BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A.No.230(V) of 2012-13

(Arising out of the order of the learned Joint Commissioner of Sales Tax, Cuttack-I Range, Cuttack, in First Appeal Case No. AA(OVAT)51/CUIC/2011-12, disposed of on 16.08.2012.)

Present: Smt. Suchismita Misra, Chairman, Shri S. Mohanty, 1st Judicial Member & Shri P.C. Pathy, Accounts Member-I

M/s. Sri Lalbaba Roller Flour Mills, Nayabazar, Cuttack. ... Appellant.

- V e r s u s -

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

For the Appellant : ... Mr. B.N. Joshi, ld. Advocate.
For the Respondent : ... Mr. M.S. Raman, ld. Addl. S.C.(C.T).

Date of Hearing: 02.07.2019 ***** Date of Order: 25.07.2019

O R D E R

This second appeal has been filed by the dealer-appellant under section 78(1) of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') against the impugned order dtd.16.08.2012 of learned Joint Commissioner of Sales Tax, Cuttack-I Range, Cuttack (in short, 'JCST') reducing the demand to Rs.18,00,969.00 from Rs.31,41,453.00 raised in the order of assessment passed on 04.08.2010 by learned Sales Tax Officer, Cuttack-I Central Circle, Cuttack (in short, 'STO') U/s. 42 of the OVAT Act for the period 01.04.2005 to 31.10.2008.

2. The factual matrix from which this appeal arises are as follows:-

The dealer-appellant in the instant case is a manufacturer of Atta, maida and Suji out of wheat which are its finished products in course of manufacturing process chokad (husk of wheat) is obtained as by-product which is tax-free goods appearing in Schedule 'A' of the rate chart under the OVAT Act. The finished products are sold inside

the State as well as outside the State of Odisha. The dealer is not only a manufacturer but also a trader of goods dealt in. One part of goods purchased has been utilised for manufacturing and other parts used for trading. Pursuant to an audit visit conducted under the provisions of the OVAT Act, Audit Visit Report (AVR) was submitted. It has been observed by the Sales Tax Officer, Head of the Audit Team in the AVR that the dealer has claimed input tax credit (ITC) on local purchase of wheat, atta, suji and maida along with machinery spare parts, electric bulbs, wires and fittings, bearings, V-belts M.S. Plates, hardware materials and packing materials from registered dealers. But as per Section-20(3)(b) of the OVAT Act, 2004 and schedule-D, the ITC shall not be allowed on capital goods not connected with the business of the dealer and also for subsequent purchases of capital goods. The dealer-assessee has claimed ITC of Rs.2,28,827.23 from 01.04.2005 to 31.10.2008 on purchase of machinery spare parts, electric bulbs, wires and fittings, bearings, V-belts, M.S. Plates and hardware materials which ought to be taken into account at the time of assessment. It is also observed in AVR that the dealer has availed cent per cent ITC on purchase of wheat where as the dealer sells goods both taxable and exempted after manufacturing atta, suji, maida and chokad hence the ITC shall be allowed proportionately in relation to goods which are not so exempted in accordance with the provision contained u/s.20(3)(c) of the OVAT Act and Rule 11 of the OVAT Rules which relates to input tax credit and calculation of input tax credit respectively. It has been suggested in AVR that in the instant case 24% of the finished goods are exempted tax free items for which input tax credit may be allowed proportionately on the purchase of wheat used in the manufacturing process. The AVR further suggested for disallowance of ITC proportionately availed to the tune of Rs.3,23,633.00 on purchase of packing materials used for sale of exempted or tax free goods in accordance with the provision contained u/s.20(3)(d) of the OVAT Act. The ld. STO taking into account the

explanation offered in respect of observations /objections raised by the Team head of the audit team accepted the availment of ITC on purchase of machinery spare parts as the same are badly necessary to repair the machine for production of the finished product. However, the ld. STO taking into account the ITC claimed on purchase of wheat and packing materials agreed to the contents of objection raised in the AVR and reduced ITC by Rs.10,47,506.00 against the total claim of ITC of Rs.45,93,844.04. Accordingly, the ld. STO raised extra demand of Rs.31,41,453.00 which includes penalty of Rs.20,94,301.68 imposed u/s.42(5) of the OVAT Act. Being aggrieved with the order of assessment the dealer-assessee preferred appeal before the ld. JCST.

The ld. JCST on careful consideration of the grounds of appeal, the provisions under the OVAT Act, the contents of the AVR and the arguments proffered by the ld. Advocate adopting the formula prescribed u/r. 14(4) (i) of the OVAT Rules came to a conclusion that ITC of Rs.6,00,688.00 is to be reversed u/s.20(3) proviso C of the OVAT Act inasmuch as the dealer has not reversed entry tax credit proportionately. The ld. JCST has also observed in the appeal order that the ITC claimed by the dealer-appellant on purchase of atta, maida, suji, packing material and spare parts of machinery is permissible under the Act. Thus, he allowed the dealer-assessee to avail ITC of Rs.39,93,156.14. As the balance tax due is reduced from Rs.10,47,150.84 to Rs.6,00,322.84 the ld. JCST reduced the penalty from Rs.20,94,301.68 to Rs.12,00,645.68. Accordingly the demand of tax and penalty is reduced to Rs.18,00,969.00.

3. Being further aggrieved, the dealer-assessee has filed second appeal before this forum on the following grounds:--

a) The appellant in this case is a manufacturer of Atta, Maida & Suji out of wheat which are its finished products. In course of manufacturing process choked (Husk of Wheat) obtained as a by-product.
b) Confirming portion of appeal order is wrong, illegal, arbitrary and not in accordance with the facts and circumstances of the case and totally based on wrong interpretation of relevant provision of reversal of I.T.C.
c) Since the appellant is a manufacturer of only taxable product i.e. “Atta Maida & Suji and maintains all required books of accounts as per the provision of the OVAT Act, reversal of ITC u/s.20(3(c)) or Rule 14 of

the Act/Rules is not attracted. The forums below have not understood the law in it's true spirit and raised demand of reversal of ITC.

d) The observation of the learned A.O. is erroneous that 24% of the finished product is sold as exempted for which reversal of ITC is applicable.

e) The Hon'ble Orissa Sales Tax Tribunal has already passed a judicious order on 05.02.11 in S.A. No. 95(V) of 2009-10 that for a manufacturer where by-product is natural outcome of finished product, reversal of tax is not attracted. This order is binding on the Revenue as decided in case of Chowhan Machinery Mart Vrs. State of Orissa -19 VST (2009) page 178 (Orissa).

f) Since demand raised is outcome of reversal of ITC and returned figures are accepted in the instant case, penalty as has been imposed is not sustainable in the eyes of law.

Case Law:- (25 STC (1970)211, Hindustan Steel Ltd. Vrs. State of Orissa (Supreme Court) & Sree Krishna Electricals Vrs. State of Tamil Nadu (2009) 23 VST 249 (Supreme Court).

4. The dealer-respondent has filed following cross objection in response to the grounds of appeal filed by the Revenue:-

Action of the ld. Assessing Authority and ld. first appellate authority is justified as per the provisions contained in Section 20(8) (i) & Section 20 (9) (g) of the OVAT Act. The respondent-State subsequently filed additional cross objection submitting that learned. JCST has allowed ITC on purchase of spare parts of machinery which runs contrary to express provision contained in Section 20(3) read with Section-2(8) of the OVAT Act. It has been contended that the appellate authority was not justified in allowing the dealer to avail input tax credit in respect of tax paid on purchases of spare parts on machinery effected prior to 31.05.2008, i.e. prior to the date of effect when the OVAT (Amendment) Act, 2008, came into force. The reason for filing the additional cross objection has been attributed to inadvertence in touching this question in law while filing cross objection to the second appeal. As the addl. Ground taken involves question of law it was prayed to allow the same to be argued at the time of hearing before this Tribunal. In this connection it has been pointed out that at page-4 and page-5 of the appeal order pertaining to the observation

of the ld. JCST that the availment of ITC by the dealer-assessee on purchase of capital goods, spare parts of machinery and others as well as on purchase of atta, maida, suji and packing materials is permissible under the Act is not in accordance with the provision contained under the Law.

