BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL:CUTTACK

S.A.No.20(V)/2009-10

(Arising out of the order of the learned Asst. Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur, in First Appeal Case No. AA 107/SAII/VAT/08-09, disposed of on 07.02.2009)

Present: Smt. Suchismita Misra, Chairman — Shri A. K. Panda, Judicial Member-I — Shri P.C. Pathy, Accounts Member-I

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

-Versus-

M/s. Utkal Pharmaceuticals, Padampur, Dist- Bargarh. ... Respondent.

For the Appellant: : Shri. M. S. Raman, Addl. S.C. (C.T.)
For the Respondent: : None.

Date of Hearing: 14.08.2018 ***** Date of Order:16.08.2018

O R D E R

This second appeal has been filed against the order dtd.07.02.2009 of the learned First Appellate Authority/Assistant Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, 'FAA/ACST') passed in First Appeal Case No. AA 107/SAII/VAT/08-09, reducing the demand raised to figures admitted by the dealer-assessee against the demand of Rs.6,16,184.00 raised by the learned Assessing Officer/Sales Tax Officer, Sambalpur Range, Sambalpur (in short, 'AO/STO') in his order passed on 08.09.2008 under Section-42 of the Odisha Value Added Tax Act (in short, 'OVAT Act') for the period from 01.04.2005 to 31.03.2008.

2. The brief facts of the case are that the dealer-respondent carries on business in medicines, drugs, tinned food, manohary goods and beverages. The ld. STO has framed audit assessment U/s. 42 of the OVAT Act basing on the suggestions of Audit Visit Report (AVR) submitted by the ld. STO, Audit. In the AVR it has been alleged that appellant has claimed and availed ITC of Rs.2,05,394.67 on opening stock as on 01.04.2005 prior to issue of

VAT-608 by the competent authority. The dealer-respondent has claimed adjustment on the basis of Form VAT-607 filed on 30.04.2005 with a view to availing ITC on opening stock. The dealer has filed revised returns on 22.08.2008 for the tax periods from 01.04.2005 to 30.06.2008 without claiming input tax on opening stock as on 01.04.2005. As the dealer-assessee has filed the revised returns after receipt of the notice for the tax audit which violates the provisions of Section-33(5) of the OVAT Act, 2004, the ld. STO rejected the claim of ITC on opening stock amounting to Rs.2,05,394.67 which resulted in demand of Rs.6,16,184.00 including two times penalty on the tax assessed as per the provisions contained U/s.42(5) of the OVAT Act. This led the dealer-assessee to come in first appeal before the ld. ACST on the following grounds:-

(i) The AVR was submitted by the ld. STO, Bargarh Circle, Bargarh beyond seven days as not valid and legal AVR to be utilised against the appellant.

(ii) The appellant has rightly claimed credit of sales tax paid on goods in stock at the commencement of VAT i.e. as on 01.04.2005 Vide form VAT-607 filed in time on 30.04.2005 claiming sales tax refund of Rs.2,05,394.67. The dealer-assessee has complied with and has fulfilled all the conditions laid down in Section-107 and Rule-123, but the ld. STO has failed to discharge his mandatory obligation to verify and allow the claim of credit by 31.12.2005 as prescribed in Rule.123(2)(h) and to communicate the acceptance of the claim of credit preferred by the appellant in Form VAT-608 under Rule-123(3)(h), in absence of which, the input tax credit admitted shall be apportioned over a period of six months in equal instalments and shall be adjusted against output tax payable as prescribed in Rule 123(4).

(iii) The rejection of claim of above ITC of Rs.2,05,394.67 towards OST paid on the opening stock of goods as on 01.04.2005 claimed vide Form VAT-607 on the ground that no Form VAT- 608 has been granted is not sustainable in law, particularly when the Form VAT-608 has also not been granted before making the impugned order of assessment.

