

BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL:CUTTACK

S.A. No.323(VAT)/2014-15

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S.A. No. 325(VAT)/2014-15

(Arising out of the order of the learned JCST, Puri Range, Puri in First Appeal Case No. AA/31/VAT/JATNI/2009-10, disposed of on 31.03.2014)

**Present: Smt. Suchismita Misra
Chairman**

**Shri S. Mohanty
Judicial Member-II**

**Shri P.C. Pathy
Accounts Member-I**

S.A. No.323(VAT)/2014-15

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

... State.

-Versus-

M/s. Shri Karshni Alloys Pvt. Ltd.,
Plot No.A/13, Sarua, Industrial Estate,
Sarua, Khurda, Pin- 752055.

... Dealer.

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... State.

For the State: : Mr. M.L. Agarwal, Ld. S.C.(C.T.)
: Mr. M.S. Raman, Ld. Addl. S.C. (C.T.)
For the Dealer : : Mr. K.R. Mahapatra, Ld. Advocate.

Date of Hearing: 18.01.2019 ***** Date of Order: 31.01.2019

ORDER

These two appeals have been filed by the State as well as the dealer against the orders of the Joint Commissioner of Sales Tax, Puri Range, Puri/ first appellate authority (in short, 'ld. JCST/FAA') passed on 31.03.2014 in first appeal case No. AA/31/VAT/JATNI/2009-10 allowing the first appeal in part and reducing the demand to Rs.97,96,659.00 against the demand of Rs.

1,04,97,765.00 raised by the learned Assessing Authority, Jatni Circle, Jatni (in short, 'ld. AA') in his order passed on 16.02.2010 for the period from 01.04.2005 to 31.03.2009 under section 43 of the Odisha Value Added Tax Act, 2004 (in short, 'the OVAT Act'). Both these appeals have arisen out of the same order. Therefore, both were heard together, and were disposed of by this common order.

2. The brief facts of the case are that the dealer-assessee is engaged in manufacturing of Silico Manganese/ Ferro Manganese purchasing raw-materials and selling finished products both in intrastate and interstate trade and commerce. Consequent upon receipt of Tax Evasion Report (in short 'TER') submitted by the Sales Tax Officer, Vigilance, Bhubaneswar Division, Bhubaneswar alleging escaped turnover on account of involvement of the dealer both in suppression of purchases and sales. The ld. AA completed the assessment under section-43 of the OVAT Act by confronting the contents of the report, allowing inspection of seized documents, supplying and providing the dealer-assessee with the certified copies of statement recorded from different persons on different dates connected with the business of the dealers and considering the allegations levelled against the business in the report vis-a-vis explanations furnished at the assessment stage came to the finding on thorough and detailed examination that the suppression of sale reported is established at Rs.8,74,81,382.00 for which the books of accounts maintained by the dealer were rejected by the ld. AA as the same don't reflect correct and complete picture of their business transactions and escape assessment was completed to the best of judgement of the ld. STO raising demand to the tune of Rs.1,04,97,765.00 which is inclusive of penalty of Rs.69,98,510.00 imposed U/s. 43(2) of the OVAT Act. Being further aggrieved, both the State and the dealer have approached this Tribunal.

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3. The State assails the order passed by the first appellate authority on the following grounds:-

- a. The order of the Id. JCST appears to be unjust and improper.
- b. It is not prudent for a company to make an advance payment of Rs. 1,36,080.00 for supplying of certain goods during the year 2009 and the goods were not delivered till the end of March-2013 and even the amount was not returned by the supplying firms, which appears to be incongruent and likely to be verified.
- c. The reduction of fright charges from 7.5% to 5% was without any basis. Further the first appellate authority had upheld all the suppression, but he had reduced the purchase suppression form Rs.6,92,95,495.00 to Rs.6,55,41,574.0 without any justified reason.
- d. The order of the Id. JCST may be set-aside for further verification and reassessment.

4. No cross objections has been filed by the dealer.

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5. The dealer assails the order passed by the first appellate authority on the following grounds:-

- a. The order of the assessing authority as well as appellate authority has neither been based on the facts and circumstances of the case nor on points of law.
- b. The learned assessing authority as well as appellate authority has acted either assuming proper jurisdiction and /or in excess of his jurisdiction.
- c. The determination of G.T.O. & T.T.O. on the facts and particular circumstances of the case are arbitrary, unwarranted and uncalled for.
- d. The appellant was deprived from the benefit of natural justice and debarred from the reasonable opportunity of being heard.