5. Mr. B.N. Joshi, the learned Advocate on behalf of the dealer appellant appearing on the date of hearing reiterated the points raised in grounds of appeal filed earlier and submitted that the confirming portion of appeal order is not just and proper and ought to be quashed in the interest of justice. The additional cross objection filed by the State is not correct in respect of reversal of ITC on purchase of spare parts like V-Belt in absence of which machineries cannot function and finished goods cannot be produced for which both the ld.STO and ld. JCST have recorded that availment of ITC by the dealer-appellant is permissible under the law. Mr. Joshi, the ld. Advocate submitted a written note in furtherance of grounds of appeal filed. He has brought to the notice of this Bench the Judgment of the Hon'ble High court of M.P. and Gujarat in favour of the dealer-appellant. He also submitted that this Tribunal has passed order in certain cases which favours the case of the dealer appellant. The advance ruling of this Tribunal in this connection which is in favour of the Revenue has been stayed by our Hon'ble High court as the aggrieved dealers preferred writ before the Hon'ble Court. This Tribunal has passed advance ruling in favour of proportionate ITC to be allowed to the registered dealer under the OVAT Act. In the written note it has been submitted for consideration the only point of dispute which is confined to reversal of ITC amounting to Rs.6,00,688.00 and imposition of two times of penalty by the ld. JCST. He further contended that the impugned order is not sustainable and liable to be quashed in the interest of justice on the following ground:-

The appellant is manufacturer of taxable finished product i.e. Atta, Maida & Suji out of wheat and in course of manufacturing gets Husk (choked) as by-product. In this case the dominant concern to qualify manufacturing and processing goods intended to be produced is finished product as stated and not the by-product. In other words if by-product to which manufacturer had not intended to produce out of his purchased goods, is found to be exempted from tax liability, the reverse tax method

U/s.20 or U/r. 14 is not applicable. This finding has been confirmed by the judgements of the following High Courts and Judgments of the Odisha Sales Tax Tribunal, Cuttack as under:-

(i) Commissioner Commercial Taxes, Uttarakhand, Dehradun Vrs. Eastern Agro Mills Ltd. (2013) 60 VST 325 (Uttarakhand High Court)

(ii) Ruchi soya Industries Ltd. Vrs. State of M.P. and others (2014) 70 VST 40 (MP)

(iii) State of Gujarat Vrs. Jayant Agro Organics Ltd. (2016) 90 VST 399 (Gujarat) & Hon'ble Odisha Sales Tax Tribunal's order in:-

(iv) S. A. No. 133(V) & 134 (V) of 2012-13 order dated 01.08.2013

(v) S. A. No. 227(V) of 2013-14 order dated 28.07.2014

(vi) S.A. No. 149 (V) of 2016-17 dtd. 08.12.2017 Division Bench.

(vii) S.A. No. 422(V) of 2015-16 dt.07.02.2018 Division Bench

(viii) S.A. No. 20(V) of 2017-18 dtd. 19.06.2019 Division Bench

That Hon'ble High Court of Orissa in STREV No.13 of 2013 & STREV No. 14 of 2013 vide order dt.30.07.2013 has stayed the operation of the Advance Ruling dtd. 10.10.2012 passed by the Full Bench, Odisha Sales Tax Tribunal, Cuttack in ARA No.08, 09 & 10 of 2012 favoring Revenue in Reversal of ITC matter identical to the present case.

That appellant further submits that during period under appeal they have availed ITC of Rs.38,28,084.04 against purchase of Q 92148.53 of wheat for Rs.9,57,02,084.40. The resultant, taxable products (Atta, Maida & Suji) sold and output tax collected and paid amounts to Rs.41,51,513.30. Thus output collected exceeds by Rs.3,23,429.26. As such reversal of ITC is not warranted.

First appellate authority repeated the observation in the order of assessment and AVR for which there is clear indication that ITC availed confined to consumables, machinery and other eligible items, like packing materials etc. covering amount of Rs.2,28,827.29. State has not properly examined the claim in conformity to the Case Law reported (2012) 56 VST 68 (Orissa) NALCO Vrs. D.C.C.T., BBSR-III Circle, Khordha while filling cross objection.

Since point of dispute confined only to reversal of ITC, penalty is not warranted in this case as there is no suppression/concealment and returned

figures and books of A/cs are accepted. Further as per amended provision penalty may be equal to tax assessed and not twice as has been imposed.

The ld. Advocate has attached a sheet containing details of total ITC availed on wheat and corresponding output tax paid on wheat products viz. Maida, Suji and Atta resulting excess output tax paid as against input tax credit availed. On this ground it has been submitted that the reversal of ITC as has been illegally determined is not sustainable.

6. Mr. M.S. Raman, the learned Additional Standing Counsel (C.T.) appearing on behalf of the Revenue reiterated the points raised in the cross objection and additional cross objection. Besides, he has submitted a written note citing relevant provisions under OVAT Acts and Rules, Judgments delivered by the Hon'ble Supreme Court of India in cases of Jai Bhagwan Oil & Flour Mills Vrs. Union of India reported in (2009) 14 Supreme Court Cases 63, State of Karnataka Vrs. M.K. Agro Tech Pvt. Ltd. reported in (2018) 52 GSTR 215 (SC), order dtd.18.08.2018 passed by Single Bench in S.A. No. 290(V)/2017-18 in the matter of M/s. Lingaraj Flour Mills (P) Ltd. Vrs. State of Odisha, Judgment dtd. 02.11.2015 passed by Hon'ble High Court of Odisha in STREV No.20 of 2015 in the matter of M/s. Banspani Iron Ltd. Vrs. State of Odisha in connection with prospective nature of amendment of section-2(8) of the OVAT Act, 2004 from the appointed date i.e. 01.06.2008. Respondent-State took the contention that the second appeal filed by the dealer-appellant may be dismissed and taking into consideration additional grounds in cross objection ITC availed by the dealer-appellant in respect of spare parts of machinery made prior to 31.05.2008 ought to be disallowed in view of amended provision. Mr. Raman submitted that three-probable issues are to be addressed. It is to be decided as to whether the dealer is entitled to full input tax credit on purchase of wheat out of which husk (choked) is resulted in manufacturing activities which is tax free under the Act. In view of the provisions towards availment of ITC as provided/prescribed under Acts and Rules whether proportionate ITC is to be reversed in accordance with the provision C of sub-section-3 of section-20 of the OVAT Act? Whether acceptance of claim of ITC on purchases of spare parts of machineries from the registered dealer inside the State by first appellate authority against the suggestion contained in AVR and the Amendment of

Section-2(8) of the OVAT Act w.e.f. 01.06.2008 is justified? Mr. Raman put emphasis on Judgment of this Tribunal in S.A.No.65/2009-10 delivered in the year 2010 though passed in different context but stated to have relevance to this case. Mr. Raman further took the stand that so far as imposition of penalty is concerned our Hon'ble High Court has held that in civil consequences mens-rea is not very relevant. In the written note Mr. Raman made the following submissions:

1. The provisions of statute, in vogue during the period of assessment in question so far as is required for the present purpose, are extracted hereunder for convenience and better comprehension:

Section 19(1) of the OVAT Act:

> [The net tax payable by a registered dealer for a tax period shall be the difference between the output tax (…) and the input tax, which can be determined from the following formula:
>
> Net tax payable = (O + …) – I]

Section 20(3) of the OVAT Act:

> [Input tax credit shall be allowed for purchases made within the State from a registered dealer holding a valid certificate of registration in respect of goods intended for the purpose of—

(a) sale or resale by him in the State;

(b) use as inputs or … in the manufacturing of goods within the State, other than those specified in Schedule A … for sale; …

(d) for use as containers or materials for packing of goods other than those exempt from tax under this Act, for sale or resale; …

Provided that …

(c) where a registered dealer sells or despatches goods, both taxable and exempt under this Act, the input tax credit shall be allowed proportionately only in relation to the goods which are not so exempt.]

Section 20(9) of the OVAT Act:

[If the goods purchased— …

(g) are utilized in manufacture of goods exempted from tax, on which input tax credit has been availed in a tax period, prior to its utilization, by a dealer manufacturing both taxable goods and goods exempted from tax, or

(h) are exempted from levy of tax subsequently, …

the input tax credit availed in respect of purchase of such goods shall be deducted from the input tax credit admissible for the tax period during which any one or more such events occurs.]

Rule 14 of the OVAT Rules:

[(1) Where input tax credit is already availed by a registered dealer against purchase of goods, a part of which is, however, used in manufacturing or processing of goods exempt from tax, the input tax credit so availed for such part of the goods will be deducted from the input tax credit for the tax period in which such event takes place.

