BEFORE THE JUDICIAL MEMBER-I: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 188(V) of 2017-18

(Arising out of the order of the ld. JCST (Appeal), Balasore Range, Balasore, in First Appeal Case No. AA-119/BA-2016-2017 (VAT), disposed of on dtd.28.05.2017)

P r e s e n t: **Shri S. Mohanty,**
1st Judicial Member

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

- V e r s u s -

M/s. Omm Namah Shivay, At/P.O.- Uttareswar, Soro, Balasore. ... Respondent

For the assessment period: 01.04.2013 to 31.03.2015

For the Appellant ... Mr. M.L. Agarwal, S.C.
For the Respondent ... Mr. J. Bal, Advocate

Date of hearing: 11.07.2019 ******** Date of order: 11.07.2019

O R D E R

When the entire amount of demand under the heads of tax due and penalty in an audit assessment u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) by the assessing authority is set aside and the demand is reduced to return figure by the first appellate authority, the order of first appellate authority became impugned by way of this second appeal at the instance of Revenue. Revenue has challenged the sustainability of the impugned order of the first appellate authority with a prayer to set aside the same and to restore the order of the assessing authority.

2. The assessee-dealer M/s. Omm Namah Shivay in the case in hand engaged in trading of asbestos, iron rod, cement and liquid adhesive within the State of Odisha. It affects purchase and sale of goods within Odisha. The assessing authority in the assessment u/s.42 of the OVAT Act for the tax period from 01.04.2013 to 31.03.2015 relating to the assessee-dealer has acted upon the audit visit report (in short, the AVR) with the following allegations like, (i) purchase suppression of Rs.23,16,05,962.00, (ii) sale suppression of Rs.9,73,58,693.00, (iii) wrong claim of ITC of Rs.18,09,871.96 without supported by original tax invoice, (iv) wrong claim of ITC where the sale value is less than the purchase value amounting to Rs.29,45,999.00 and (v) mismatch of ITC amounting to Rs.2,46,88,854.93 for the period under assessment. The assessment was done in absence of the dealer as the dealer was set exparte for non-appearance in the hearing in spite of due receipt of the notice. In absence of the dealer, the assessing authority accepted the AVR allegations such as, purchase suppression and sale suppression to be true. Similarly, in absence of the dealer and for non-production of the original tax invoice as mandate u/s.26 of the OVAT Act, the assessing authority denied the claim of ITC to the tune of Rs.18,09,871.96 which was not supported by tax invoice. The allegation of disclosure of sale value lesser than the purchase value amounting to Rs.29,45,999.00 was also found established. On application of the provision u/s.20(3-a) and u/s.20(8-a) of the OVAT Act, the assessing authority has held that, the ITC on purchase of goods shall be only to the extent of output tax payable on the sale of goods. Further, with regard to the allegation of mismatch of ITC, the assessing authority has held that, keeping view the non-disclosure or no disclosure or less disclosure of the output tax collected from the assessee-dealer by the selling dealers in their respective returns as per VATIS, the mismatch amount of ITC is not allowable to the dealer. Ultimately, the assessing authority re-determined the GTO, TTO, tax liability, ITC

amount admissible to the dealer and found the dealer is liable to pay tax Rs.79,07,490.00.

3. The first appellate authority deleted the charge of purchase suppression/sale suppression as on verification of the annual return he found the dealer has disclosed the amount of sale/purchase in detail which includes the allegation of the purchase suppression/sale suppression. Since the order of the assessing authority was an exparte order without verification of the books of account and other consolidated return figure, the determination of the sale suppression and purchase suppression held by the assessing authority became not established before the first appellate authority. As regards disallowance of ITC for non-filing of the original tax invoices, the first appellate authority allowed the ITC claim of the dealer on due verification of the purchase invoices in original produced before him. Similarly, the first appellate authority found that, the assessing authority has wrongly made the entire calculation with regard to the allegation like, the amount of sale price is lesser than amount of purchase price and finally found that, the sale price is higher than the cost of the goods. With regard to the mismatch of ITC, the first appellate authority has held that, the appellant is not responsible in case of non-payment of tax by the selling dealer prior to 01.10.2015. Hence, he also allowed the mismatch of ITC in favour of the dealer. Ultimately, the first appellate authority reversed all the findings of the assessing authority on each count consequently, the tax due became reduced to return figure.