- e. The impugned order has been passed deliberately and consciously ignoring the material/documentary evidences and on mere surmises and conjecture and is liable to be quashed.
- f. The Id. assessing authority without giving reasonable opportunity and verifying the books of accounts of the petitioner in a very casual manner blindly followed the report of Vigilance authority and accordingly raised a vague demand of Rs.34,99,255.00 U/s. 43 of the Orissa Value Added Tax Act, towards tax and Rs.69,98,510.00 towards penalty, total amounting to Rs.1,04,97,765.00.
- g. The Id. appellate authority without considering explanation of the appellant and verifying the books of accounts of the appellant blindly followed the order of assessment and accordingly confirmed demand of Rs.32,65,553.00 of the Orissa Valued Added Tax Act, towards tax and Rs.65,31,106.00 towards penalty, total amounting to Rs.97,96,659.00.
- h. The Id. Appellate authority while passing the order has not followed explanation of the dealer appellant and simply relied on observation of assessing authority. The Id. assessing authority as well as appellate authority has relied on the followings and observed that the following transactions are not accounted for which is not correct:-
 - i. As regards transaction relates to M/s. Down Earth ITC and Evolution Channel through said transaction not accounted for in the Journal but it is duly accounted for in the Ledger Account of the Dealer Company hence it cannot be treated as Purchase Suppression.
 - ii. As regards purchase from M/s. R.S. Associates amounting to Rs.3,66,943.00 it has duly entered in the books of accounts. The copy of the ledger account duly submitted before appellate. However without verifying disallowed the same by the appellate authority.
 - iii. As regards transaction with M/s. Sarangadhar Minerals amounting to Rs.2,64,420.00 it has duly entered in the books of accounts. The

copy of the ledger account duly submitted before appellate. However without verifying disallowed the same by the appellate authority.

- iv. As regards transaction with M/s. Evolution Channel amounting to Rs.1,85,580.00 it has duly entered in the books of accounts. The copy of the ledger account, goods received notes is submitted before appellate. However without verifying disallowed the same by the appellate authority.
- v. Mr. Sankar Nag it is to state that Mr. Sankar Nag is the Director of the Company of M/s. Bagalamukhi Steel Products Pvt. Ltd. The Materials I.e. Lancing Tube have been Purchased From the above Company on 20.04.2005 which had been duly entered in the Books of Accounts and Due Entry Tax has been paid on the same.
- vi. As regards Purchase of 71,6000 MT of Mn ore from M/s. Orissa Mining Corporation Ltd. during 29.12.2007 to 31.12.2007 are duly entered in the ledger account for the 2008-2009 i.e. on 24.06.2008. The said transaction duly entered in day to day stock register as well as ledger A/c. Of the dealer but invoice was received only on 24.06.2008 from the selling dealer.
- vii. As regards M/s. R.S. Associates, M/s. Sarangdhar Minerals, M/s. Down Earth ITC & Evolution Channel it is to state that same has been duly entered in the Purchase register and ledger A/c of the petitioner. Further due Entry tax has been paid on the same transaction hence it cannot be treated as purchase suppression.
- i. The ld. assessing authority as well as appellate authority without verifying the ledger account with reference to the purchase register has treated the purchase suppression on account of purchase of 71.600 MT of Iron ore from M/s. OMC Ltd. is not correct on the fact that the same has been purchased on suffered due Input Tax and the petitioner disclosed the same in the VAT Return and availed Input Tax Credit as per Provision U/s. 20 of the OVAT Act 2004. So the observation of assessing authority as regards suppression of purchase is not correct.

j. As observed by the assessing authority the dealer had also admitted before vigilance authority that the transaction with M/s. R.S. Associates, M/s. Sarangdhar Minerals, M/s. Evolution Channel, M/s. Siraj Udin & Co, M/s. Sun Steel Industries M/s. Shree Shakti Motors, M/s. Om Sai Minerals, M/s. Pawan Gupta and M/s. Jeypore Sugar Ltd. are not reflected in the return hence it is fraudulent nature of the business of the dealer and after thought arrangement. The observation is only general opinion of the assessing authority without having any concrete proof in the hand of the assessing authority. A mere statement of staff could not be treated as not conclude the transaction of purchase suppression. When the petitioner has maintained ledger accounts, purchase register/journal, day to day stock account and the same has been reflected in the books of accounts it cannot be treated as purchase suppression on the basis of statement of staffs of the company. This contention is supported with observation of apex court, in the case of CIT Vrs. Ashok Kumar Soni reported (2007) 291 ITR 172 (RAJ) it was held by the Hon'ble Rajasthan Court that, "admission in statement during search is not a conclusive proof of fact and can always be explained subsequently by the part. Second statement of the assessee to be read together with first statement to evaluate weight of admission for appreciating evidence". In the instant case when the transactions are duly reflected in the regular books of accounts the statement of staffs is not conclusive proof that the transaction are not entered in the register/books of Accounts. The documentary evidences. Oral statements being secondary evidence cannot prevail over documentary evidence. Even if an oral statement is found to be admissible, yet its correctness is to be substantiated in material particulars as held by Hon'ble Apex Court in the case of Saravan Sings Vrs. State of Punjab reported in AIR 1957 SC 637. When all the transaction are duly explained before assessing authority without verifying the same he has conclude that there is

suppression of purchase which is not maintainable in the eyes of law.

