy, Advocate
For the State : Sri S.K. Pradhan, Addl. SC (CT)

Date of hearing : 06.10.2023 *** Date of order : 03.11.2023

O R D E R

Dealer and the State are in appeals against the impugned order dated 28.03.2014 relating to the same tax period. Therefore, they are taken up together for disposal by this composite order for the sake of convenience.

2. Dealer in **S.A. No. 65 (V) of 2014-15** and State in **S.A. No. 198 (V) of 2014-15** assail the impugned order of the Addl. Commissioner of Sales Tax (Revenue) (hereinafter called as 'First Appellate Authority') in F A No. AA-177/VAT/ACST/Assmt./Puri/BH-II/2012-13 setting aside the assessment order of the Asst. Commissioner of Sales Tax, Puri Range, Bhubaneswar (in short, 'Assessing Authority') for reassessment.

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

M/s. Trupti Enterprises (P) Ltd. is engaged in sale of spare parts of TATA make passenger vehicles and commercial vehicles on wholesale & retail basis and also provides service facilities in all three outlets as service provider of TATA Company. The assessment period relates to 01.04.2005 to 30.09.2008. The Assessing Authority raised tax and penalty of ₹52,15,947.00.00 u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act').

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority set aside the order for reassessment with certain directions. Being aggrieved with the order of the First Appellate Authority, both the Dealer and State prefer these appeals. Hence, these appeals.

The State files cross-objections against the appeal of the Dealer.

4. The learned Counsel for the Dealer submits that the First Appellate Authority went wrong in confirming the finding of the Assessing Authority in disallowing ITC of ₹5,544.00, which is contrary to law. He further contends that the First Appellate Authority rightly deleted the

warranty replacement turnover relating to damaged/defective spare parts as the same are not coming under the definition of 'sale'. So, he submits that the order of the First Appellate Authority requires interference only to the extent of disallowance of ITC.

He relies on the decision of Hon'ble High Court of Orissa in case of ***State of Orissa v. Firestone Tyres and Rubber Company of India Ltd.***, **[1993] 88 STC 408 (Orissa);** decision of Hon'ble High Court of Rajasthan (Jaipur Bench) in case of ***Commercial Taxes Officer v. Ceat Tyres of India***, **[1988] 68 STC 53 (Raj)**; and decisions of Hon'ble Apex Court in case of ***Commissioner of Income Tax, Hyderabad v. Motors and General Stores (P) Ltd.***, **AIR 1968 SC 200; &** ***M/s. Tata Motors v. The Deputy Commissioner of Commercial Taxes (SPL) & ANR***, **2023-TIOL-66-SC-CT-LB**.

5. On the contrary, the learned Addl. Standing Counsel (CT) for the State submits that the First Appellate Authority and the Assessing Authority have rightly disallowed the ITC of ₹5,544.00, but the First Appellate Authority went wrong in allowing credit of ₹3,45,145.60 as per Form VAT-608, deleting the warranty replacement turnover of the damaged/defective spare parts and remanding the matter for adjustment of tax paid under challans. So, he submits that the finding of the First Appellate Authority regarding deletion of warranty replacement turnover and adjustment of tax paid under challans suffer from infirmity and as such, the same requires interference in appeal.

He relies on the decision of the Hon'ble Apex Court in case of ***Mohd. Ekram Khan & Sons v. Commissioner of Trade Tax, U.P.***, **[2004] 136 STC 515 (SC)** and the order of this Tribunal in ***S.A. No. 149 (V) of 2011-12*** dated 15.07.2019 (**State of Odisha v. M/s. Samal Automobiles, Sambalpur**).

6. Heard the rival submissions of the party, gone through the orders of the First Appellate Authority and Assessing Authority vis-a-vis the materials available on record. The assessment order reveals that the Assessing Authority disallowed the ITC of ₹5,544.45 out of ₹56,68,008.82 and warranty replacement of defective goods for ₹76,80,883.76. The Assessing Authority completed the assessment and raised the tax demand.