4. When the tax due became reduced to nil figure, Revenue being aggrieved, called the impugned order of the first appellate authority in question as not sustainable in the eye of law. It is contended by the Revenue that, the findings on the allegation of sale of the goods at a lesser price than the cost price and allowance of ITC to that extent the dealer claimed is not sustainable in the eye of law. Similarly, it is also contended that, in absence of the proof of actual

payment by the selling dealer to the government treasury of the amount of output tax collected by the assessee-dealer on sale, ITC as claimed by the assessee-dealer is not allowable.

5. The appeal is heard without Cross Objection from the side of the dealer. However, by way of notes of submission in the hearing the dealer has supported the findings of the first appellate authority.

6. From the rival contentions in the appeal in hand, the questions framed for decision are-

(i) whether the first appellate authority is wrong in allowing ITC (a) for non-submission of original invoice and other evidence, (b) for mismatch of ITC and (c) for sale of the goods at a lesser price than the cost of the goods;

(ii) what order?

7. As discussed above, though the first appellate authority has taken into consideration of the five numbers of allegations brought in by the AVR but with regard to the sale suppression and purchase suppression, the findings of the first appellate authority is gone unchallenged. Hence, no need to go into the details of those sale suppression and purchase suppression which was reversed by the first appellate authority.

So far as the findings of denial of ITC, where the sale price is lesser than the cost price the relevant provision in this regard incorporated in the text book by way of amendment Act w.e.f. 01.10.2015 i.e. sec.20(8-a) of the OVAT Act. The provision reads as follows:-

Sec.20(8-a) of the OVAT Act:-

> "Where sale price of any taxable goods, for any reason, is less than the purchase price of the said goods, the input tax credit on purchase of such goods shall be allowed only to the extent of the output tax payable on the sale of such goods and in such case if the input tax credit has been availed in excess of the output tax paid or payable, it shall be reversed in the manner prescribed."

Bare reading of the provision as it revealed, when for any reason there was sale of goods in a lesser price, in that case ITC will be allowed to the extent of output tax payable on sale of such goods. The provision as it indicates, in no case the amount of ITC can be higher than the amount of output tax collected by the dealer.

Learned Standing Counsel argued that, the first appellate authority has wrongly held that, the assessing authority was wrong in determining the sale price lesser than the purchase price on the basis of opening stock and closing stock by disallowing the incidental charges which the appellant has added on the purchase price to arrive at the sale price of the goods. But, on examination of the details of the account, it is found that, the cost of goods is lesser than the sale price of goods.

In the written submission, the dealer has held that, the cost price as shown is different from the actual cost of the goods because at a later period the assessee was given the trade discounts/cash discounts by the sellers, cost price is always less of these discounts. So, the sale price in no case can be treated as lesser than the cost price. This fact in the written submission contradicts the findings of the first appellate authority. Any discount affects the purchase value necessarily affects the ITC allowable to the dealer. On the other hand, the first appellate authority has held that, on proper calculation it was found that, the cost price was not higher than the sale price. So, in the considered view of this Tribunal, this question needs appraisal afresh on proper verification of the books of account, registers and connected documents of the dealer. Further, application of the restrictions on availing ITC as per sec.20(8-a) of the OVAT Act is always there.

So, in the remand assessment, the authority below (first appellate authority) needs to inquire into the details of the sale price and purchase price, so as to determine whether the ITC claimed by the dealer is correct or not.