- k. As regards purchase from M/s. Shakti Motors the observation of Ld. assessing authority is not correct as the stocks are duly entered in the ledger but due to non receipt of invoices from the sealing dealer it was not entered in the Journal but it is very much available in the Ledger and Stock Account. Since the related invoices and file of M/s. Sree Shakti Motors are seized by the vigilance authority the petitioner has filed a petition before assessing authority to supply copy of all such invoices for proper explanation of facts before them. But the ld. assessing authority as well as appellate authority without supplying the same has observed purchase suppression which is not sustainable in the eyes of law.
- l. As regards transaction with M/s. Chanekswar Minerals the alleged transactions have been duly entered in the Books of Accounts and due entry taxes have been paid on the said transaction. Since it has been mentioned in the invoices as "Iron Ore" the same description has been reflected in the way bills. Since the transaction has been reflected in the books of accounts and we have utilized the same as our Raw materials for production of finished products it cannot be treated as purchase suppression.
- m. Regarding allegation of purchase suppression of 704.464 MT of Iron Ore and 71.740 MT of Coke transported by 59 nos. of trucks the ld. assessing authority has failed to confront/co relate the same with report of vigilance authority with whom the vigilance authority has arrived the suppression. Without properly confronting the same he has observed purchase suppression which is not sustainable in the eyes of law.
- n. As alleged regarding balance sheet for the year 2005-06 to 2007-08 it is stated that the said balance sheet is unsigned and roughly prepared by the staff as a projection and subsequently after completion of due statutory audit by the CA the same has been duly

filed before the competent authority. Further the Vigilance Authority while calculating purchase figures with reference to return filed has not taken correct figures in to the account. As regards sundry creditors as admitted by the STO(V) it relates to payment to the contractor. Hence it is not required to be mentioned in the VAT returns. Since in the present case the sundry creditor as mentioned in the balance sheet neither relates to any purchase or sales it is not required to mention in the return. Hence the said allegation has no merits at all.

- o. As regards opening stock position in form E it is to state that the said copy which is available with vigilance authority is unsigned copy and does not have any authenticity. The dealer company has not filed ny returns i.e. form-E before the Mining Department as on 09.11.2008 for which the mining officials have issued a letter to that extend to file the return. On the basis of such letter the return has been filed only on 15-11-2009. The copy of such letter and acknowledgement are produced before the assessing authority. The allegation of the vigilance authority is based on the O/s. Of Mining return. In this context it may be explained that the aforesaid mining return had been prepared roughly and had not been submitted to the authorities. Hence concluding the said figures mentioned in the mining return as opening stock of the petitioner is not factually correct and as alleged of purchase suppression has no merits. The ld. Appellate authority without verifying the same has sample accepted the contention of assessing authority which is liable to be dropped.
- p. On the facts and particular circumstances of the case so also the documents/evidences/details submitted before assessing authority it is humbly prayed that the allegation of the reporting officials, since do not based on any fact and /or any documentary evidence but based on presumption only may kindly be dropped in the interest of justice and equity. Further the ld. STO(V) on his

investigation as well as in the Order of assessing authority they have not found or established any suppression against Sales or found any discrepancy in the stock. Without finding any other discrepancy determination of discrepancy/ suppression of purchases is not sustainable in the eyes of law. The STO(V) has also not proved a single instance either on record or in course of inspection as regards suppression of Sales or stocks. Hence when there is no sales suppression and stock discrepancies found by the STO(V) on his investigation the suppression of purchases determined is not sustainable and the report submitted as against OVAT & ET Act is liable to be quashed and the order is liable to be quashed.

- q. The visiting officials do not have any incoming and outgoing documents evidencing purchase and/or sales of goods, within the period 01.04.2005 to 31.03.2009. It is also submitted that not a single transaction of corroborating evidence for example transportation of goods, payment to transporter etc, excess cash as recorded in the books with that of the sales disclosed, excess deposits in its bank accounts or any discrepancies in Stock were also not found during the search of the premises. It may be further appreciated that no such Electricity/Power consumption found by the Vigilance Authority to determine the turnover of production of the petitioner. Therefore, the allegations are baseless and are not supported with any documents/evidences and as such are liable to be dropped being not correct and sustainable on fact and law.
- r. Determination of suppression of purchase of Rs.6,55,41,574.00 and addition of freight mechanically@5% on such imaginary value is excessive and without any basis hence it is liable to be deleted and order to be quashed.
- s. Imposition of penalty U/s.10(2) of the OET Act 1999 by the assessing authority and appellate authority is mechanical and gross non application of judicial mind as penalty is imposed without having any wilful suppression for which the same is illegal. It is rule

of law as held by the Supreme Court in the case of Hindustan Steel Ltd. Vrs. State of Orissa (1980) 25 STC 211 (SC), Commissioner of sales tax U.P. -V/S-Sanjeeva Fabrics (2010) 35 VST 1 (SC) that penalty is not to be imposed merely because law authorities to do so unless there is contumacious and wilful disobedience of provisions of law.

6. No cross objection has been filed by the State.

7. Mr. M.L. Agarwal, learned Standing Counsel (C.T.) appearing on behalf of the Revenue reiterated the points raised in the grounds of appeal filed. He vehemently opposed to the reduction of tax and penalty by the learned JCST.