The First Appellate Authority upheld the disallowance of ITC and deleted the warranty replacement turnover. The First Appellate Authority also directed the Assessing Authority to allow the adjustment of tax of ₹6,08,210.00 subject to verification, to verify the calculation mistake of ₹9,58,900.47 and to determine the consequential penalty as per law. Being aggrieved by this order, both the Dealer and State have come up in appeal.

7. The Dealer challenges only the disallowance of ITC, whereas the State calls into question the finding of the First Appellate Authority with regard to deletion of warranty replacement turnover, adjustment of payment of tax and claim of ITC of ₹3,45,145.60 as per Form VAT-608.

As regards the claim of the Dealer relating to disallowance of ITC, the Dealer claims ITC relaying on the provision of Section 107 of the OVAT Act read with Rule 123(3) of the OVAT Rules. Section 107 of the OVAT Act deals with the ITC in respect of stock held on the appointed date, i.e. 01.04.2005. All the dealers whose registration has been continued under sub-section (5) of Section 25 other than those who are liable to pay turnover tax u/s. 16, shall furnish a statement of their opening stock of raw materials and other goods held on the date of such appointed date to the Commissioner in the prescribed form, i.e. Form VAT-607, as per Rule 123(3) of the OVAT Rules. The Dealer has filed copy of the order sheet of the assessment record wherein it is apparent from the order sheet dated 15.03.2012 that the Assessing Authority on verification of books of account found that the Dealer had disclosed tax and surcharge of ₹13,03,291.30 and

₹17,62,484.38 respectively. The Assessing Authority further found the tax paid on purchase of such first point tax paid goods at ₹1,12,550.60 & ₹2,32,595.00 and the Dealer is eligible to avail credit of sales tax paid goods in stock as on 01.04.2005 within six months. The Assessing Authority also issued Form VAT-608 to the Dealer advising the Dealer to claim ₹3,45,145.60 within the stipulated period. But, the Assessing Authority in assessment disallowed such credit, which, in turn, the First Appellate Authority allowed the same with a finding that the Dealer should not suffer for the procedural lapses. We do not find any impropriety or illegality on such finding and, therefore, the contention of the State merits no consideration on this score.

8. The assessment order reveals that the Assessing Authority disallowed the ITC of ₹5,544.00 as the Dealer claimed the same on retail invoice received from M/s. Kailash Diesel.

Section 20(6) of the OVAT Act provides that the ITC shall not be claimed by the Dealer for any tax period until the dealer receives the tax invoice in original evidencing the amount of input tax. The Commissioner vide SRO No. 208/2009 and SRO No. 317/2007 conferred the power to the Sales Tax Officer (Assessing Authority) to allow the ITC in absence of tax invoice as per the proviso to Section 20(6) of the OVAT Act. The Assessing Authority and First Appellate Authority ought to have allowed such ITC claimed under retail invoice on the basis of said notifications. So, the claim of ITC for ₹5,5544.00 of the Dealer is liable to be allowed.

9. As regards the appeal of the State regarding deletion of turnover under warranty replacement of defective goods, the Assessing Authority added the turnover of ₹76,80,883.76 as the Dealer had not issued any credit note nor received any debit note from the purchaser as required u/s. 23 of the OVAT Act. The First Appellate Authority specifically found that the Dealer has done the contractual obligation entered between the Dealer and

TATA Motors. The Dealer as the agent of TATA Motors has replaced the damaged/defective spare parts and subsequently had got goods in lieu of the goods from TATA Motors. No consideration has been received from TATA Motors for the damaged/defective spare parts supplied to the vehicles covered under warranty. The Dealer had submitted a statement/chart duly certified by the Engineers of TATA Motors along with description of details spare parts nos. etc. to TATA Motors and in lieu of replacement, the Dealer had received goods in exchange of damaged/defective goods supplied to the vehicles covered under the warranty from TATA Motors. So, the First Appellate Authority recorded a finding that the receipt of goods in exchange of defective spare parts against new one does not fall under the scope of 'sale' defined under the OVAT Act.

