BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 13 (VAT) of 2019
&
S.A. No. 5 (ET) of 2019

(Arising out of orders of the learned Addl. CST (Appeal), Central Zone, Odisha, Cuttack in Appeal Case No. AA-106101610000118/2016-17 & No. AA- 108101610000120/ 2016-17, disposed of on dated 24.12.2018)

Present: **Shri A.K. Das, Chairman**

M/s. Bharatia Distributors Pvt. Ltd.,
Chauliaganj, Cuttack ... Appellant

-Versus-

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

For the Appellant : Sri B.B. Panda, Advocate.
For the Respondent : Sri M.S. Raman, Addl. SC (CT)

Date of hearing: 27.04.2021 *** Date of order: 12.05.2021

O R D E R

Both these appeals relate to the same tax period and involve common question of fact and law for which these cases are heard together and are disposed of by this common order.

S.A. No. 13 (VAT) of 2019 :

2. The dealer-appellant has preferred this appeal under Section 78 of the Odisha Value Added Tax Act,

2004 (hereinafter called as 'OVAT Act') challenging the order dated 24.12.2018 passed by the learned Addl. CST (Appeal), Central Zone, Odisha, Cuttack (hereinafter called as 'first appellate authority') in Appeal Case No. AA. 106101610000118/2016-17 thereby dismissing the dealer's appeal and confirming the order dated 04.06.2016 passed by the Joint Commissioner of Sales Tax, Cuttack-I Range, Cuttack (in short, 'assessing authority') raising demand of ₹2,78,944.00 towards tax, interest and penalty.

3. The relevant facts leading to the filing of the present appeal are that the appellant- M/s. Bharatia Distributors Pvt. Ltd., Chauliaganj, Cuttack carried on business in cement, electrodes, iron and steel goods which it purchased from inside and outside the State of Odisha. The assessing authority basing on the findings contained in Audit Visit Report (in short, 'AVR') submitted by the DCST, Cuttack-I East Circle, Cuttack for the tax period from 01.04.2013 to 31.03.2015, issued a statutory notice to the dealer-appellant to produce the books of account and to show-cause. In response to such statutory notice issued by the assessing authority, the appellant appeared through Sri B.B. Panda, Advocate and produced the books of account

along with supporting documents for the relevant tax period. The assessing authority on verification of the books of account and other relevant documents produced by the dealer opined that:-

(i) Since no fraudulent intention of the dealer was established, it would not be just and proper to levy penalty for issuance of credit notes beyond the stipulated period of three months as suggested in the AVR;

(ii) The explanation of Mr. Kedia, the authorized representative of the dealer that due to some error in calculation a small payment was left out and the said amount was deposited later on after being pointed out by the audit was acceptable as less payment could be the result of genuine error. However, the assessing authority agreed with the finding of the AVR regarding imposition of penalty for late deposit, limited the penalty amount to ₹16,629.00, i.e. equivalent to the amount of tax deposited;

(iii) ITC mismatch of ₹96,292.00 as pointed out in the AVR could be established as the authorized

representative failed to give suitable reply. However, no penalty was imposed as there was no fraudulent intention on the part of the dealer;

(iv) It is not proper to levy penalty for non-payment of interest amounting to ₹8,811.00 for late filing of return during the period 2013-14 and 2014-15 since the dealer-appellant has deposited the interest for delay in filing the return;

(v) The claim of ITC of ₹2,18,492.00 against the transaction with nil filers was disallowed and no penalty was imposed on this score as fraudulent intention of the dealer was not established; and

(vi) The dealer is required to pay ₹2,78,944.00 which includes interest and penalty.

3(a). The dealer-appellant challenging the above findings of the assessing authority preferred appeal before the first appellate authority u/s. 77 of the OVAT Act on the following grounds :-

(i) The order of the assessing authority was not tenable in the eye of law as it refused to provide the benefit of ITC to the dealer-appellant inspite of the fact that it produced the tax invoices against

purchase of goods from different registered dealers of Bhubaneswar and Cuttack Circles who have filed periodical returns in time but due to wrong noting in the system of the Department, mismatch was pointed out which was duly explained to the Audit Visit Officer with supporting documents;

(ii) The assessing authority committed error in ignoring the tax invoices produced by the dealer-appellant without giving any finding that those are fake and forged documents; and

(iii) The amended provisions of Rule 11A of the OVAT Rules came into force on 01.10.2015 for which the same has no application to the facts and circumstances of the present case as the dealer was assessed for the tax period 01.04.2013 to 31.03.2015 which is prior to amending the Rules came into force. The amending Rule 11A of the OVAT Rules having no retrospective effect, refusal of benefit of ITC to the dealer-appellant is illegal, arbitrary and against the sanction of law.

The first appellate authority negatived all the contentions raised by the dealer-appellant and confirmed the order of assessing authority raising demand of ₹2,78,944.00. Hence, the present second appeal.