8. Mr. K.R. Mohapatra. Ld Advocate appearing on behalf of the dealer-assessee reiterated the grounds of appeal filed. He brought to the notice of the Bench the Circular issued by the Commissioner of Commercial Taxes, Odisha, Cuttack vide Letter No.12169/CT dtd.05.08.2016 directing the officers of the Department with the instructions that when books of accounts is not produced before the inspecting officer by the assessee, the copy of adverse materials or Tax Evasion Report can be given to the assessee, if he so demands, only after production of the books of accounts by the assessee to the assessing officer (the assessing officer may retain a photo copy of the relevant pages of the books of accounts for reference) but if the evasion report is prepared after verification of books of accounts, then a copy of adverse materials of tax evasion report can be given to the assessee on his demand. During assessment, the adverse materials or the tax evasion report are to be duly confronted to the assessee, and it should be recorded in Form of a Statement and simultaneously reflected in the order sheet. The ld. Advocate laid stress on the point that the dealer-assessee was not supplied with the copies with the seized documents for which the points alleged in the report could not be properly explained. The ld. Advocate also brought to the notice of the Bench the judgment passed by the Hon'ble High Court of Orissa in the case of

Lakhiram Jain and Sons Vrs. Sales Tax Officer, Rayagada Circle, Rayagada And Another reported in (2009) 21 VST 280 (Orissa) wherein the Hon'ble Court made it clear that "where in the course of inspection the inspecting officer seizes incriminating materials as well as regular books of account from the business premises of a dealer, the assessing officer or the inspecting officer shall supply copies of the seized regular books of account and incriminating material(s) to the dealer if he asks for the same before asking the dealer for furnishing his explanation in connection with any proceeding under the OVAT Act". The ld. Advocate argued that there is violation of natural justice as the seized documents were not returned to the dealer-assessee to defend the points raised in the Tax Evasion Report. He further brought to the notice of the Bench the decision of the Hon'ble High Court of Orissa in case of M/s. Steel Authority of India Vrs. State of Orissa And Others reported in (1988) 70 STC 2 (Orissa) wherein it was held that, "Sales by the dealer of unserviceable materials such as empty drums, scrap, waste materials, etc., do not constitute the business of the dealer (Steel Authority of India) and are therefore not includable in the turnover of the dealer for the purpose of assessment to sales tax". This point has been argued in respect of allegation of out of account sale of transformer scrap amounting to Rs.8,31,540.00. The ld. Advocate also filed a written note of submission covering the entire allegation levelled in the report and explanations thereon arguing that the explanations and documentary evidences produced before the ld. AA and Ld. JCST which have not been properly taken into consideration and the assessment order and the appeal order were passed relying on the allegations contained in the Vigilance report.

The dealer has filed petition under Rule 102 of the OVAT Rules, 2005 praying for filing of additional evidence in the matter which was considered and the dealer was allowed to adduce additional evidence which are as follows:-

SL. No.	Description	Annexure	Running Page No.
1.	Written Note of Submission	-	-
2.	Copy of Invoice No.6, dtd.20.04.2005, in respect of purchase of Lancing pipe amounting Rs.3,16,900/-.	I	1-3
3.	Copy of ledger Account of Orissa Mining Corporation in respect of purchase made under GRN-551 to 555 and the Bank statement depicting the refund of amount shown in the credit side with forwarding letter of OMC in this respect.	II	4-6
4.	Copy of relevant portion of Material Received Register in respect of purchase of Raw materials from July' 2008 to Dec' 2008 relating to FY-2008-09.	III	7-21
5.	Copy of Ledger account of M/s. Shree Shakti Motors for the month of Oct' 2008, in respect of purchase of raw materials during 2008-09.	IV	22-23
6.	Copies of Copy of Ledger account of M/s. Down Earth ITC, Evolution Channel, RS Associates, Sarangadhar Minerals, Sun Steel Industries & Om Sai Ram Minerals in respect of purchase of raw materials during 2008-09.	V	24-37
7.	Copies of Ledger Accounts of M/s. Chennakesava Minerals for the year	VI	38-73

	2008-09, along with purchase invoices/bills with reference to the entry under GRN No.246 & 249 of the Material Received Register as per Annexure-III		
8.	Copies of Letter of Mining officer, Cuttack, and copies of Mining Returns in Form-E submitted on dtd.15.11.2008 and on 17.12.2009, for the year 2008-09 & 2009-10 up to Dec-2009.	VII	74-90
9.	Copies of Electricity Bills of the Appellant's Factory for the month of Jan, Feb, and Mar-08, with reference to the consumption of electricity et	VIII	91-93
10.	Copy of 'Share Purchase Agreement' dtd.05.03.2008, along with details of relevant schedule- 'D' in respect of Balance Sheet as at 31.01.2008 appended thereto.	IX	94-135
11.	Copies of relevant purchase invoices of different parties with reference to the entries made in the seized 'Lucky Boy' exercise note book.	X	136-210
12.	Copies of Audited Balance Sheet and Profit & Loss Accounts for the Financial Year 2005-06.	XI	211-222
13.	Copies of Audited Balance Sheet and Profit & Loss Accounts for the Financial Year 2006-07, 2007-08 and 2008-09.	XII	223-270
14.	Copies of Monthly Return filed under	XIII	271-316

	OVAT Act for the period from 01.09.2008 to 31.12.2008, relevant to financial Year 2008-09.		
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It has been stated that the ld. assessing authority while completing the assessment has not accepted the explanations and confrontation of the dealer-appellant as to each and every allegation of the ld. STO, Vigilance, along with supportive evidence and their clarification with reference to its business transactions which have also not taken into consideration by the ld. AA who has simply observed in the 1st Para of the Assessment order that, “the Evidence produced before him are not full proof and afterthought arrangement”. Further the ld. Assessing authority while determining the suppression has given force on the statements given by the staff at the time of inspection without co-relating alleged documents with the corresponding entries of books of accounts of the dealer and completed the assessment to the best of his judgment.