…

(4) Where a registered dealer fails to keep separate account of purchase of goods for purpose of determining reverse tax credit under sub-rule (1), the input tax credit already availed shall be reversed in the following manner:

(i) in case of a registered dealer manufacturing or processing both taxable goods and goods exempted from tax for sale;

$$X = \frac{U \times V}{W}$$

Where—

X = is the input tax credit to be reversed;
U = is the input tax credit availed during the tax period;
V = is the total sale value of goods manufactured or processed, exempted from tax in that period;
W= is the total sale value of goods manufactured or processed in that tax period. …]

2. The computation of proportionate ITC as made by the first appellate authority is in conformity with the provisions of the OVAT Act and rules framed there-under.

Proviso (c) to sub-section (3) of Section 20 read with Rule 14 clearly indicates that while processing a commodity, if two products come out, i.e., one taxable and the other tax exempted, then the input tax credit is to be allowed proportionately and such proportion is required to be computed by application of formula contained in Rule 14 of the OVAT Rules.

Section 2(27) of the OVAT Act defines "Input Tax Credit" to mean 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 registered dealer paying turnover tax under Section 16. This definition unambiguously clarifies that set off of input tax is allowed when there is an output tax. At this juncture reference to Section 9 would suffice to construe that the input tax is to get set off against the output tax.

Conjoint reading of Section 20, Section 2(27) and Section 9 would indicate that where goods sold involved both taxable [here in the instant case atta, maida and suji] and exempted from tax [chokad, in the present case] input tax credit shall be allowed proportionately only in relation to the goods which are not so exempt.

3. In the matter of Commissioner of Sales Tax Vrs. Bharat Petroleum Corporation Ltd., (1992) 85 STC 220 (SC) it has been indicated at page 230 that:

"... The other point is whether the assessees [BPCL and Phulgaon Cotton Mills] can be said to manufacture 'acid sludge' and 'cotton waste', respectively. It is suggested for the State that the assesses are purchasing acid and cotton for the manufacture of kerosene and yarn/cloth, respectively and it is ludicrous to suggest that the assesses are purchasing sulphuric acid and cotton for manufacturing acid sludge and cotton waste. Put like that the assessee's contention seems a little artificial. But the contention is not really absurd. For, the assessees do purchase sulphuric acid and cotton for use in a manufacturing process which yields not only kerosene and yarn/cloth but also acid sludge and cotton

waste. As pointed out in State of Gujarat Vrs. Raipur Manufacturing Co. Ltd., (1967) 19 STC 1 (SC), where a subsidiary product is turned out regularly and continuously in the course of a manufacturing business and is also sold regularly from time to time, an intention can be attributed to the manufacturer to manufacture and sell not merely the main item manufactured but also the subsidiary products. There is also no evidence on record to suggest, at least so far as acid sludge is concerned, that it is not a commercial commodity with a market but an item of waste. …"

4. In the matter of Jai Bhagwan Oil & Flour Mills Vrs. Union of India, C.A. No.3169 of 2009, vide Judgment dated 04.05.2009 it has been observed by Hon'ble Apex Court as follows:

"5. … The High Court held that 'finished goods' refers to goods produced in an industrial unit by a process of manufacture and "manufacture" means production of an item distinct and different from the raw material, having a separate identity; and that the appellant had failed to place before the court necessary material to explain (i) the process and technology in the manufacture of oil cake; (ii) the composition of the oil cake; (iii) the purpose and use of oil cake; and (iv) the product name in the market and the marketability of oil cake as a finished goods. The High Court held that in the absence of such material, it will not be possible to decide whether 'oil cake' was a 'finished goods' for the purpose of the Scheme, or merely the residuary waste generated as a by-product while producing mustard oil as the finished goods.

6. We are of the considered view that the learned single Judge and the Division Bench missed the real issue. The question was not whether oil cake was a by-product or not. There are several manufacturing processes which yield or produce more than one finished product or manufactured item. When considering whether the 'finished goods' is a marketable product, distinct and different from the raw material from which it is produced, the fact that the finished goods is the main product, or is a parallel main product or

is a by-product of the manufacturing process, may not make any difference. …"

5. In the matters of State of Odisha Vrs. Madanlal, SA No.65 (ET) of 2009-10, &c. this Hon'ble Tribunal vide order dated 19.08.2010 held that chuni which is produced by milling dal/pulse being co-product has marketable value and, thereby, the first appellate authority committed gross error of law and fact in holding that *chuni* is not a finished product.

6. In the context of partial input tax credit the Hon'ble Supreme Court in the matter of State of Karnataka Vrs. M.K. Agro Tech Pvt. Ltd., (2018) 52 GSTR 215 (SC) on the contention of the assessee-respondent therein that:

"3. … The assessee, on the other hand, contends that Section 17 of the KVAT Act would not be applicable in the instant case because of the reason that sunflower oil cake, as an input, is used in its entirety in the extraction of sunflower oil. De-oiled cake is not the result of any manufacturing process but is only a by-product. Therefore, sale of such by-product, even when it is exempted from output tax, would not have any bearing. The High Court in its impugned judgment has accepted this position adopted by the assessee thereby giving full input tax deduction.",

held as follows:

"28. The first mistake which is committed by the High Court is to ignore the plain language of sub-section (1) of Section 17. This provision which allows partial rebate makes the said provision applicable on the 'sales' of taxable goods and goods exempt under Section 5. Thus, this sub-section refers to 'sale' of the 'goods', taxable as well as exempt, and is not relatable to the 'manufacture' of the goods. The High Court has been swayed by the fact that while extracting oil from sunflower, cake emerges only as a by-product. Relevant event is not the manufacture of an item from which the said by-product is emerging. On the contrary, it is the sale of goods which

triggers the provisions of Section 17 of KVAT Act. Whether it is by-product or manufactured product is immaterial and irrelevant. Fact remains that de-oiled cake is a saleable commodity which is actually sold by the respondent assessee. Therefore, de-oiled cake fits into the definition of "goods" and this commodity is exempt from payment of any VAT under Section 5 of the KVAT Act. Thus, provisions of Section 17 clearly get attracted when 'sale' of these goods takes place.

…

31. Fourthly, the entire scheme of the KVAT Act is to be kept in mind and Section 17 is to be applied in that context. Sunflower oil cake is subject to input tax. The Legislature, however, has incorporated the provision, in the form of Section 10, to give tax credit in respect of such goods which are used as inputs / raw material for manufacturing other goods. Rationale behind the same is simple. When the finished product, after manufacture, is sold, VAT would be again payable thereon. This VAT is payable on the price at which such goods are sold, costing whereof is done keeping in view the expenses involved in the manufacture of such goods plus the profits which the manufacturer intends to earn. Insofar as costing is concerned, element of expenses incurred on raw material would be included. In this manner, when the final product is sold and the VAT paid, component of raw material would be included again. Keeping in view this objective, the Legislature has intended to give tax credit to some extent. However, how much tax credit is to be given and under what circumstances, is the domain of the Legislature and the courts are not to tinker with the same."

7. Conceding for the sake of argument that in place of Rule 14, if Rule 12(3) of the OVAT Rules is made applicable to the present fact-situation, then the formula prescribed in Rule 11(1)(c) would have to be applied.

Rule 12(3) & Rule 12(4) envisages that:

[(3) Where the proceeding or manufacturing activity of a dealer results in the production of both taxable goods and goods exempted from tax, input tax credit admissible shall be determined by applying the

principles as provided under sub-rule (1) of Rule 11 in respect of each tax period.

Explanation.—

For the purpose of this sub-rule, the expression, "total input tax" referred to in sub-rule (1) of Rule 11 shall be the tax on that part of the input, which is actually utilized in processing or manufacturing.

(4) For the purpose of this rule, the expression "output" shall mean sale of finished products consequent upon processing or manufacturing or sale of goods used in the execution of works contract, as the case may be.]

Rule 11(1)(c) would lay down that:

[(1) Where a dealer effects sales of goods both, subject to tax and exempt from tax, under the Act, the following calculation for claiming input tax credit shall apply—

(c) Where a part of the sales effected by a dealer in a tax period are subject to tax and the remaining part of the sale are exempt from tax under the Act, the amount that can be claimed as input tax credit shall be calculated from the following formula:

$$\text{ITC allowed} = \frac{P \times Q}{R}$$

Where —

P = is the total amount of input tax;

Q = is the taxable turnover of sales including zero-rated sales; and

R = is the total amount of all sales including exempt sales;

during the period.]

8. Thus being the factual position, the first appellate authority was justified in determining quantum of ITC to be allowed on the facts and in the circumstances of the case by adhering to mandate contained in proviso (c) to sub-section (3) of Section 20 of the OVAT Act read with Rule 14(4) of the OVAT Rules.

