BEFORE THE DIVISION BENCH, ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A.No.177(V) 2019.

(Arising out of the order of Ld. Addl.CST(Appeal),Bhubaneswar, in First Appeal Case No.AA-(VAT)-128/BH-II/2018-19, disposed of on dated 26.6.2019)

Present:- Shri S.K.Rout, 2nd Judicial Member **& Shri S.R.Mishra,** Accounts Member-II.

M/s. Bajaj Electricals Limited,
Plot No.Janapath, Kharbel Nagar,
Bhubaneswar ... Appellant,

- V e r s u s –

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

For the Appellant ... Mr.T.K.Satapathy,Adv.
&
Mr.D.Mohanty, Adv

For the Respondent ... Mr.D.Behura,
Standing Counsel.
(CT & GST Organisation)

Date of Hearing: 7-10-2023. Date Order: 6-11-2023.

O R D E R

The dealer appellant on filing the second appeal U/s.78 of the Odisha Value Added Tax Act, (in short OVAT Act), seeks the intervention of this forum against the order dated 26.6.2019 passed by the Learned Additional Commissioner of Sales Tax (Appeal), Bhuabaneswar, (hereinafter referred to as Learned First Appellate Authority/Ld. FAA) in setting aside the order of assessment passed U/s.42A of the OVAT (Amendment) Act, 2015 by the Learned Sales Tax Officer, Bhubaneswar II Circle, Bhubaneswar, (hereinafter referred to as Learned Assessing Authority/Ld. AA in case of M/s.

Bajaj Electricals Limited for the tax period from 1.4.2016 to 30.6.2017.

2. Briefly stated the facts of the case are that the dealer appellant which carries on business in resale of electrical goods and execution of works contract was subjected to assessment U/s.42A of the OVAT Act for the material period by the Ld. AA which resulted in determination of refundable amount to the tune of Rs.1,00,59,247.00.

3. On being aggrieved with the aforesaid order, the dealer has preferred an appeal before the Ld. FAA raising disputes with regard to the disallowance on claim of Input Tax Credit (ITC) due to mis-match in VATIS database and reversal on account of supply of exempted goods; non-consideration of labour charges as the same have suffered service tax by issue of separate invoices and non-consideration of claim of adjustment of Rs.7,05,332.00 paid against Tax Deducted at Source (TDS). The Ld. FAA however, failed to appreciate the appeal on first two grounds but has remanded the case to the Ld. AA for consideration of the claim of the dealer only in respect of the deduction of tax at source.

4. Being dissatisfied with the above order passed by the Ld. FAA, the dealer has sought for intervention of this forum on the following grounds:-

i) That the impugned orders passed by the forum below are illegal, arbitrary and unconstitutional.

ii) That the disallowance of the claim of ITC due to discrepancy in ITC ledger provided by VATIS is illegal.

iii) That the reversal of tax of Rs.1,53,868.00 from the claim of ITC against exempted sales is illegal and bad in law, since the goods involved in such sales were from the purchases effected from out-side the State and having no involvement of ITC.

iv) That the disallowance of claim of labour and service charges on which service tax has been paid is not proper and justified.

5. The respondent State on the contrary has filed cross objection defending the order so passed by the Ld. FAA.

6. Heard the case. Examined the impugned orders vis-a-vis the grounds of appeal, written note of submissions by the dealer as well as the case laws cited. The issues involved and our findings against the same are narrated below.

7. **Issue involving claim of ITC**

It is observed from the impugned order passed the Ld. AA that an amount of Rs.37,78,227.00 was disallowed from the claim of ITC of the dealer due to mis-match in VATIS as per Rule 11A of the OVAT (Amendment) Rules 2016 effective from 1.10.2015. The Ld. FAA was also of the opinion that as no amount of ITC can be allowed on any purchase of goods in excess of the amount of such tax actually paid under the Act, the Ld. AA was justified in disallowing the issue. In course of the present proceeding the learned counsel of the dealer ,Sri Satpathy has averred that there should be an harmonious construction of the whole provisions of Section 20 of the OVAT Act

including the proviso while considering the claim of ITC. He further cited the doctrine of impossibility i.e. Lex non cogit ad imposssibilia claiming that being a purchaser it can not keep track on the action of the sellers in filing their correct and complete returns with due discharge of tax. He further claims that since the dealer appellant is in possession of valid tax invoices showing purchase of goods from the registered dealers within the State which have been duly incorporated in its returns, it is entitled for its claim. It has further been argued that the benefit of ITC ought not to be denied to the dealer on account of the default of the sellers over-whom it does not exercise any control.

8. The above contentions of Sri Satpathy are examined with reference to the amended provisions of law w.e.f.1.10.2015 since the period of assessment involves from 1.4.2016 to 30.6.2017 Section 20(3a) of the OVAT (Amendment) Act reads as follows:-

> "Notwithstanding anything contained in this Act, no amount of input tax credit shall be allowed to a registered dealer on any purchase of goods in excess of the amount of such tax actually paid under this Act".