The ld. ACST on careful consideration has allowed the appeal in full by reducing the assessment to figures admitted by the appellant on the ground that viewed in the light of non-issuance of Form VAT-608 the revised return filed on 22.08.2008 cannot be ignored as the ITC claim of Rs.2,05,394.67 appears to have been claimed rightly. As per the provisions of law the said claim is allowed for the dispute occurred due to the negligence of the ld. AO in discharging his obligatory duties.

3. The State has preferred second appeal against the order of the ld. FAA with the following grounds:-

(i) The order of the ld. ACST is arbitrary, illegal & bad in law.

(ii) The ld. ACST has dealt in dispute elaborately but wrongly allowed input tax credit of Rs.2,05,394.67 against opening stock of goods held on 01.04.2005 & claimed for the same in Form-607 but the dealer has submitted revised return for the period i.e. tax period from 01.04.2005 to 30.06.2008 without adjusting input tax credit earlier claimed in original return.

(iii) The ld ACST has urged to accept revised return filed & on the other hand has allowed input tax credit adjustment of Rs.2,05,394.67 which should actually been allowed after issue of Form-608.

(iv) The ld. ACST should have set aside the assessment & remanded back for proper action by ld. Taxing Authority i.e. issue of Form-608 as per provision of law & assessed the dealer afresh levying penal interest as per provision of OVAT Act i.e. Section 34(b)(III) for natural justice & propriety.

(v) The order of ld. ACST allowing appeal in full is against provision of law & liable to set aside & case be remanded back to the Taxing Authority for assessment afresh.

4. Following cross objections have been filed by the respondent-dealer.

(i) The order of the ld. ACST is not arbitrary, illegal or bad in law.

(ii) The ld. ACST has rightly allowed ITC of Rs.2,05,394.67 against opening stock of goods as on 01.04.2005.

(iii) The learned ACST has rightly observed that the revised returns filed on 22.08.2008 cannot be ignored.

(iv) There is no case at all for setting aside the assessment merely for issue of Form VAT-608 and / or for levy of penal interest U/s. 34(1)(b)(iii) as wrongly contended by the State in Ground No.4

(v) The order of the ld. ACST is not violative of any provision of law so as to be liable to be set aside and / of the case remanded back to the Taxing Authority for a fresh assessment.

A written submission was received in the meantime from the ld. Advocate on behalf of the dealer-respondent containing the following contentions:-

(a) Tax audit in the case of the Respondent was conducted and completed on 21.04.2008 and the AVR (copy enclosed) signed by the Audit Officer has been reviewed by the STO (Audit), Sambalpur Range, Sambalpur on 30.06.2008, after a lapse of 70 days from the date of completion of audit and the said AVR has been received by the Assessing Officer thereafter and on the basis of which, a notice in Form VAT-306 dt. Nil U/s.42(1) has been issued by him vide Memo No.2776 dt.15.07.2008. As per provisions of Sec 41(4) r/w Rule 45(3), the AVR has to be mandatorily submitted by the Audit Officer to the Assessing Authority within 7 days from the date of completion of audit on 21.04.2008, which expires on 27.04.2008 (and not from the date of review of the AVR by the Range Officer and for which, there is no provision in the Act and Rules) and, therefore, the above AVR submitted beyond 7 days is not a valid and legal AVR to be utilised against the Respondent for taking up a valid assessment proceeding U/s.42. As such, the initiation of proceeding U/s. 42 is not sustainable in law and consequently, the impugned order of assessment is liable to be annulled. This point was raised in Ground No.2 of the Grounds of 1st appeal and also stated at pages 2 & 3 of the 1st appeal order, but no finding thereon was recorded by the 1st appellate authority, who granted relief on facts only.

(b) To establish the above submission, reliance is placed upon **M/s. Jindal Stainless Ltd. Vrs. Authority in W.P.(C) No.16957/2009 of**

the Hon'ble Orissa High Court. In the case of Jindal (Supra), the Hon'ble Court has taken into consideration the provision U/s.41(4) and held that, non-compliance of Sec.41(4) renders the AVR invalid and assessment made on the basis of such AVR is illegal, whereas in the case of pal construction (Supra), the Hon'ble Court has referred the matter to the larger Bench, which is now pending. While referring the matter to the larger Bench in Pal Construction (supra), the Hon'ble Court has not stayed the operation of the decision in Jindal Stainless (supra), which has got binding force. Copy of the order dt. 20.10.2014 in the case of Pal Construction (supra) is enclosed.