8. So far as the next allegation i.e. disallowance ITC for non-submission of original invoice, the order of the first appellate authority as it revealed, the dealer could furnish the original invoices before the first appellate authority and in consequence thereof, the first appellate authority has allowed ITC as claimed by the dealer. Learned Standing Counsel strongly argued that, this original invoices were never produced before the first appellate authority but the first appellate authority, in a slipshod manner allowed the ITC. Such an allegation has no basis particularly when it is meant to touch the integrity of the authority who has acted in his official capacity while passing the impugned order. When the first appellate authority has categorically mentioned that it had the occasion to verify the original invoices, then there is less scope in the hands of the Revenue to rebut the same by saying that there was no such production of original invoices. However, for the interest of justice and equity it is believed that, in the remand assessment the first appellate authority will be also at liberty to inquire the original or in duplicate or other connected documents, if any on production by the dealer or available in the LCR to ascertain whether the dealer has produced documentary evidence including the tax invoices in support of the claim of ITC.

9. So far as the mismatch of ITC is concerned, this Tribunal has time and again held that, in case the mismatch of ITC, the purchasing dealer should not suffer for any fault of the selling dealer.

10. In **Sri Vinayaga Agencies v. Asst. Commissioner (CT), Vadapalani-I, Assessment Circle, Chennai and another [2013] 60 VST 283 (Mad.)**, it is held as follows:

> "(ii) That sub-section (16) of section 19 states that the input-tax credit availed is provisional. It, however, does not empower the authority to revoke the input-tax credit availed of on a plea that the selling dealer has not paid the tax. It only relates to incorrect, incomplete or

improper claim of input-tax credit by the dealer. it was not so in these cases."

Similarly, in the matter **Faiveley Transport Rail Technologies India Limited v. Asst. Commissioner (CT), Hosur (South), Hosur (2017) 97 VST 395 (Mad)**, it is held as follows:-

> "Held, allowing the petitions, that the dealer could not be denied the entire tax credit on verification of the Department website alleging that the dealer had reported higher purchases and availed of input-tax credit in excess."

11. In ***Commissioner of Trade & Taxes, Delhi and others Vs. Arise India Limited and others TS-2-SC-2018-VAT***, the Hon'ble Apex Court in SLP before it upheld the view of the Hon'ble High Court that, Sec.9(2)(g) of the Delhi VAT Act to the extent it disallows input tax credit to purchaser due to the default o the selling dealer in depositing tax, as violative of Article 14, 19(1)(g) of the Constitution of India.

Treating both, the guilty purchaser and the innocent purchaser at par is violative of the Article 14 of the Constitution. A bona fide purchaser cannot be denied because of the intentional or intentional default of the selling dealer over whom the purchasing dealer has no control. The taxing authority is not handicapped under law to collect tax from the defaulting dealer and punish the defaulting dealer also. It is only to be seen that, the selling dealer is a registered dealer or not. Once the purchasing dealer has demonstrated that, he has complied with the requirements, he cannot be denied ITC only because the selling dealer fails to discharge his obligation under the Act. The selling dealer ought to have deposited the tax collected under the law.

In the matter of **Shanti Kiran India Pvt. Ltd. v. Commissioner of Trade Tax Department, 2013 (2) TM 180** which was later on confirmed by the Hon'ble Supreme Court it is observed

that, it is not the dealer's liability to see whether the tax was deposited by the taxing authority or not.

In the case in hand, it is not the allegation of a taxing authority that, the alleged transactions are fake or the alleged selling dealers are fake entity. So in the result, it is held that, the allowance of ITC by the impugned order of first appellate authority calls for no interference.

12. All the questions framed for decision are answered hereinabove. In the result it is held that, the matter need be remitted back to the first appellate authority for assessment afresh so far as the ITC allowable to the dealer against the allegation of sale of the goods in a lesser price than the cost of the goods and production of documentary proof like tax invoices against the claim of ITC. So far as the mismatch of ITC is concerned, there is no need to interfere with the order of the first appellate authority and the deletion of allegation of sale suppression and purchase suppression by the first appellate authority is confirmed as not questioned. Hence, it is ordered.

13. The appeal is allowed in part. The matter is remitted back to the first appellate authority for assessment afresh on two counts as per the observation hereinabove and to raise tax due, if any to which the dealer is liable to pay.

Dictated & corrected by me,

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

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