

(in short, the AVR) with three nos. of allegations, such as sale suppression, purchase suppression and mismatch of ITC. Acting upon the AVR, STO, Bhubaneswar as assessing authority initiated assessment proceeding u/s.42(4) of the Orissa Value Added Tax Act, 2004 (hereafter referred to as, the OVAT Act). As against the allegation of less sale in comparison to purchase, the assessing authority found the physical stock of cement with the dealer as per the book balance was only 2120 bags, whereas on physical verification as reported by the audit team, the stock was only 1491 bags. There was shortage of stock of 629 bags on the date of visit. The dealer's explanation like 160 bags of cement were yet to be received from selling dealer M/s. Ramco Cement, Bhubaneswar was accepted. The further explanation of the dealer regarding damage cement of 151 bags was also taken into consideration but, even thereafter the dealer could not explain the rest number of cement bags such as 319. The value of such 319 bags was calculated at Rs.95,700.00 and the assessing authority treated the same as sale suppression. Similarly, on verification of the physical stock the goods to the tune of Rs.26,100.00 was available in the business premises without purchase invoices as reported by the audit team, the assessing authority accepted the suggestion i.e. purchase suppression to the tune of Rs.26,100.00. The third allegation against mismatch of ITC i.e. to tune of Rs.84,546.00, the assessing authority found the selling dealer in some cases has not shown, the sale, in some cases they have not filed return, so the mismatch amount of ITC of Rs.84,546.10 was also disallowed to the dealer. As a result, in ultimate analysis, the VAT liability of the dealer was calculated at Rs.27,786.00. The dealer found to have paid nil, the entire amount was raised against the dealer. Besides, penalty of Rs.55,572.00 was also imposed at twice of the tax calculated thereby, the total demand raised against the dealer was at Rs.83,358.00.

3. In appeal at the instance of the dealer, the first appellate authority has allowed ITC as claimed by the dealer save and except

the ITC of Rs.6,057.00 and Rs.3,551.00 against the damage of stock with the findings that, sub-sec.3(a) of Sec.20 of the OVAT Act is not applicable to the case in hand and accordingly he re-determined the tax liability of the dealer at Rs.3,806.00. Above it, penalty of Rs.7,612.00 was imposed, thereby, the total demand became reduced to Rs.11,418.00.

When the demand became reduced, the order of the first appellate authority is called in question in this second appeal by the Revenue.

4. The contention of the Revenue is, as per Sec.20(8)(f) of the OVAT Act no input tax credit shall be claimed or be allowed to a registered dealer in respect of goods purchased on payment of tax but, not sold because of any theft, damage or destruction. So, the ITC allowed in this case against damage stock should be reversed.

5. The appeal is heard without Cross Objection.

6. **Finding:-**

The allegations in AVR and the order of assessing authority as it revealed, the assessing authority found there was less sale in comparison to purchase leading to sale suppression, there was stock discrepancy leading to purchase suppression, whereas there was also mismatch of ITC and disallowance of ITC on the differential quantity of stock suppression.

On perusal of the impugned order, it only can be said that, the order of the first appellate authority is clumsy, confusing and is simply without application of mind and improper application of different provisions under law. However, the present appeal being restricted to the grounds in appeal, it is only to be decided here is, whether the dealer is entitled to ITC on damage stock and if not, whether the dealer should be asked to reverse the ITC availed on damaged stock.

7. Law is no more *res integra* in view of the provision u/s.20(8)(f) read with sec.20(9)(b) of the OVAT Act that, when the

goods are not sold because of any theft, damage and destruction, ITC is not available. The first appellate authority at one place accepted the aforesaid view and findings of the assessing authority but at another place rejected the same. The calculations and figures with regard to damage, stock and mismatch are also not correct. Mismatch of ITC for default of the selling dealer cannot be a ground to deny ITC to the dealer and this principle has been well settled by many of the judicial pronouncements including plethora of orders of this Tribunal, so it need not be repeated here in detail.

8. Thus, from the discussion above, it can be concluded as follows.

ITC on damage stock is not available to the dealer as per Sec.20(8)(f) of the OVAT Act. Mismatch of ITC due to default of the selling dealer is of no adverse effect against the claim of ITC by the instant dealer. The matter should be remitted back to the first appellate authority for assessment afresh in the light of observation hereinabove.

Accordingly, it is ordered.

The appeal is allowed in part on contest. The impugned order is set aside. The matter is remanded to the first appellate authority for assessment afresh in the light of observation hereinabove.

Dictated & corrected by me,

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

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