9. The said Section inserted w.e.f. 1.10.2015 which is a non-obstante clause has got a overriding effect over all other provisions of the Act. Further Rule 11 A of the OVAT Rules, which provides for recalculation of ITC reads as follows.

Rule 11A. Recalculation of input tax credit.-

(1) Subject to sub-section (3a) of Section 20, no input tax credit shall be allowed on purchases of goods against tax invoices in excess of the amount of tax actually paid into the Government Treasury.

(2) In case of any mismatch occurs in input tax credit, the selling as well as the purchasing dealers shall revise the returns within the time prescribed under sub-section (4) of Section 33, either incorporating or removing the tax invoice, as the case may be.

(3) Where any mismatch in input tax credit occurs, as a result of spillover transactions such mismatch shall be reconciled automatically by the online system.

(4) When the claim of input tax credit preferred by a registered dealer is not reconciled with the corresponding selling dealer with due payment of tax, the claim for input tax credit shall be disallowed.

(5) The input tax disallowed shall be adjusted,-

(a) by reducing the excess input tax credit, if any; or

(b) by enhancing the output tax payable; or

(c) by demanding the tax against the purchasing dealer:

Provided that where the claim of input tax of the dealer is reduced, the dealer shall be given opportunity of being heard.]

10. Besides, Section 95 of the OVAT Act, clearly casts the burden of concession on the claimant it-self. It is obvious that until and unless tax is remitted to the State exchequer, the benefit of the same cannot be availed by the purchasing dealer. Since Section 20(3a) of the OVAT Act being a restrictive provision having overriding effect on other provisions of the Act, the contention of the appellant that it is in possession of the tax invoices is not sufficient with regard to discharge of its onus for availing such ITC. Similarly, it is well settled statutory principle that if a statute provides for a thing to be done in a particular thing, then it has to be done in that manner and in no other manner. As such, the contentions advanced by the learned advocate and the case laws cited are found to have no relevance because of the amended provisions of law w.e.f. 1.10.2015

11. Further with regard to the reversal of ITC on account of sale of exempted goods, although the dealer claims that such goods were in fact purchased from outside the State, in absence of any conclusive findings made by the lower fora and also any corroborative documents placed before us, we are unable to consider the same. The same is thus found to be rightly disallowed as per Section 20(9) of the OVAT Act.

12. In view of the aforesaid discussions, we therefore find no cogent reason to interfere in the order passed by the Ld. FAA so far as the disallowance of claim of Input Tax credit is concerned.

Determination of Taxable Turnover under Works Contract.

13. During the period the dealer was admittedly in receipt of gross contractual amount of Rs.39,38,53,247.00 and has claimed deduction of Rs.10,21,92,822.00 labour, service and other like charges being not taxable under the OVAT Act. But in absence of any supporting documents the said deduction was confined to Rs.9,84,63,312.00 i.e. 25% of the gross contractual receipts. The Ld. FAA was also found to be unanimous with the opinion of the Ld. AA in this regard.

14. The learned counsel of the dealer has raised objection against such opinion of the Lower Fora and stated that since there is no involvement of transfer of property in goods, the entire claim of Rs.10,21,92,822.00 should have been allowed as deduction towards labour and service charges. On the contrary, the learned counsel of the Respondent State emphasised that since the claim was not supported with material evidence, Ld. AA as well as Ld. FAA were justified in their action. In this context, Proviso to Rule 6 (e) of the OVAT Rules which is relevant is quoted below.

> " ***Provided that*** where a dealer executing works contract fails to produce evidence in support of such expenses as referred to above or such expenses are not ascertainable from the terms and conditions of the contract or the books of accounts maintained for the purpose, a lump sum

amount on account of labour, service and like charges in lieu of such expenses shall be determined at the rate specified in the Appendix.

15. It is observed from the impugned orders that the dealer claims Rs.10,21,92,822.00 towards deduction on account of labour and service charges, yet failed to produce evidence in support of the claim. Thus, in absence of the same, the determination of labour, service and like charges as per the rate specified in the Appendix is considered to be just and proper.

16. In view of the aforesaid facts and circumstances, the impugned order passed by the Ld. FAA in remanding the case to the Ld. AA for consideration of TDS deposit of Rs.7,05,332.00 after obtaining confirmation from the concerned quarters, is considered to be justified and requires no intervention. As a result, the appeal preferred by the dealer is dismissed being devoid of merit. Cross objection filed by the respondent is disposed of accordingly.

Dictated and corrected by me

Sd/-
(S.R.Mishra)
Accounts Member-II.

Sd/-
(S.R.Mishra)
Accounts Member-II.

I agree,

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