The State relies on the decision in case of ***Mohd. Ekram Khan & Sons*** cited supra wherein the Hon'ble Apex Court observed that since the assessee had supplied the parts and had received the price therefor, the transaction was subject to levy of sales tax under the Act. In the instant case, the Dealer has not received any consideration amount towards replacement of defective/damaged spare parts under warranty scheme. So, the decision relied on by the State is not applicable to the present facts and circumstances of the case.

In case of ***Motors and General Stores (P) Ltd.*** cited supra, Hon'ble Apex Court have been pleased to distinguish the terms 'sale' and 'exchange' observing therein that "*The difference between a sale and an exchange is this, that in the former the price is paid in money, whilst in the latter it is paid in goods by the way of barter*."

In case of ***M/s. TATA Motors Ltd.*** cited supra, the Hon'ble Apex Court have been pleased to observe that the decision in ***Mohd. Ekram Khan*** does not apply to a case where the dealer has simply received a spare parts from the manufacturer of the automobiles so as to replace a defective part

therein under a warranty collateral to the sale of the dealer on a dealership agreement or any other agreement akin to an agent of the manufacturer which is not sale transaction.

In the case of ***Firestone Tyres and Rubber Company of India Ltd.*** cited supra, the Hon'ble Court have been pleased to observe that dealer was required to sales tax on amount actually charged from customer and the dealer is required to pay tax on an amount which was not charged from the customer as 'sale price' while replacing the tyre by way of exchange. Hon'ble High Court of Rajasthan in case of ***Ceat Tyres of India*** cited supra reiterated the same proposition of law that there was no occasion to require the assessee to pay tax on an amount which was charged from customer as 'sale price' while replacing the tyre.

In view of the decisions cited supra, when the Dealer has not charged any amount from the customer as 'sale price' while replacing the defective/damaged spare parts, the Dealer is not required to pay any tax on such warranty replacement turnover. So, the First Appellate Authority has committed no illegality in deleting the said turnover from the tax net.

Therefore, we do not find any illegality in the order of the First Appellate Authority to call for any interference on this score, rather, the First Appellate Authority had passed a reasoned order.

10. The State in course of hearing also raises a ground that the Assessing Authority has rightly allowed adjustment of tax ₹2,08,54,264.00 basing on challans against the claim of ₹2,14,62,274.00. The First Appellate Authority specifically recorded a finding that the Dealer submitted the challans showing payment of ₹2,14,62,274.00 during the tax period 01.04.2005 to 30.09.2008 and thus, directed the Assessing Authority for adjustment of ₹6,08,210.00 subject to verification. So, we do not find any merit in the contention of the State and thus, fails.

11. So, for the foregoing discussions, we are of the considered view that the First Appellate Authority has rightly deleted the warranty replacement turnover added by the Assessing Authority with a reasoned order, allowed the claim of ITC as per Form VAT-608 and adjustment of tax as per challan, but disallowed the claim of ITC of ₹5,544.00 in contrary to the notification of the Finance Department. Therefore, the finding of the First Appellate Authority regarding deletion of warranty replacement turnover and adjustment of tax as per challans are hereby affirmed, but the finding of affirming the order of the Assessing Authority regarding disallowance of claim of ITC of ₹5,544.00 is hereby set aside. Hence, it is ordered.

12. Resultantly, the appeal at the instance of the Dealer is allowed and the appeal at the instance of the State is dismissed. The impugned order of the First Appellate Authority stands modified to the extent as observed above. The Assessing Authority is instructed to recompute the tax liability of the Dealer as per law in the light of the above observations within a period of three months from the date of receipt of this order. 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/-
(B. Bhoi)
Accounts Member-I