(c) The Notice in form VAT-306 issued U/s. 42(1) vide Memo No.2776 dt.15.07.2008, despatched by RPAD No.1994 dt. 17.07.2008 was received by the Respondent on 23.07.2008 to produce the books of account on 19.08.2008 to make the audit assessment without allowing the statutory period of 30 days as provided under Section 42(2) of the OVAT Act. Copies of the Notice and the envelope are enclosed herewith. If the statute requires to do a thing in a particular manner, the authority is to follow the same.

(d) Sub-section (2) of Section 42 provides that where a notice is issued to a dealer under sub section (1) he shall be allowed time for a period not less than thirty days for production of relevant books of account. The use of the expressions "shall" and "less than thirty days" make it amply clear that the Assessing Officer is bound to allow minimum thirty days time for production of books of account and documents. On a plain reading of sub section (2), it further reveals that discretion is vested on the Assessing Officer to allow time more than thirty days for production of books of account, but he has no jurisdiction to allow less than thirty days' time for production of books of account.

(e) Law is well-settled that when the statute requires to do certain thing in certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal

maxim “Expressio unius est exclusion alteris” meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible. [see Taylor /v. Taylor, (1876) 1 ch.D.426; Nazir Ahmed V. King Emperor, AIR 1936 PC 253; Ram Phal Kundu v. Kamal Sharma; and Indian Bank’s Association v. Devkala Consultancy Service, AIR 2004 SC 2615, Gujarat Urja Vikas Nigam Ltd.-v- Essar Power Ltd., (2008) 4 SCC 755].

(f) If the notice issued is invalid for any reason, then the proceeding initiated in pursuance of such notice would be illegal and invalid. Section 42(2) of the OVAT Act is a mandatory provision not with regard to any procedural law, but with regard to a substantive right. Any infirmity or invalidity in the notice under Section 42(2) of the OVAT Act goes to the root of jurisdiction of the Assessing Authority. Issue of notice under Section 42(2) of the OVAT Act is a condition precedent to the validity of any assessment under Section 42 of the OVAT Act. Therefore, if the notice issued for assessment is invalid, the assessment would be bad in law. Hence, the notice for assessment of tax without allowing the minimum period of 30 days for production of the books of account and documents is invalid in law and consequentially, the impugned order of assessment is not sustainable in law. Judgment dt.25.09.2017 of the Hon’ble Orissa High Court in the case of Delhi Footwear v. STO in W.P.(C) No.2971 of 2009 (copy enclosed) is relied upon.

(g) In support of relief granted by the FAA on facts on the grounds stated in the order, i.e. non-issue of Form VAT-608 due to negligence of the Assessing Officer and the revised returns filed on 22.08.2008 after receipt of AVR along with Notice in Form VAT-306 without claiming any amount of ITC on opening stock of 01.04.2015 without any variation in the figures of purchases, sales, Vat paid on purchases and Vat due on sales. The said revised returns could not be treated as unacceptable under the proviso to sec.33(5), which is applicable only to the revised returns filed after receipt of notice for audit visit and before completion of tax audit. It cannot be applied to

the revised returns filed after the receipt of notice for audit assessment.