9. The assessment under Section 42 of the OVAT Act being made as a result of tax audit conducted under Section 41 and taking into consideration the contents of AVR, the assessing authority has exercised power under Section 42(5) of the OVAT Act. Glance at contents of AVR reveals that the dealer has availed total amount of ITC in spite of the

fact that it has produced and sold taxable goods, namely atta, maida and suji and tax exempted goods, i.e., chokad which is in contravention of proviso (c) of sub-section (3) of Section 20 of the OVAT Act. Accordingly, tax has been assessed on consideration of "erroneous claims of … input tax credit" and "contravention of any provision of this Act" which connotations empower the assessing authority to initiate action under Section 42(1). Once tax has been assessed, thereby the provisions attracted power vested in the assessing authority under Section 42(5). Thus, there was no scope but to impose penalty on the quantification of the tax. In other words, it is submitted that since terms of provisions of Section 42 of the OVAT Act are attracted, penalty under sub-section (5) is concomitant.

10. Judicial pronouncements in this regard may be noticed in order to justify the demand raised by the assessing authority as affirmed by the first appellate authority.

20.1. Interpreting mandate of imposition of penalty in case of tax delinquency leading to civil consequence, the Hon'ble Supreme Court in Union of India Vrs. Dharamendra Textile Processors, (2008) 18 VST 180 (SC) [three-judge Bench] laid down that:

"27. … The object behind the enactment of Section 271(1)(c) read with the explanations indicates that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276C of the Income-tax Act."

The Hon'ble Supreme Court has in the Dharamendra Textile Processors (supra) at paragraph 29 held thus:

"29. The above being the position, the plea that rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip N. Shroff's case, (2007) 8 SCALE 304 = (2007) 291 ITR 519 (SC) was not correctly decided but Chairman, SEBI's case, (2006) 5 SCC 361 has analysed the legal position in the correct perspectives. The reference is answered. …"

The Hon'ble Apex Court at paragraph 11 of the said Judgment quoted relevant portions of Chairman, SEBI's case, (2006) 5 SCC 361. With reference to said judgments it is humbly submitted that mens rea is

not essential element for imposing penalty for breach of civil obligations or liabilities.

20.2. The Hon'ble High Court of Orissa in Jai Jagannath Marble Vrs. Commissioner of Commercial Taxes, (2011) 39 VST 312 (Ori) = 2010 (II) ILR CUT 226 has been pleased to hold as follows:

"11. In this respect, reliance was placed by the Revenue on the decision of the honourable Supreme Court in the case of Union of India Vrs. Dharamendra Textile Processors, (2008) 18 VST 180 (SC) wherein the Hon'ble Supreme Court while considering Section 11AC of the Central Excise Act, 1944 (levy of penalty) determined that the application of the aforesaid section would depend upon the existence or otherwise of all the conditions stated in the section. Once the section is found to be applicable in a case, the concerned authority would have, no discretion in quantifying the amount and penalty must be imposed as stipulated under sub-section (2) of Section 11A of the Central Excise Act. This view has been re-affirmed by the Hon'ble Supreme Court in the case of Union of India Vrs. Rajasthan Spinning & Weaving Mills, (2010) 1 GSTR 66."

20.3. In the case at hand, there was erroneous claim of ITC and non-compliance of mandate contained in proviso (c) to sub-section (3) of Section 20 touching the liability. In other words, the dealer did not discharge correctly its liability under the OVAT Act. The provision contained in Section 42(1) contemplates action for assessment in the event of erroneous claims of input tax credit or contravention of the statutory provisions. This infraction in discharging liability attracted assessment under Section 42 whereby the tax has been assessed. Therefore, in view of principle of law as stated in Union of India Vrs. Dharamendra Textile Processors, (2008) 18 VST 180 (SC) that in case of tax delinquency mens-rea is not necessary factor for consideration in order to impose penalty. The position of law has been clarified in Jai Jagannath Marble Vrs. Commissioner of Commercial Taxes, (2011) 39 VST 312 (Ori) = 2010 (II) ILR CUT 226.

20.4. The Constitution Bench of the Hon'ble Supreme Court in the case of R.S. Joshi, Sales Tax Officer Vrs. Ajit Mills Ltd., (1977) 40 STC 497 (SC) = AIR 1977 SC 2279 wherein it has been observed as follows:

"... This word 'forfeiture' must bear the same meaning of a penalty for breach of a prohibitory direction. ... The Criminal Procedure Code, Customs & Excise Laws and several other penal statutes in India have used diction which accepts forfeiture as a kind of penalty. ... Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be preceded by mens-rea. The classical view that 'no mens-rea, no crime' has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens-rea. Therefore, the contention that Section 37(1) fastens a heavy liability regardless of fault has no force in deprive the forfeiture of the character of penalty. ..."

20.5. The Hon'ble Supreme Court in Union of India Vrs. Dharamendra Textile Processors, (2008) 18 VST 180 (SC) extracted passage from Corpus Juris Secundum, Vol.85, at page 580, paragraph 1023 which is as follows:

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

20.6. This Hon'ble Tribunal bearing in mind conceptual and contextual difference between "penalty for commission of fraud, misrepresentation or deliberate attempt to evade tax" and "penalty for not discharging statutory liability", appreciate that the latter expression falls within the ambit of expression "the penalty under that provision is a civil liability" as stated in Union of India Vrs.

Dharamendra Textile Processors, (2008) 18 VST 180 (SC). In this Judgment in the ultimate the Hon'ble Court held that:

"Willful concealment is not an essential ingredient for attracting civil liability."

20.7. Section 42(5) begins with the expression "without prejudice to any penalty or interest that may have been levied under any provision of this Act". The apex Court in re, Pratap Rai, AIR 1978 SC 1244 stated that the words 'without prejudice to' are used to mean 'saving' or 'excepting'. Thus, there is no scope to read into the statute what was not expressly stated therein. The word "shall" employed in sub-section (5) of Section 42 is indicative that when the determination of tax liability by the assessing authority shows "tax assessed", he is left with no option but to impose quantum of penalty specified under Section 42(5).

20.8. Once tax is assessed as per Section 42(3)/(4), penalty under Section 42(5) of the OVAT Act attracts. This submission of the State of Odisha-Respondent finds support from the following observation of this Hon'ble Court in Jindal Stainless Ltd. Vrs. State of Orissa, (2012) 54 VST 1 (Ori):

"32. … Quantification of penalty is dependent on the tax assessed under Section 42 of the OVAT Act. For the purpose of assessed tax, opportunity of hearing was afforded to the assessee, the explanation of the assessee and its books of account were examined and considered. Penalty is only quantified on the basis of the tax assessed. No discretion is left with the assessing officer for levying any lesser amount of penalty. Therefore, even if further opportunity will be given to the assessee before imposing penalty that will be a futile exercise. Penalty is not independent of the tax assessed. If the tax is assessed, imposition of penalty under Section 42(5) is warranted."

The State of Odisha represented by the Commissioner of Sales Tax also refers to the following Judgments rendered by the Hon'ble Gujarat High Court in the context of levy of penalty where the word "shall" is employed in the penalty provision of the taxing statute:

i. State of Gujarat Vrs. Oil and Natural Gas Corporation Limited, (2017) 97 VST 506 (Guj);

ii. Riddhi Siddhi Gluco Biols Ltd. Vrs. State of Gujarat, (2017) 100 VST 305 (Guj);

iii. State of Gujarat Vrs. Ashirwad Beverages, (2017) 104 VST 114 (Guj);

iv. State of Gujarat Vrs. Swastik Surfactants Ltd., (2017) 104 VST 251 (Guj).

20.9. In view of such authoritative pronouncements and clear and unambiguous provision contained in the statute, and the material available before this Hon'ble Tribunal shows that there has been erroneous claim of deductions and contravention of the provisions of the statute touching liability under Section 42(1) of the OVAT Act by the dealer-appellant, there is no scope to interfere with the orders of the authorities below. As the department conducted tax audit under Section 41 of the OVAT Act and as a consequence thereto framed assessment under Section 42 of the OVAT Act, the infraction of statutory provision could be detected, or else the appellant-dealer would have evaded such legitimate tax due to the Government exchequer.

11. The State of Odisha-Respondent has sought to agitate in terms of Section 78(5) read with Section 77(7)(b) of the OVAT Act that the first appellate authority has erred in application of law to the facts of the case in proper perspective to extent where he has allowed input tax credit in respect of spare parts of machinery.

12. This Hon'ble Tribunal has been conferred with power under sub-section (4) and sub-section (5) of Section 78 as follows:

"(4) The Tribunal shall, after giving both parties to the appeal a reasonable opportunity of being heard, dispose of the appeal.

(5) For the purpose of sub-section (4), the Tribunal shall have the same powers and shall be subject to the same conditions as provided in sub-section (7) of Section 77, and any order passed under sub-section (4) shall be final."

Section 77(7) so far as is relevant for the present purpose is extracted hereunder [pre-amended position is given as the assessment period is from 01.04.2005 to 31.10.2008]:

"(7) In disposing of an appeal, the appellate authority may, after giving the appellant a reasonable opportunity of being heard and after causing such enquiry as he may deem necessary—

…

(b) enhance the assessment including any part thereof whether or not such part is the subject-matter in the appeal."

13. Facts as unfurled by the first appellate authority reveals that [page 4 of the appellate order]:

"… The dealer had purchased capital goods, i.e., spare parts of machinery and others and availed ITC of Rs.2,28,827.29. …"

Further fact stated at page 5 of said authority reads thus:

"… The ITC claimed by the dealer appellant on purchase of atta, maida, suji, packing material and spare parts of machinery is permissible under the Act. …"

14. During the relevant period [01.04.2005 to 31.05.2008], it is humbly submitted that, "spare part" of machinery being not considered to have fallen within the scope of definition of "capital goods" as per Section 2(8), the input tax credit in this regard as claimed under Section 20(3) ought to have been disallowed by the first appellate authority below.

15. Relevant portion of the provision of the statute which deals with allowance of input tax credit on account of purchase of "capital goods" is extracted herein below:

Section 20(3) of the OVAT Act

[(3) Input tax credit shall be allowed for purchases made within the State from a registered dealer holding a valid certificate of registration in respect of goods intended for the purpose of—

…

(b) use as inputs or as capital goods in the manufacturing or processing of goods, other than those specified in Schedule A and Schedule C and Schedule D for sale; …]

16. The Respondent humbly submits that, the definition of "capital goods" as contained in Section 2(8) pre-amended and post amended position has not been kept in mind while allowing such ITC by the first appellate authority. The definition of "capital goods" post-amendment and pre-amendment is given for better appreciation of law:

Section 2(8) : Capital goods	
Pre-amendment	Post amendment
["capital goods" means plants, machinery and equipments used directly in the process of manufacturing, but does not include such plant, machinery and equipments which are used for the purposes and in the circumstances specified in Schedule 'D';] [(8)	["capital goods" means plants, machinery and equipments used directly in the process of manufacturing [a][and shall include the components and spare parts thereof, but shall not include] such plant, machinery and equipments which are used for the purposes and in the circumstances specified in Schedule 'D';] a. Substituted by the Orissa Value Added Tax (Amendment) Act, 2008 (Orissa Act 3 of 2008), assented to by the Governor on 05.05.2008, vide Law Department Notification No. 5495/Legis., dtd. 07.05.2008, published in the Orissa Gazette Extraordinary No.901, dt.08.05.2008, w.e.f. 01.06.2008, vide Finance Department Notification No.27252-CTA-11/07-F. (SRO No.248/2008), dt.28.05.2008, published in the Orissa Gazette Extraordinary No.1042, dt.29.05.2008.

17. When under delegated power under Section 1 of the OVAT (Amendment) Act, 2008 the Finance Department has appointed 01.06.2008 as the date on which the said amendment Act came into force, prior thereto, the provisions of said amendment Act would not be effective. The term "spare part" came to the statute book on and from 01.06.2008. Therefore, allowance of input tax credit on the purchase of spare parts during the period from 01.04.2005 to 31.05.2008 is illegal and without sanction of law. The question whether dealer is entitled to avail input tax credit on the tax paid at the time of purchase of "spare part" prior to 31.05.2008 is no more res integra in view of Judgment

rendered by the Hon'ble High Court of Orissa in the case of Bansapani Iron Ltd. Vrs. State of Odisha, 2016 (I) ILR-CUT 50.

18. Heard the rival contentions. Gone through the grounds of appeal, memo of cross objection, impugned orders of assessment as well as appeal, additional cross objection filed by the State-respondent, written submission made by both parties, relevant records of appeal and assessment and case laws cited. In this appeal following questions are to be addressed for adjudication:-

I. Whether in the facts and circumstances of the case and in law, ld. JCST committed an error of law in allowing proportionate input tax credit on the amount of tax paid on the purchase of wheat out of which the dealer-appellant produced and sold finished product viz. atta, maida and suji including co-product/by-product i.e. husk of wheat (choked) which is a goods exempted from Value Added Tax as per Schedule 'A' under the OAVT Act, 2004 ?

II. Whether the ld. JCST is justified in retaining penalty in the facts and circumstances of the present case in absence of suppression/concealment by the dealer-appellant and in the face of the fact that returned figures and books of accounts are accepted by the forum below and the output tax paid on finished product is more than the input tax claimed by the dealer on the purchase of wheat?

III. Whether the appellate order suffers from infirmity in law inasmuch as the appellate authority failed to examine entitlement of the dealer-appellant in availing input tax credit in respect of purchases of spare part of machinery made prior to 01.06.2008, i.e., the date on which the OVAT (Amendment) Act, 2008, came into force whereby "spare part" was treated as "capital goods" under Section 2(8) of the OVAT Act?

Regarding reversal of ITC due to sale of finished goods i.e. choked (husk of wheat) as exempted from tax there is no incongruity in the order passed by the ld. JCST which is confirmable to the OVAT Acts and Rules hence there is no point in interfering with the findings of the ld. JCST. The findings of the ld. JCST is based on reversal of entry tax credit proportionately as per proviso(c) of sub-section (3) of Section-20 of the

OVAT Act and the formula applied by the ld. JCST in arriving at ITC to be reversed is in accordance with the provision contained in rule 14(4) (i) of the OVAT Rules, I am not inclined to disturb the findings of the ld. JCST on this score. Keeping in view the provision of input tax credit contained u/s. 20(3)(c) of the OVAT Act and the provision in respect of reversal of input tax credit u/r.14(4)(i) of the OVAT Rules in case of a registered dealer manufacturing or processing both taxable goods and goods exempted from tax for sale, and the pronouncements by the Apex Court in case of Jai Bhagwan Oil and Flour Mills Vrs. Union of India and others (2009) 14 SC 63 and State of Karnataka Vrs. M.K. Agro Tech Pvt. Ltd. (2018) 52 GSTR 215 (SC) I am of the view that reversal of ITC made in accordance with Rule 14(4)(i) of the OVAT Rules as made by ld. JCST calls for no interference. The determination of reversal of ITC by the ld. JCST is upheld.

Regarding imposition of penalty the argument of the ld. Advocate on behalf of the dealer-appellant is not worthy of consideration on the ground that the assessment is an audit assessment and imposition of penalty is not dependent upon the factors like suppression/concealment of turnover. It is also not necessary that books of accounts ought to be rejected for imposition of penalty in the audit assessment. The dealer appellant is found to have not adhered to the provision contained under the Act. the submission of the State in respect of penalty u/s. 42(5) of the OVAT Act finds support from the following observation of the Hon'ble Court in the matter of Jindal Stainless ltd. Vrs. State of Odisha (2012) 54 VST 1 (Ori.):-

> "32. … Quantification of penalty is dependent on the tax assessed under Section 42 of the OVAT Act. For the purpose of assessed tax, opportunity of hearing was afforded to the assessee, the explanation of the assessee and its books of account were examined and considered. Penalty is only quantified on the basis of the tax assessed. No discretion is left with the assessing officer for levying any lesser amount of penalty. Therefore, even if further opportunity will be given to the assessee before imposing penalty that will be a futile exercise. Penalty is not independent of the tax assessed. If the

tax is assessed, imposition of penalty under Section 42(5) is warranted."

There is considerable force in the submission of the respondent-State regarding failure on the part of appellate authority in examining entitlement of the dealer-appellant in availing input tax credit in respect of purchases of spare parts of machinery made prior to 01.06.2008, i.e. the date on which the OVAT (Amendment) Act, 2008 came into force whereby "spare parts" was treated as capital goods u/s.2(8) of the OVAT Act. allowance of input tax credit on the purchase of spare parts of machineries during the period from 01.04.2005 to 31.05.2008 is not in accordance with the provision under law. But there is not clear cut mention of purchase of spare parts of machineries during the period 01.04.2005 to 31.05.2008. It is not ascertainable as to what is the turnover on this count which is to be disallowed. The Judgment rendered by the Hon'ble High Court of Odisha in case of Banspani Iron ltd. Vrs. State of Odisha 2016 (1) ILR CUT-50 is squarely applicable. For this reason, it is a fit case to be remanded to the ld. STO to examine the matter with reference to the amended provision under the OVAT Act in the light of the Judgment of Hon'ble High Court of Odisha in the case of Banspani Iron ltd. Vrs. State of Odisha. For the aforesaid reason the order of the ld. JCST warrants interference.

Law is well settled that when the statute requires certain things to be done 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. So far the imposition of penalty is concerned, I am of the considered opinion that the penalty u/s.42(5) is mandatory under the Statute. It is quantified on the basis of tax assessed. As such the ld. JCST has no discretion in this regard. Therefore, I find no infirmity in the findings of the ld. JCST so as to call for interference on the score of reversal of ITC on account of sale of exempted finished goods and imposition of penalty in the tax thus assessed.

19. In the result, the appeal is dismissed. The order of the ld. JCST is set-aside and the matter is remanded to the ld. STO with a specific direction to assess the dealer afresh on limited issue of ascertaining ineligibility of claiming of ITC on purchase of spare parts of

machinery effected from registered dealers inside the State with reference to the amendment of Section 2(8) of the OVAT Act w.e.f. 01.06.2008 inasmuch as the impugned appeal covers the period 01.04.2005 to 31.10.2008, in accordance with the provision under the law, within a period of three months from the date of receipt of this order. Cross objection is disposed of accordingly.

Dictated and corrected by me,

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

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

S. Mohanty,
1st Judicial Member In the assessment u/s 42 of the OVAT Act Input tax claimed on goods like wheat when denied to the extent proportionate to the bi-products exempted from tax on sale, resulting direction for reversal of input tax availed with penalty u/s 42 (5) of the OVAT Act, before both fora below the unsuccessful dealer called the order of 1st appellate authority in question with a prayer to allow full amount of ITC and to delete the penalty.

At the cost of repetition, the facts relevant for the purpose of this appeal are, the appellant dealer is a manufacturer of Atta, suji, maida from wheat. In the process of manufacturing of Atta from input like wheat he produced main product Atta and by-product like Chokoda. Atta is taxable whereas Chokoda is exempted from tax. Basing upon audit visit report with the allegations of wrong claim of ITC on capital goods, packing materials in the audit assessment, for the tax period 01.04.2005 to 31.10.2008 the AA did not allow full amount of ITC as claimed and reduced it proportionate to the amount of by-product. In appeal before FAA also could not succeed but the FAA only applied different mode of calculation of input tax, hence this second appeal by the dealer.

On the other hand, State by way of Cross Objection while supported the impugned order but in a later period by way of additional cross objection claimed for reversal of ITC availed on spare parts purchased by the dealer prior to the amendment of the provision u/s 2(8) dtd.01.06.2008 relates to capital goods.

The questions framed for decision on the basis of grounds of appeal and cross objection may be stated as follows.

(i) Whether the confirming order of first appellate authority asking for reversal of ITC in proportion to the sale of goods like chokad which is tax exempted is not in accordance to law?

(ii) Whether the cross objection is maintainable to the extent of claim of reversal of ITC on and spare parts as per sec.2(8) read with sec.20(3) of the OVAT Act;

(iii) Whether imposition of penalty u/s.42(5) of the OVAT Act is attracted in case of wrong claim of ITC:

(iv) What order

20. **Question No.I**

Coming to the core issue i.e. reversal of ITC or admissibility of the ITC on the wheat used in manufacturing Atta, the main product and choked, the bi-product. Main product Atta is taxable, whereas bi-product choked is exempted from tax. Claim of the Revenue is, once a portion of goods produced/manufactured and sold as exempted from tax, then to that extent the dealer is not entitled to ITC and the ITC should be proportionately reduced.

21. Learned Addl. Standing Counsel placed reliance in the matter of Jai Bhagaban Oil & Flour Mill v. Union of India and others (2009) 14 SCC 63, State of Karnataka v. M.K. Agro Tech Pvt. Ltd. (2018) 52 GSTR 215 (SC), order of this Tribunal in Single Bench vide S.A. No.290(V) of 2017-18.

Conversely, learned Counsel for the dealer placed reliance in the matter of Ruchi Soya Industries Pvt. Ltd. v. State of M.P. and others (2014) 70 VST 40 (M.P.), State of Gujarat v. Jayant Agro

Organics Ltd. (2016) 90 VST 399 (Guj.) and a number of decisions of this Tribunal by Single Bench or Division Bench at different point of time deciding this question in favour of the dealer.

22. At the outset, it is pertinent to mention here that, there was an advance ruling by this Tribunal in A.R.A. No.13 & 14 of 2013 deciding this question in favour of the Revenue that, in case of sale of bi-product which are exempted from tax the input tax credit should be proportionately reduced. The order in A.R.A. was challenged before the Hon'ble Court in STREV No.13 & 14 of 2013. The Hon'ble Court had stayed the operation of advance ruling vide its order dtd.30.07.2013 but both the STREVs are disposed of on 01.05.2010 with liberty to the petitioner to revive this revision within thirty days. In consequence thereof, the stay order became infructuous. Resultantly, it can safely be said that, the advance ruling became reinforced.

Section 78A(6) reads as follows:-

"The advance ruling so pronounced by the advance ruling authority shall have effect on other dealers situated in similar in facts and circumstance of any case."

Thus, the legislative mandate is, when there is an advance ruling by this Tribunal it has got binding effect on all the dealers of the State having identical issue. Therefore, consequent upon the dismissal of STREV before the Hon'ble Court it can definitely be said that, the taxing authority is obliged under law to apply Rule 12 read with Rule 11 for determination of ITC admissible to the dealer as held in the advance ruling by this Tribunal in all similar cases. Undoubtedly the present one is of a case of similar nature.

However, at the same time it is made clear that, any decision of the Hon'ble Court, in the event of revival of the STREV, the direction or order of the Hon'ble Court will necessarily have binding effect on all cases including present one.

23. Another aspect of the case regarding the mode of calculation of ITC is found required to be decided here. On careful scrutiny of the orders of both the fora below, it is found that, both have adopted different mode of calculations. The first appellate authority has adopted the mode of calculation as per Rule 14, whereas, though not explicit, but as it appears, the assessing authority has adopted the mode as per Rule 11(1)(c).

For the conflicting views in the mode of calculation, it is felt necessary to delve into the matter in the light of statutory provisions.

5-a. The provision under VAT Act relating to input tax, reversal of tax etc. have undergone changes time to time. The definition of "reversed tax" u/s.2(43) has undergone a change w.e.f. 01.06.2008. The tax period under question in the assessment in hand is 01.04.2005 to 31.10.2008. The definition prior to the amendment w.e.f. 01.06.2008 reads as follows.

> "(43) ***"REVERSE TAX"*** means that portion of input tax on the goods for which credit has been availed but such goods are used subsequently for any purpose other than resale or manufacture of taxable goods or execution of works contract or use as containers or packing materials."

The provision above is silent on manufacture and sale of goods exempted from tax.

The definition after the amendment w.e.f. 01.06.2008 reads as follows:-

> "(43) ***"REVERSE TAX"*** means that portion of input tax on the value of goods purchased for which credit has been availed by a dealer to which he is not entitled under sub-section (9) of Section 20;"

The definition as above, confined to the reversed tax as defined u/s.20(9) of the act.

Section 20(9) of the OVAT Act reads as follows:-

> "(9) If goods purchased-

(a) are intended for any of the purposes specified under sub-section (3) but are subsequently used otherwise, or
(b) are lost due to theft, damage or for any other reason, or
(c) remain unsold at the time of closure of business, or
(d) are subsequently transferred to any place outside the State otherwise than by way of sale on which input tax credit h as already been available at the full rate, or
(e) remain unutilized or unsold on the date on which the exercise of option for composition of tax under this Act, is allowed, or
(f) remain unutilized or unsold on the date on which the liability of the dealer to pay tax under Section 11 is changed to Section 16, or
(g) are utilized in manufacture of goods exempted from tax on which input tax credit has been availed in a tax period prior to its utilization, by a dealer manufacturing both taxable goods and goods exempted from tax, or
(h) are exempted from levy of tax subsequently, or
(i) are returned to the selling dealer and necessary adjustment is made by revising the tax invoice, or by issue of credit or debit notes in respect of such goods;
the input tax credit availed in respect of purchase of such goods shall be deducted from the input tax credit admissible for the tax period during which any one or more of such events occurring tax period during which any one or more of such events occurs.
Provided that if part of the goods so purchased are used otherwise or lost or remain unsold, the amount of reverse tax credit shall be proportionately calculated.
Provided further that if no input tax credit is available for such deduction, the input tax credit availed of shall be repayable in the manner prescribed.
Provide also that in case of clause (d), the input tax credit so reversed shall be limited to four per centum of the value of the goods in respect of which input tax credit has been allowed."

Section 20(9)(g) above is relevant in the present context. A careful reading of sec.20(9)(g), it can be said that, the provision under the sub-clause relates to goods purchased and utilized in the manufacture of goods exempted from tax on which the input tax credit has been availed. Here, the dealer has purchased goods (inputs) for manufacturing Atta a taxable goods but not for chokad.

5-b. On the other hand, Rule 14(1) as it was before amendment w.e.f. 25.02.2009 reads as follows;

> "Where input tax credit is already availed by a registered dealer against purchase of goods, a part of which is, however, used in manufacturing or processing of goods exempt from tax, the input tax credit so availed for such part of the goods will be deducted from the input tax credit for the tax period in which such event takes place."

Above rule also speaks, when the dealer purchased goods and part of those purchased goose when used in manufacturing of goods exempted from tax, that means the Rule 14(1) relatable to Sec.20 (9)(g) and that indicates, the goods only when utilized in the manufacturing of the goods which are exempted from tax. The present case is not of that nature as the dealer has never utilized part of goods for production of chokad. Hence there is no question of application of Section 20(9)(g) read with Rule 14 and the definition u/s.2(43) to the case in hand.

24. Here, we may take consideration of the provision under Rule 12 which reads as follows:-

"12. Partial input tax credit.-
(1) The Government may, by notification, specify such goods or such class of dealers, subject to such conditions and restrictions, as may be specified in that notification, to be allowed input tax credit partially.
(2) Partial input tax credit as referred to in sub-rule (1) shall be at the proportion of the value of actual utilization of input to the value of output in a tax period.
(3) Where the processing or manufacturing activity of a dealer results in the production of both taxable goods and goods exempt from tax, input tax credit admissible shall be determined by applying the principles as provided under sub-rule (1) of Rule 11 in respect of each tax period.
Explanation.-
For the purpose of this sub-rule, the expression ***"TOTAL INPUT TAX"*** referred to in sub-rule (1) of Rule 11 shall be the tax on that part of the input, which is actually utilized in processing or manufacturing.
(4) For the purpose of this rule, the expression ***"OUTPUT"*** shall mean sale of finished products consequent upon processing or manufacturing or sale of goods used in the execution of works contract, as the case may be."

Rule 12(3) above denotes, when in a manufacturing activity of the dealer results in a production of both taxable goods and goods exempted from tax, in that case, the **P X Q/ R** method is to be adopted to calculate the input tax admissible to the dealer.

25. Section 20(9) of the OVAT Act and Rule 14 of the OVAT Rules are enabling provisions, acting upon which the tax authority can ask for reversal of ITC, whereas Sec.20(3) proviso (c) of the OVAT Act read with Rule 12 of the OVAT Rules are the disabling provision acting upon which a taxing authority can deny or disable the dealer from claiming ITC.

Legislature while formulating two modes of calculation of ITC such as **P X Q/R** as per Rule 11(1) and **X=U X V/W** as per Rule 14 has necessarily viewed two separate situations, one is to deny ITC other is to claim for reversal. So, in no stretch of imagination one can say both the modes of calculations are same or mutually inclusive of each other.

26. The decision relied by learned Addl. Standing Counsel in State of Karnataka Vrs. M.K. Agro which relates to the Sec.17 of the KVAT Act and Rule 131 of the KVAT Rules. The Apex Court on application of the partial rebate as per the provisions under the Karnataka VAT Act and Rules has held that, there should be apportionment of the input tax available to the dealer. Rule 12 of the OVAT Rules is more or less similar Rule 131 of the KVAT Rules. If the rule is applied to the case in hand, then the dealer is not entitled to ITC on the goods which are sold as exempted from tax and **P X Q/R** method is to be adopted for calculation of the input tax admissible to the dealer.

27. Plea of the dealer is, it has never intended to produce goods like chokad. It has been registered as a unit to produce atta, the production of chokad is an ancillary and inevitable to production of atta. It is a bi-product, the same itself is not a finished product.

28. The deciding factor for denial of ITC on the goods which are exempted from tax produced in the manufacturing process is to be treated as finished, distinct, marketable goods or not ?

Learned Addl. Standing Counsel, Mr. Raman placed reliance in the matter of Jai Bhawani Oil & Flour Mill v. Union of India (2009) 14 SCC 63, in which their Lordships have held that,

> "The true test to ascertain whether a process is a manufacturing process producing a new and distinct article is whether the article produced is regarded in the trade, by those who deal in it, as a marketable product distinct in identity from the commodity/raw material involved in the manufacture. There can therefore be no doubt that when mustard seeds are subjected to the process of extraction whereby mustard oil as also the manufacture of oilcake. Oilcake is a distinct and different entity from mustard seeds and it has a separate name, character and use different entity from mustard seeds and it has a separate name, character and use different from mustard seed. Oilcake is not a waste to be thrown away, but a valuable product with a distinct name, character, use and marketability. There can thus be no doubt that the oilcake was finished goods eligible or transport subsidy, until it was specifically excluded by the Central Government in the year 1997. The respondents are directed to verify and release the subsidy amount due to the appellant in regard to oilcake exported out of the State."

29. Further, when we look into the rate chart of the VAT at entry Sl. No.3 of Part-I of the schedule has included chokad in the category of wheat and groundnut including chokad i.e. w.e.f. 01.07.2005.

From above, can it be definitely said that, chokad is a distinct product? Yes, because it is distinct and marketable goods, particularly when the dealer has sold the same by the name called chokad in the market and it is purchased accordingly. The ratio laid down in of Jai Bhagwan Oil & Flour Mill (supra) above can successfully applied here.

30. From the discussion above, taking cue from the authorities discussed hereinabove and as per the statutory obligations u/s.78A(6) of the OVAT Act, the irresistible conclusion

is, the dealer, knowing fully well about the compulsory, inevitable production of bi-product like choked in the manufacturing of Atta has entered into business. 'Chokad' is a distinct marketable goods, should be treated as a finished goods for the purpose of trade and commerce. So, when it is exempted from tax in that event, the input tax of the dealer should be proportionately reduced as per Rule 12(3) of the OVAT Rules read with Sec.20(3) proviso (c) of the OVAT Act. The first appellate authority has committed wrong in application of Rule 14, **X=U X V/W** for calculation of the ITC. The mode of calculation should be **P X Q/R** method as per Rule 11(1) of the OVAT Rules.

30-a. Needless to mention here that, the Division Bench or Single Bench of this Tribunal while deciding the same question time to time has not taken consideration of the advance ruling above. Moreover, the decisions of this Tribunal cited by the dealer can successfully be distinguished in the light of discussions above.

31. **Question No.II**

The Revenue has advanced cross objection on 29.01.2004. However, in the hearing it has advanced additional grounds asking therein the relief of reversal of ITC on machineries and spare parts purchased after 01.06.2008. Filing of appeal and cross objection must be in accordance to Sec.78 of the OVAT Act read with Rule 98 of the OVAT Rules. The party who has not filed cross appeal can raise grounds in the cross objection and such cross objection should be treated and disposed of as appeal. But, in that event, sec.78(3) mandates the memorandum of cross objection shall be in the prescribed format and shall be verified in prescribed manner which is not complied in the case in hand. The additional ground taken in the hearing is a belated one, it was not supported by any petition to condone the delay. So, it can safely be said that, the cross objection in this case is not filed in accordance to the procedure laid down under the Act and Rules.

31.(a) Even though, the claim and prayer of the Revenue in additional grounds of cross objection is not entertainable, but for sake of brevity, if we delve into the question on merit, there is no dispute that, components and spare parts are included in the definition of capital goods u/s 2(8)OVAT act only w.e.f. 01.06.2008. Therefore, for the period prior to that, the spare parts never can be termed as capital goods on which the dealer can claim ITC.

31.(b) Adverting to the case, the AVR is silent on wrong claim of ITC keeping in view the amendment of definition of capital goods w.e.f. 01.06.2008. Consequently, neither the assessing authority in the assessment, nor the first appellate authority had any scope or reason to deal this question. The allegation in AVR is like claim of ITC on capital goods is not available as per Sec.20(3)(d) and Schedule-D of the OVAT Act relating to machinery spare parts, electric bulb, wires and fittings, bearings. V Belts, M.S. plates and hardware materials as per Sec.20(3)(c) of the OVAT Act is not the same that of wrong claim of ITC keeping view the amendment of SEc.2(8) of the OVAT Act. So, this question is being beyond AVR, it cannot be considered in an audit assessment as per the ratio laid down by Hon'ble Court in **Bhusan Power & Steel Ltd. Vrs. State of Orissa and Others (2012) 47 VST 466 (Ori.)**. It is apt to mention here that, in a recent decision, the Hon'ble Court in **Tata Sponge Iron Ltd. v. Commissioner of Sales Tax in W.P.(C) No.3661/2019 dtd.17.04.2019** has held that,

"The law laid down by High Court must be followed by all authorities and subordinate Tribunals when it has been declared by the highest proceedings or deciding on the rights involved in such a proceeding"

********** "Section 41 & Section 42 of the Odisha Value Added Tax Act, 2005- Whether the first appellate authority was justified in ignoring the ratio of the Judgment in *Bhushan Power & Steel Ltd. Vrs. State of Odisha, 2012 (I) ILR-CUT 421 = (2012) 47 VST 466 (Ori.)* wherein it was held that the assessing authority cannot travel beyond the materials available in the audit report and

utilization of any other materials from any other sources in audit assessment is completely foreign to audit assessment under Section 42 of the OVAT Act? – ignoring said law laid down by the High Court by the appellate authority amounts to contempt."

31.(c) In view of the authoritative pronouncements above, it is held that, the cross objection is bad both in law and fact.

32. **Question No. III**

In an audit assessment u/s.42 of the OVAT Act in case of wrong claim of ITC by the dealer penalty u/s.42(5) is necessarily warranted. So, avoiding elaborate discussion on this question when it is trite in law and the well settled by plethora of decisions, here it is held that, the view of the authority below in Sec.42(5) of the OVAT Act is the correct appreciation of the statute, hence not interceptable.

33. **What order**

From a conspectus of above, in the case in hand, I conclude my finding as follows.

(i) Cross objection filed by raising additional grounds in the hearing without proper format is defective. The claim in the cross objection is not available to the Revenue as this is a question beyond AVR which is beyond the scope of assessing authority as forbidden by the Hon'ble Court in Bhusan Power & Steel case.

(ii) Calculation mode of reversal of ITC as determined by the first appellate authority in the impugned order on application of Rule 14 read with Sec.20(3) proviso (c) is wrong.

(iii) The dealer's input tax admissibility can be re-determined on application of Sec.20(3) proviso (c) read with Rule 12(3) i.e. partial input tax credit on application of the method contemplated under sub-rule (1) clause (c) of Rule 11 of the OVAT Act such as **P X Q/R** method.

(iv) Wrong claim of ITC in the case in hand attracts penalty u/s 42 (5) of the OVAT Act.

(v) Since the mode of calculation adopted by the first appellate authority is erroneous the matter need to be remitted back to the assessing authority for limited purpose of re-calculation of ITC admissible to the dealer.

(vi) Order of the Hon'ble Court if any on the revival of STREV No.13 & 14 of 2013 will supersede in present order and both the parties have the liberty to re-agitate the issue in the light of order of the Hon'ble Court on the disputed question in the STREV following the ratio laid down in **Dinabandhu Sahoo vrs. Union of India & Others WP(C) No.1441 or 2018 dtd.1.2.2019.**

In the wake of above it is ordered.

The matter be remitted to the assessing authority for calculation of ITC as per Rule 12(3) read with Rule 11(1)(c) of the OVAT Rules. The dealer is liable to pay penalty as per Sec.42(5) of the OVAT Act. Realization of the demand as such is subject to the order of honourable court if any as observed above. The appeal as disposed of accordingly whereas, the cross objection be treated as dismissed on contest.

Dictated & corrected by me,

(S. Mohanty)
1st Judicial Member

(S. Mohanty)
1st Judicial Member

Smt. Suchismita Misra, Chairman

The dissenting orders passed by learned 1st Judicial Member and learned Accounts Member were placed before me for my perusal. On careful examination of both the orders it could be gathered that both the Members have unanimously held that the first appellate authority has correctly come to a conclusion regarding the dealer-assessee's claim to avail ITC on purchase of wheat but they differed with each other regarding application of the relevant provisions for calculation of ITC in favour of the dealer-assessee. In this regard learned 1st Judicial Member is of the view

that since 'chokoda' is a distinct marketable product and is purchased accordingly for consumption the ratio laid down in the case of Jai Bhagwan Oil and Flour Mills Vs. Union of India and others, (2009) 14 SCC 63, should be applied to the present case. While holding thus and quoting the provisions and rules to be applied in this case learned 1st Judicial Member came to a conclusion that in the instant case the mode of calculation for ITC to be availed by the dealer-assessee should be **P X Q/R** as per Rule 11(1) of the OVAT Rules and not as per Rule 14 i.e. **X = U X V/W**. Learned Accounts Member also held that the first appellate authority was justified in determining the quantum of ITC to be allowed in favour of the dealer-assessee adhering the provision of Section 20(3) proviso (c) of the OVAT Act read with Rule 14(4) of the OVAT Rules. After perusing both the orders, I find that the conclusion drawn by learned 1st Judicial Member regarding determination of ITC of the dealer by reducing proportionately as per Rule 12(3) read with Section 20(3) proviso (c) of the OVAT Act seems to be justified in the facts and circumstances of the case and, therefore, the mode of calculation of the ITC in the instant case should be taken as **P X Q/R** method as per Rule 11(1) of the OVAT Rules and not Rule 14(4) of the OVAT Rules as held by learned Accounts Member.

34. So far as their conclusion regarding cross-objection filed by the Revenue raising additional grounds in course of hearing is concerned, it is found that they have some difference to the extent that when learned 1st Judicial Member held outrightly that cross-objection filed by the Revenue is bad both in law and fact, learned Accounts Member has dealt with the same in his order and considered the same as a ground for remitting back the case to the Sales Tax Officer to examine whether allowance of ITC on the purchase of spare parts of machineries during the period from 01.04.2005 to 31.05.2008 is not in accordance with the provision

under law since he held that there is no clearcut mention of purchase of spare parts of machineries during the period 01.04.2005 to 31.05.2008. He (the Accounts Member) also opined that it is not ascertainable as to what is the turnover on this count which is to be disallowed. However, on examining the facts and circumstances of the present case it is felt that learned 1st Judicial Member following the ratios laid down by Hon'ble High Court of Orissa in the cases of Bhusan Power & Steel Ltd. Vs. State of Orissa and others, [2012] 47 VST 466 (Ori.) and Tata Sponge Iron Ltd. Vs. Commissioner of Sales Tax (W.P. (C) No. 3661/2019 dated 17.04.2019) has correctly opined that cross-objection on this score by the Revenue is bad in law. Therefore, I have no hesitation to go with the findings of learned 1st Judicial Member in this issue.

35. It is also found from the dissenting orders that both the Members are of the same view regarding imposition of penalty on the dealer-assessee as per the provisions contained in Section 42(5) of the OVAT Act which needs no interference so far as the view taken by the first appellate authority is concerned in this regard. However, ultimately it is noticed that both learned Members have virtually set aside the impugned order while directing for remand of the matter to the assessing authority for calculation of ITC and categorically held that the dealer is liable to pay penalty as per Section 42(5) of the OVAT Act on tax dues. Learned 1st Judicial Member further added that realization of the tax due and calculation of penalty thereon as such is subject to the order of Hon'ble Court, if any, on the revival of STREV Nos. 13 & 14 of 2013.

Considering all these aspects I agree with the findings and the order as well passed by the learned 1st Judicial Member.

Dictated & Corrected by me,

(Smt. Suchismita Misra)
Chairman

(Smt. Suchismita Misra)
Chairman

As per the majority view hereinabove, it is ordered.

The case is remitted back to the assessing authority with a direction to make assessment afresh as per the provision envisaged u/R.12(3) read with Rule 11(1)(c) of the OVAT Rules for calculation of ITC. Penalty to which the dealer will be found liable be imposed as per Sec.42(5) of the OVAT Act. Realization of the tax due and penalty as such is subject to the order of Hon'ble Court, if any, as observed above.

The appeal is disposed of accordingly and the Cross Objection by the Revenue stands dismissed on contest.

Dictated & corrected by me,

Sd/-
(Suchismita Misra)
Chairman

Sd/-
(S. Mohanty)
1st Judicial Member

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