Similarly, in appeal before the first appellate authority, the dealer produced several evidence of books of accounts including authenticated copy of party ledgers and journal entries in respect of the purchases made during the relevant period so as to establish that every purchase made by the dealer have been duly recorded in the books of accounts of the appellant company which even though appreciated but out rightly rejected by the ld. Appellate authority with the observation that “the copy of so called journal/ Ledger cannot be treated as the regular books of accounts as the same are not statutory record of purchase under the Act and can be fabricated by the dealer at any point of time according to its suitability”. Further restricting the meaning of books of accounts as to ‘purchase register and related purchase invoices’ with reference to the purchase made by the appellant dealer and without verifying the related entries in the

records maintained by it, ld. first appellate authority confirmed the alleged purchase suppression as per assessment.

It is therefore, in view of the above statutory privilege permitted to the dealer to maintain and record its business transactions in various mode and manner of accounting practices and procedure authorized by the Act, and accordingly rejection of books of accounts of the appellant including various journal vouchers and ledger copies in support of their purchases which have been produced for verification before the forum below as against the alleged suppression which is illegal and abuse in the process of law.

The assessing authority has taken the view of the statements of staffs given at the time of investigation during their visit to the business premises, which have also not confronted with the available records maintained by the dealer appellants and this also amounts to violation of natural justice.

This contention is supported with the observation of the finding of the honourable court, in the case of CIT Vrs. Ashok Kumar Soni reported (2007) 291 ITR 172 (RAJ) it was held by the Hon'ble Rajasthan High Court that, "admission in statement during search is not a conclusive proof of fact and can always be explained subsequently by the party. Second statement of the assessee to be read together with first statement to evaluate weight of admission for appreciating evidence". In the instant case when the transactions are duly reflected in the regular books of accounts, the statement of staff recorded during inspection is not conclusive proof that the transactions are not entered in the register and in the books of accounts of the appellant. Oral statements being secondary evidence cannot prevail over documentary evidence. Even if an oral statement is found to be admissible, yet its correctness is to be substantiated in material particulars as held by Hon'ble Apex Court in the case of Saravan Sings Vrs. State of Punjab reported in AIR 1957 SC 637.

The Id. A.A. has taken cognizance of several things in voluminous manner, bereft available records including the profit and loss accounts and balance sheets of the appellant company from 2005-06 to 2007-08 and the evidence which require further consideration of material fact. It is pertinent to mentioned here that, neither the Investigating agency nor the assessing authority have found any discrepancy in the physical stocks during the relevant tax period. They have also not found any discrepancy as to the cash and bank transactions of the appellant dealer. The entire assessment has been made out under the presumption that the seized loose documents, bills, statements and voucher etc are not tallied with the available records of the appellant.

Regarding allegation as to suppression of purchase in respect of one challan bearing no.175/45, dtd.29.09.2008 of M/s. Sirajudin & Company (P) Ltd. issued in favour of M/s. Saumya Alloys (P) Ltd., showing dispatch of 10.150 MT of 'Mn. Ore' found from the business premises have not been accounted for and value of the goods have been determined at Rs.1,69,505.00. It has been contended that the statement of the scrap recorded at the time of investigation have not been cross-verified from the records of the respective 3rd party, whose name have been stated in the challan, nor the authorities below could have summoned them to cross-verify the allegation with reference to the said challan. Hence the inference drawn by the revenue without cross-verification of the related party, allegation of purchase suppression is not sustainable in law.

Regarding allegation of suppression of purchase in respect of seized documents in file no.19 called **"Delhi correspondence and cheque details, cash requisition"** the details stated at **Page No.4, under clause-vi-(a) to (g)** of the order of assessment were not taken into account by the dealer;

It has been stated that they have already produced all records and vouchers in support of the allegations. The copy of which are produced from Annexure-I to IV.

So far as purchase suppression in respect of verification of some loose documents seized from the business premises of the appellant are concerned. Copy of ledger accounts, copy of the bank statement of the appellant as well as copy of invoices along with transport bills are being annexed-V.

In respect of allegation of suppression of purchase of raw-materials obtained from M/s. Chenakeshava Minerals, Andhra Pradesh with reference to purchase invoices Sl. No. 74 to 81, all dtd.06.10.2008. It was stated that actually the selling dealer has not sold iron ore lumps, but manganese ore which the dealer appellant has correctly recorded in the books of accounts. This typographical and clerical mistake and omission on the part of dealer in preparing the documents of the title of the goods may not be treated as suppression of purchase. It was contended that allegation of purchase suppression of stock of raw materials worth Rs.1,63,,85,525/- and estimated sales suppression amounting to Rs.99,10,316/- on the basis of alleged seized copy of stock statement of raw materials in 'Form-E' furnishing to the mining officer, Cuttack is not correct. The 'form-E' is seized by the STO(V) is a rough sheet which is found from the factory premises. It is further contended that the alleged document 'Form-E' does not bear any signature of the appellant nor the author of the same be identified by the department and therefore it cannot be utilised in appellant adversely. Mere presumption that the said document has been furnished to the concerned authority without any confirmation from that authority even assuming the same without any corroboration in the books of accounts of the appellant is nullity in law.

The copy of electric bills from the period from Jan' 2008 to March' 2008 has been annexed as Annexure-VIII, showing

consumption of Zero unit as there was no production except fixed charges/other duty during the relevant period. Hence it is argued that the estimation of sales suppression is mere guess work for allegation of suppression of purchase to the tune of Rs.1,35,41,232.00 with reference to the verification of noting of one seized 'lucky Boy' exercise note books; It was contended that the ld. AA as well as first appellate authority ignored the documents produced before them for verification on the grounds that "copy of ledger cannot be treated as regular books of accounts as the same are not statutory records of the purchase under the Act". They produced certain documents in this connection at Annexure-X.

Regarding allegation of purchase suppression of Rs.1,27,35,246.85 basing of the seized balance sheet and profit & loss account of the company for the year 2005-06. Copy of balance sheet, profit and loss accounts for 2005-06 furnished as Annexure-XI with the contention that ld. STO(V) as well as the assessing authority has determined the purchase suppression of Rs.1,27,35,246.85 by taking together the figure shown in the liability for year 2005-06 under the heading "Sundry Creditors of Suppliers" which includes the amount of "Unsecured Loan" of Rs.94,82,114.85 borrowed from the relatives of the Directors of the company and only an amount of Rs.32,53,132.00 has been earmarked towards sundry creditors for suppliers which includes the outstanding dues in respect of security payments, diesel cost and payment for contract works etc., for which neither the ld. STO, Vigilance nor the ld. AA could bring the correct materials on available records to establish the above purchase suppression.

It is further contended that the assessment was shown on the basis of tax evasion report without verification of related books of accounts available which the appellant in this connection he furnished related copies of balance sheet and profit loss accounts for the year 2006-07, 2007-08 and 2008-09 as Annexure-XII.

Regarding allegation as to out of account sale of transformer amounting to Rs.8,31,540.00 shown in the schedule-5 annexed to the balance sheet for the year 2007-08. It has been contended that the transformer sold as scrap is not related to the regular business activities of the dealer-appellant, nor it be treated as 'sales' as per provisions of section 2(45) of the Act, for which the ld. assessing authority is perverse in facts as well as in law holding the transaction as sale suppression.

In this connection the appellant relied upon the decision of Hon'ble High Court of Orissa in the case of M/s. **Steel Authority of India Limited-Vrs-State of Orissa and Others, reported in (1988) 70 STC 2 (Ori)**, wherein it was held that, "sale by the dealer of unserviceable materials such as empty drums, scrap, waste materials, etc., do not constitute the business of the dealer (Steel Authority of India) and are therefore not includable in the turnover of the dealer for the purpose of assessment to sales tax")

It is further contended that the ld. AA has not cross verified the relevant returns under the Act for the respective tax period with reference to the allegation of purchase of raw materials. The copies of returns from 01.09.2008 to 31.12.2008, submitted as Annexure-XII. It was stated that the assessment containing the demand is liable to be quashed or set-aside in the interest of natural justice and equity.

Per Contra, Mr. M. L. Agarwal, Ld. SC (C.T.) vehemently opposed the contention taken by the dealer that the sale of transformer amounting to Rs.8,13,540.00 is not to be treated as sales as per provision of Section-2(45) of the OVAT Act is not correct for the judgment of the Hon'ble High Court of Orissa rendered in the case of M/s. Steel authority of India Vrs. State of Odisha (1998) 70 STC 2 (Ori.) has long ago been over ruled by the Hon'ble Supreme Court in the case of State of Odisha Vrs. Orissa Road Transport Corporation (1997) 107 STC 204 (SC.). as per the judgment of the Hon'ble Supreme Court M/s. Orissa Road Transport Company Ltd's main business is of

running buses and providing transport facilities to the travelling public. Along with these services the company has been disposing of unserviceable, old, obsolete and un-utilise parts from its stores. These parts used to be disposed of at yearly intervals. The company didn't get itself registered as a dealer under the said Act. According to it no business was being carried on in respect of which any sales tax could have been levied. The Hon'ble apex Court held that "in our opinion the High Court was not right in concluding that the respondent was not a dealer who was liable to pay sales tax on the sales of the spare parts etc., made by it. We accordingly allow these appeals and answer the questions of law in the negative and against the respondent". M/s. Orissa Road Transport Company Ltd. is the respondent in this case. The ld. SC. (C.T.) thus, supported the tax and penalty imposed by the ld. AA and upheld by the ld. JCST. He further treated that not only the Sales Tax Authorities of the Vigilance Division but also the Assessing Authority and the appellate authority have allowed adequate opportunities and access to the seized documents and the statements recorded on several occasions for reference and for explaining the matter. The dealer-assessee has only repeated the explanations furnished earlier without supplying cogent documentary evidences against the allegations levelled against the business transactions. He has brought to the notice of the Bench that the copy of invoices No.6 dtd.20.04.2005 mentioned against Sl. No.2 of the Index of additional evidences adduced has been tampered with and the details of the scheduled goods at Annexure-I is not same as the allegation made by the Vigilance Authorities and the value of lancing pipe indicated in the details in the scheduled of goods as per Annexure-I is not same as the photo copy of duplicate of transporter invoice furnished by the ld. Advocate on behalf of the dealer-assessee. He further stated that the matter has already been discussed threadbare in the orders passed by both the ld. AA and Ld. FAA.

9. Heard both the parties. Gone through the grounds of appeals, written submission and additional evidence adduced by the ld. Advocate on behalf of the dealer-assessee, the impugned orders of appeal and assessment, the case laws cited, the relevant records of assessment and appeal and tax evasion report submitted by the Vigilance Division, Bhubaneswar. Since the note book, registers, written slips and written papers including copies of unsigned statement in Form-‘E’ and copy of balance sheet and Profit and Loss Accounts were seized from the business premises of the dealer-assessee, the onus of explaining the said documentary evidences lies on the dealer-assessee. In absence of any proper and plausible explanations the ld. AA accepted the allegation levelled against the business by the sales tax authorities of Bhubaneswar Vigilance Division. The issue before the Tribunal is to take a decision as to whether the confirmation of the findings of the ld. AA and acceptance of certain explanations at the time of appeal hearing by the ld. JCST is justified? From the records available at this end evidences produced by the ld. Advocate on behalf of the dealer-assessee it is evident that the documents furnished are not convincing on the ground that the dealer has not maintained purchase register or stock register in respect of the goods dealt in. Instead of praying for issue of summon against M/s. Sirajudin and Company Pvt. Ltd. and M/s. Soumya Alloys Pvt. Ltd. in respect of dispatch of 10.150MT of manganese Ore vide Challan No.175/45 dtd.29.09.2008. The dealer-assessee blaming the sales tax authorities for further inquiry in the matter is not proper. For it has been admitted in the statement recorded from authorised signatory that such purchases are being utilised in their production. As the item is relevant for the business of the dealer-assessee and the challan was seized from the place of business of the dealer-assessee. The suppression of purchase upheld by the ld. JCST is proper. Similarly, in case of seized document in file No.19 called “Delhi correspondence and cheque detail and cash requisition” the transactions relate to the

period 2008 and its invoice No.6 and in the invoice copy submitted a period 2008 has been overwritten as 2005 from the evidence adduced at the time of hearing before this Bench and the evidence available in the Vigilance Report don't tally. The explanation offered by the ld. Advocate is not acceptable. As the dealer failed to produce specific entry in respect of goods received in the books of account and relevant purchase invoices with reference to the purchase of goods, the evidence adduced are not accepted as valid and genuine documents. Even the ld. advocate could not adduce the tax invoice issued by M/s. Orissa Mining Corporation for the transaction of purchase of 71.600MT of Manganese Ore. The information invoice number, date, quantity of goods purchased of ITC collected etc., are not found legible and no entry of the same is available in purchase register. Though the same has been entered in ledger account vide G.R. No.552,553 , 554 and 555 but no copies of G.R. details produced so far as the loose document seized from the business premises of the dealer is concerned. No valid reason could be cited for non-entry of the transactions in the books of accounts maintained till the date of visit of the Vigilance Authorities on 07.11.2008 and also no specific G.R. N. details have been allotted to individual purchase invoice to substantiate the claim. So far as the allegation of purchase suppression of raw materials from M/s. Chenakeshava Minerals, Andhra Pradesh is concerned the dealer could not adduce any cogent documentary evidences in support of the fact that the goods purchased was not iron lumps but manganese ore. No documentary evidence obtained from the selling dealer is produced to the effect. Rather from the documentary evidences available in the record it is evident that M/s. Chenekshave minerals, Andhra Pradesh is a dealer of iron ore lumps and the waybills supporting the transitions shows that iron ore lumps were purchased by the dealer-assessee and not manganese ore. The explanation of the dealer-assessee is not acceptable. However, so far as the allegation of purchase suppression