4. The main ground of challenge of the impugned order was that the assessing authority as well as the first appellate authority committed serious illegality in refusing to provide the benefit of ITC to the dealer-appellant on the ground of mismatch and amendment of Rule 11A of the OVAT Rules. It was vehemently urged by the learned Counsel for the appellant that both the forums below were incorrect in their approach in giving retrospective effect to the amending Rule 11A of the OVAT Rules which is contrary to law laid down by the this Tribunal as well as by the Hon'ble High Court and Hon'ble Apex Court in different judicial pronouncements. When the appellant produced the tax invoices in original, the forum below was duty bound to examine the genuineness of those documents and if found genuine should have provided the benefit of ITC to it. The dealer-appellant cannot be punished by disallowing benefit of ITC only for the fault of the selling dealer who did not mention such fact in the return filed by him. The demand

raised by the assessing authority amounts to double taxation and the same is contrary to law. The forums below also committed illegality in imposing penalty for less payment of admitted tax in the return filed on self assessment basis. He submits to set aside the orders of both the forums below and remand the matter back to the assessing authority to reassess the tax liability of the dealer-appellant keeping in view the tax invoices produced by him.

5. Per contra, learned Addl. Standing Counsel (CT) appearing on behalf of the State supporting the impugned order, argued in terms of the cross-objection filed by it that both the forums below have rightly accepted the suggestion given in the AVR in imposing penalty and interest for late filing of return and delayed payment of tax. The dealer-appellant purposefully did not pay the proper amount of tax which was clearly pointed out in the AVR and issued credit notes beyond the period of three months. The claim of ITC was also correctly disallowed by both the forums below on account of mismatch in the return filed by the purchasing dealer and the selling dealer. The dealer-appellant failed to discharge the burden on him that the tax paid under the OVAT Act relates to the goods purchased by

him and its part of the input tax. There is no illegality and impropriety in the impugned orders of both the forums below warranting interference of this authority. He submits that both the forums below thoroughly scrutinised all the materials produced by the dealer-appellant and rightly raised the tax demand of ₹2,78,944.00 which includes penalty and interest. He submits to dismiss the appeal and confirm the order of the assessing authority.

6. In view of such rival contentions of the parties, it is to be seen whether both the forums below were correct in their approach in disallowing the claim of ITC of ₹2,18,492.00 for the period 2013-14 and 2014-15. On perusal of the order of the first appellate authority, I find that it has disallowed the claim of ITC on account of mismatch in the return filed by the purchasing dealer and selling dealer. The learned first appellate authority in page-10 of the order observed that the dealer-appellant did not furnish relevant documents regarding payment of tax by the selling dealers for which the claim of ITC was disallowed by the assessment authority. In appeal, the dealer-appellant except reiterating the earlier argument, did not produce any further document in support of his claim of ITC. So the first

appellate authority on this ground as well as in view of amendment of Rule 11A of the OVAT Rules, disallowed the claim of ITC. Before examining the legality and propriety of this finding of the learned first appellate authority, it would be profitable to take note of some relevant provisions.

6(a). Section 2(25) of the OVAT Act defines 'Input' means any goods purchased by a dealer in the course of his business for resale or for use in the execution of works contract, in processing or manufacturing, where, such goods directly goes into composition of finished products or packing of goods for sale, and includes consumables directly used in such processing or manufacturing. Section 2(26) of the OVAT Act defines 'Input tax' which means the tax collected and payable under this Act in respect of sale to him of any taxable goods for use in the course of the business. Section 2(27) of the OVAT Act defines 'Input tax credit' which means the setting off of the amount of input tax or part thereof under Section 20 against the output tax, by a registered dealer other than a registered dealer paying turnover tax under Section 16.

6(b). On a conjoint reading of these provisions, it appears that a registered dealer under the OVAT Act shall be

entitled to set off of the tax paid on purchase of goods effected by such dealer either for sale or for use in execution of works contract or for manufacturing, processing against the output tax, i.e. the tax payable on the sale of any taxable goods. In the case at hand, the forums below disallowed the claim of ITC on the ground that there was mismatch in the return filed by the purchasing dealer and the selling dealer and the same was against the transaction with the selling dealers which are the nil filers. The learned first appellate authority also put much emphasis on the amending Rule 11A of the OVAT Rules which was inserted on 01.10.2015 which outlined that the claim of input tax credit preferred by a dealer if not reconciled with the corresponding selling dealer with due payment of tax, the claim of input tax credit shall be disallowed.

6(c). There is no dispute at bar that the purchasing dealer is entitled to set off of tax paid on purchase of the goods effected either for resale or for use in execution of works contract or for manufacturing or processing against the output tax. Section 2(27) of the OVAT Act specifically says about such set off of the input tax or part thereof against the output tax. The claim of the

purchasing dealer for set off of ITC against the output tax cannot be disallowed only on the ground that the selling dealer did not mention such transaction in the return filed by him. The assessee-dealer cannot be allowed to suffer for the fault of the selling dealer in reflecting the transaction made between him and the purchasing dealer in the return filed by him. A bonafide purchasing dealer cannot be denied of his claim because of fault of the selling dealer over whom the former has no control. There are different provisions in the Act to collect tax from the defaulting dealer and punishing him. If the selling dealer defaults in filing the return truthfully reflecting all the transactions, he is to be punished in accordance with law. But for the mistake of the selling dealer, the purchasing dealer cannot be punished. In the instant case, both the forums below neither examined the documents produced by the dealer-appellant nor issued any notice to the selling dealer to ascertain the genuineness of such claim. Both the forums below have disallowed the claim of ITC in a very whimsical and arbitrary manner. When a claim is made by the assessee-dealer, duty is cast on the assessing authority to examine the genuineness of such claim on the basis of the materials to be produced by