5. At the time of hearing, the ld. Additional Standing Counsel (C.T.) Shri M.S. Raman appeared and reiterated the points raised in the grounds of appeal filed earlier and took the contention that allowing the claim of ITC without verification and without issuance of Form VAT-608 is not in accordance with the provisions under the law. As the ld. AO has not verified the claim of ITC preferred by the dealer-respondent in Form VAT-607 the matter may be set aside for detailed verification of claim of the dealer-respondent which was neither done by the ld. AO nor by the Ld. FAA. With the permission of the Bench the ld. Addl. Standing Counsel (C.T.) furnished a written submission stating the following contentions:-

a) The first appellate authority has ignored to take into consideration the provisions contained in Section-107 of the OVAT Act read with Rule 123 of the OVAT Rules. The fact of the case in brief is that the dealer availed benefit of input tax credit on the opening stock as on 01.04.2005 under Section 107 without having been issued with Form VAT-608. However, the claim so availed was on the basis of its application in Form VAT-607. After audit being done, during the course of assessment, it filed revised return wherein it did not claim said input tax credit. The appellate authority should not have allowed the input tax credit which the dealer had availed based on Form VAT-607. The observation and finding of the first appellate authority is contrary to mandate of Section 107 read with Rule 123. Further he could not have directed for acceptance of revised return which has been filed belatedly which is beyond the period stipulated under Section 33 of the OVAT Act.

b) The Hon'ble Tribunal may not entertain the new pleas taken by way of written note of submission. The memorandum of Cross-objection as submitted by the dealer-respondent does not reveal such pleas. Foundation for pleas taken in the form of written note being not made, the same are not liable to be considered. In terms

of Section 98 of the OVAT Act it is submitted that the technical challenges made by the respondent-dealer is not warranted. The respondent having participated in the assessment proceeding could not now question the AVR. Section 78 entails the dealer to question the appellate order not any notice or report.

c) The first appellate authority has contradicted himself. The first appellate authority has observed that:

"... When his submission is viewed in the light of non-issuance of VAT-608 the revised return filed on 22.08.2008 cannot be ignored..."

The first appellate authority ignored to notice the following findings of the assessing authority:

"...The dealer has filed revised returns on 22.08.2008 for the tax periods from 01.04.2005 to 30.06.2008 in which he has not claimed input tax credit on opening stock as on 01.04.2005..."

It may be appreciated that the entire dispute in the case hovers round Rs.2,05,394.67 claimed as ITC on opening stock. Once the first appellate authority accepted the revised return, he should have noticed that this amount of ITC having not been claimed by the dealer in the revised return, the assessing authority had rightly levied and computed tax liability.

d) The order of the first appellate authority deserves to be vacated by restoring the assessment order.

As the ld. Advocate on behalf of the dealer-respondent failed to appear for hearing the case was heard in absence of the dealer-respondent and the appeal is disposed of on merit basing on the materials available in the record.

6. Gone through the impugned orders of the first appeal as well as the assessment, grounds of appeal, written submission at the time of hearing, cross objection filed and written submission and case laws cited by the dealer-respondent. The question before us is to answer whether the order of the ld. FAA can be sustained? On perusal of the order of ld. FAA it is observed that the ld. FAA has not verified the

claims of ITC as available on opening stock as on 01.04.2005. It would not be proper to allow the claim of ITC amounting to Rs.2,05,394.67 without proper verification of the documentary evidences to ascertain the entitlement of claim of ITC on the score. The obligation is cast on the assessing Officer to verify the genuineness of the claim preferred by the registered dealer which has not been complied. In view of the above it is observed that neither the appeal order of the ld. ACST nor the assessment order of the ld. AO is sustainable in the face of the facts. Hence the order of the ld. FAA warrants interference.

7. In the result, the appeal is partly allowed and the matter is remanded back to the ld. AO to verify and ascertain the genuineness of the claim of ITC on opening stock as on 01.04.2005 preferred by the dealer-assessee and authorise claim of sales tax credit first by issuing Form VAT-608 and then to re-compute the tax liability in accordance with the provisions under law within a period of four months from the date of receipt of this order.

Dictated and Corrected by me,

Sd/-

(P.C. Pathy)
Accounts Member-I

Sd/-

(P.C. Pathy)
Accounts Member-I

I agree,

Sd/-
(Suchismita Misra)
Chairman.

I agree,

Sd/-
(A. K. Panda)
Judicial Member-I