regarding stock of raw-materials valued Rs.1,63,85,525.00 and estimated sale suppression amounting to Rs.99,10,316.00 on the basis of alleged seized copy of statement of stock in form 'E' to be furnished to the mining officer of Cuttack depicting therein the opening stock of raw materials as on 01.02.2008 is concerned, the explanations of the dealer-assessee that the dealer-assessee is not the author of the statement of stock in Form-E and nobody has signed the Form-E and the said Form-E was not submitted with the officer of mining officer, Cuttack are not convincing. It is noticed that the dealer has not submitted/furnished the statement to the mining officer, Cuttack but the dealer assessee is supposed to explain the stock positions of raw-materials shown in the statement of stock in Form-E seized from the business premises as the name of the dealer-assessee is there in the form-E. Hence the dealer without explaining properly cannot take the stand that the statement of stock is an unsigned rough sheet having nothing to do with the business transaction. However, the determination of purchase suppression of stock of raw-materials at Rs.1,63,85,525.00 and estimate sale suppression amounting to Rs.99,10,316.00 is not convincing. If the assessing authority has accepted the sales suppression amounting to Rs.99,10,316.00 out of the alleged purchase suppression of Rs.1,63,85,525.00 the same ought to be deducted for tax should not be levied both on purchase and sale of same goods for the purpose of enhancement of turnover which has not been considered either by the ld. assessing authority or by the first appellate authority. Similarly so far as the allegation of purchase suppression of Rs.1,35,41,232.00 with reference to the verification of one seized 'Lucky Boy' exercise books is concerned it appears that the individual transactions are not verified properly by the entries made in goods received note with relevant waybill for outside the states purchases, challan and invoice and purchase order register and mention of vehicle number (vehicle carrying goods) by the dealer-assessee and the returns filed under the

VAT and ET Act for the period prior to the visit of Sales Tax Authorities of Bhubaneswar Vigilance Division on 07.11.2008. The dealer assessee must have maintained purchase order register/statement inasmuch as it is observed that in certain goods receipt note (GRM) purchase order with date has been mentioned. Proper verification of goods received note with relevant challan, invoice, truck/lorry No. and reflection of purchase in the return filed by the dealer-assessee with the sales tax authorities prior to the surprise visit of Inspecting Authorities on 07.11.2008 is very much relevant facts to be taken care of which exercise is ought to be done at the level of assessing authority. Similarly, it is marked that alleged purchase suppression of Rs.1,27,35,246.85 basing on the seized balance sheet and profit and loss account for the year 2005-06 is not convincing. As the ld. Advocate has explained the matter in the Annexure-XI and XII. The ld. Advocate has contended that the ld. STO Vigilance as well as the ld. assessing authority has determined the purchase suppression by taking together the figure shown in the liability side of the audited balance sheet of the appellant for the year 2005-06 under the heading "Sundry Creditors for Suppliers" which includes the amount of "Unsecured Loan" of Rs.94,82,114.85 borrowed from the relatives of the Directors of the company and only an amount of Rs.32,53,132.00 has been earmarked towards 'sundry creditors' for suppliers which includes the outstanding dues in respect of security payments, diesel cost and payment for contract works etc., for which neither the ld. STO, Vigilance nor the ld. A.A. could bring the correct materials available on records to establish the above purchase suppression. This aspect needs further verification by the ld. STO. So far as the allegation of out of account sale of transformer scrap is concerned it is marked that the dealer is not dealing in transformer scrap in regular course of business. The impression of the dealer-assessee is that the sale of transformer scrap is not to be treated as sales is not correct. It is treated as sale of goods exigible to tax under the VAT Act but as the

dealer in good faith has not collected tax we found reasonable cause for deletion of penalty imposed under section 43 of the OVAT Act on tax assessed on the score.

Accordingly, we feel it is a fit case to be remanded to the ld. AA to re-examine the transactions recorded in the seized 'Lucky Boy' exercise note book containing weighment details of loaded vehicles on different dates with reference to returns filed, tax invoices entry in books of accounts, waybill utilise if any, mention in challan number and vehicle number on goods receipt notes and purchase evidences and disclosure of purchases through periodical returns filed in accordance with the provisions under law by the time the Inspecting Authorities conducted surprise visit. So far as the unsigned form-E statement seized from the business premises of the dealer is concerned, the ld. assessing authority should take care to deduct enhancement on account of purchase suppression for goods which is also converted to finish product for which suppression of sale has been arrived at so far as the difference of 407.401MT of Silico- Manganese is detected. So far as the seized balance sheet, profit and loss account for the company for the year 2005-06 is concerned, the ld. STO is to ascertain properly the 'unsecured loan' borrowed by the company and sundry creditors for supplies which includes the outstanding dues in respect of security payments, diesel cost and payment for contract works etc., as contended by the ld. Advocate on behalf of the dealer- assessee. The levy of tax on sale of transformer scrap amounting to Rs.8,31,540.00 is upheld but as the dealer doesn't deal in the item in regular course of business we find it reasonable to delete penalty on the tax assessed on the score. All other concurrent findings of the ld. JCST excepting the points indicated above are upheld in absence of production of conclusive evidences against the findings on behalf of the dealer- assessee. For the aforesaid reasons the order of the ld. JCST warrants interference. The case is remanded back to the ld. AA

for the purpose of detail and proper verification of the points observed above.

10. In the result, the appeal filed by the State is dismissed. The appeal filed by the dealer-appellant is partly allowed. The Id. AA is directed to assess the dealer de-novo in the light of observations made above extending opportunities of personal hearing to the dealer-assessee in accordance with the provision under the law within a period of three months from the date of receipt of this order.

Dictated and Corrected by me.

Sd/-
(P.C. Pathy)
Accounts Member-I

I agree,

Sd/-
(P.C. Pathy)
Accounts Member-I

Sd/-
(Suchismita Misra)
Chairman

I agree,

Sd/-
(S. Mohanty)
Judicial Member-II