the dealer concerned and not to disallow such claim only for the fault of somebody else. The ground on which the forums below disallowed the claim of the dealer-appellant is untenable in the eye of law. It is pertinent to mention here that the assessment was made for the period 01.04.2013 to 31.03.2015 u/s. 42 of the OVAT Act whereas the amending provision of Rule 11A of the OVAT Rules came into force from 01.10.2015. The first appellate authority committed serious error in law in giving retrospective effect of this provision when the statute does not say that it will have the retrospective effect. Therefore, the finding of the first appellate authority that the dealer-appellant is not entitled to the benefit of ITC in view of the amending provision of Rule 11A of the OVAT Rules, 2005 is also not tenable in law. This is a fit case where the matter is to be remitted back to the assessing authority who shall examine the genuineness of the tax invoices to be produced by the dealer-appellant for the material period and decide the claim of the latter (dealer-appellant) for set off of ITC against the output tax.

S.A. No. 5(ET) of 2019 :

7. The dealer-appellant filed this appeal u/s. 17 of the Odisha Entry Tax Act, 1999 (in short, 'OET Act')

challenging the order dated 24.12.2018 passed by the first appellate authority in Appeal Case No. AA-108101610000120/2016-17 whereby it confirmed the order of assessment dated 04.06.2016 passed u/s. 9C(3) of the OET Act for the period from 01.04.2013 to 31.03.2015.

8. The assessment proceeding was initiated on the basis of the AVR wherein it was observed that the dealer-appellant has paid less amount of entry tax of ₹15,450.00 for the year 2014-15. On going through the orders passed by both the forums below, I find that they discarded the contention raised by the appellant that due to oversight there is less payment of tax amounting to ₹15,450.00 and imposed penalty of ₹30,900.00 which is equal to twice of the amount of tax assessed under sub-section (3) or (4) of Section 9C of the OET Act. The appellant challenging the orders of both the forums below argued that the penalty has been imposed on him arbitrarily without keeping in view the relevant provisions relating to imposition of penalty and the law decided by this Tribunal as well as the Hon'ble High Court and Hon'ble Supreme Court of India. He strenuously argued that the appellant having paid the admitted tax of ₹15,450.00 before completion of audit, no

penalty should have been imposed on him. The AVR only suggested for payment of interest on the admitted tax. On the other hand, learned Addl. Standing Counsel (CT) in terms of cross-objection filed by him submitted that imposition of penalty on the appellant was just and proper as he did not pay the admitted tax and interest on the same. The appellant failed to give any satisfactory explanation for withholding of tax and non-submission of revised return for less payment of admitted tax. He submits to dismiss the appeal.

9. There is no dispute in the present appeal that an amount of ₹15,450.00 was due against the appellant for the year 2014-15, which he had not deposited along with return and there was delay in payment of admitted tax. There is also no dispute at bar that the appellant is liable to pay interest because of delay in payment of admitted tax. The only dispute in the present appeal is about the imposition of penalty of ₹30,900.00 which is equal to twice of the amount of tax assessed. The appellant in the present appeal having deposited the admitted tax and interest accrued on the same, in my view, imposition of penalty without giving sufficient opportunity to the appellant of

hearing is not proper. The assessing authority was required to issue notice to the dealer u/s. 9C(1) of the OET Act for production of relevant books of account and documents and after examining all the materials produced by the dealer and causing such other enquiry, as he deems necessary, should have assessed the tax due from the dealer accordingly. In the present case, the assessing authority though issued notice to the dealer-appellant to produce the books of account and relevant documents and in pursuance of such notice, the dealer-appellant appeared before the assessing authority with all relevant documents, the assessing authority without examining the question whether the appellant is liable to pay the penalty even he has deposited the admitted tax and interest accrued on the same, has levied the penalty, which is not legally sustainable. There is nothing on record to show that the dealer-appellant with a malafide intention delayed in making payment of the admitted tax and interest accrued thereon. So, in absence of malafide intention to evade payment of tax, imposition of penalty would not be just and proper. Therefore, under such circumstances, this Tribunal is of the considered opinion that the matter should be remitted back to the assessing

authority to reassess the tax liability of the appellant afresh in the light of the observation made above.

10. In view of the foregoing discussions, the appeals filed under the OVAT Act as well as OET Act by the dealer-appellant are allowed. The impugned orders passed by the both the forums below are hereby set aside and the matters are remitted back to the assessing authority for computation of tax liability afresh for the material period under both the Acts in accordance with law in the light of the observation made above, giving an opportunity to the appellant to produce all the relevant documents in order to substantiate his claim and to examine the genuineness of those documents before coming to any conclusion. The assessing authority is to complete the entire exercise within a period of three months from the date of receipt of this order. Cross-objections are disposed of accordingly.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman