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

S.A. No. 293(V) of 2017-18
(From the order of the ld. Addl. CST (Appeal), NZ, Sambalpur, in Appeal Case No. AA-SA-18/(V)15-16, dtd.31.08.2017)

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

M/s. Bhusan Power & Steels Ltd.,
At/P.O.- Thelkoloi, Sambalpur. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2012 to 31.03.2014

For the Appellant ... Mr. U. Behera, Advocate
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 28.08.2019 ******** Date of order: 28.08.2019

O R D E R

The assessee-dealer as appellant before this Tribunal questioned the sustainability of a confirming order of assessment u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) passed by the first appellate authority dtd.31.08.2017 with a prayer to delete the demand raised towards balance tax due, interest and penalty.

2. The appellant being a limited company engaged in manufacturing and sale of sponge iron, pig iron, billets, HR coil, CR coil, etc. Being a registered dealer under the Act it used to file returns in accordance to the Act regularly. For the assessment year 2012-13

and 2013-14, also the appellant had furnished its return in due course. However, being selected for audit assessment by the competent authority, the dealer faced audit assessment u/s.42 of the OVAT Act on the basis of Audit Visit Report (in short, the AVR) submitted by duly constituted audit team u/s.41 of the OVAT Act for consecutive assessment periods such as from 01.04.2012 to 31.03.2014. In the result, learned assessing authority vide its order dtd.01.06.2015 disallowed the claim of the assessee towards ITC on certain goods which were claimed as capital goods by the dealer in the regular return. As a result, the inadmissible ITC was calculated against such goods which were not treated as capital goods covered under the definition u/s.2(8) of the OVAT Act and it is found, the dealer had claimed excess ITC. The dealer was asked to pay balance tax of Rs.20,39,85,140.00, interest to the tune of Rs.6,55,096.00 and penalty to the tune of Rs.13,10,192.00 totaling the demand raised at Rs.19,65,288.00.

3. Said decision of the assessing authority was challenged by the dealer before first appellate authority. Learned Addl. Commissioner of Sales Tax (Appeal), North Zone, Sambalpur as first appellate authority vide impugned order dtd.31.08.2017 did not interfere with the findings of the learned assessing authority, thereby the findings became confirmed and the demand towards tax due, penalty and interest remained undisturbed. Felt aggrieved, being unsuccessful before the both the fora below felt aggrieved, the assessee-dealer knocked the door of this Tribunal with the contentions like, the authorities below has arbitrarily rejected the claim of ITC on capital goods like, beaker, laboratory appliances, consumables, PH indicator, spare parts, stitching machines etc. It is also contended that, the calculation of net tax liability is violative of the provision u/s.19 of the OVAT Act. Similarly, penalty as imposed is unwarranted in the facts and circumstances of the case, hence the demand should be deleted.

4. The Revenue objected the prayer by advancing Cross Objection contending, inter alia, therein, the impugned order is just and proper.

5. Keeping in view the rival contentions, the questions framed for decision are,

(i) whether the first appellate authority has committed wrong in confirming the order of assessing authority by treating a the goods more fully described in the grounds of appeal by the dealer as not the goods covered under the definition of capital goods, denying thereby the dealer to claim ITC on purchase of those goods?

(ii) whether the mode of calculation adopted by the assessing authority by not adjusting the balance tax due from out of the carry forward ITC available in the hands of the dealer at the end of the assessment period in violation of the provision u/s.19 of the OVAT Act;

(iii) whether the penalty and interest as raised in the case in hand is not sustainable in law;

(iv) what order ?

Decision and reasons thereof

6. At the outset, it is pertinent to mention here that, in the grounds of appeal though the appellant has challenged the findings, the fora below so far as rejection of the claim of the dealer towards ITC on certain items, rejecting the claim of capital goods covered under the definition of sec.2(8) of the OVAT Act but, in the written submission learned Counsel abandoned the claim against some of the goods, whereas in the final argument learned Counsel submitted that, the dealer does not press this fact in issue so as to avoid the multiplicity and submitted that the goods may be treated as goods not covered under the definition of capital goods for which ITC is not admissible to the dealer. However, while conceding to the findings of both the fora below to this extent, learned counsel strenuously disputed the mode of

calculation of tax liability, interest and penalty by the for a below as grossly illegal and not in accordance to the mandate of the provision u/s.19 of the OVAT Act. Section 19 of the OVAT Act speaks of calculation of the net tax paid, the same is relatable to Rule 10 of the OVAT Rules and the annual return in form VAT-201A. Col. No.50 of the said form speaks about the carry forward ITC to the next year.

Learned Counsel advanced the authority in State of Gujarat v. Nishi Communication (2015) 80 VST 535 (Guj.) and argued that, in recognition of the mode of calculation of ITC under the Gujarat VAT Act which is similar to the Odisha Vat Act, the assessing authority should have adjusted the tax liability from out of the excess ITC available in the hands of the dealer and on adjustment of the same, when the dealer is not found liable towards tax, the dealer cannot be asked to pay interest or penalty. The calculation by the assessing authority which is confirmed by the first appellate authority, as it revealed, when in the audit assessment the dealer is found liable to pay tax for wrong claim of ITC on certain items, the balance tax so calculated is raised along with interest and penalty, the penalty is also levied at two times, such mode of calculation was adopted in independent of ITC available in the hand of the dealer at the end of the assessment period.

Learned counsel for the dealer advanced many fold prayer. First, he has prayed for deletion of penalty and interest or in alternative reduction of penalty to one times taking consideration of the change in law w.e.f. 01.10.2015. Learned Counsel argued that, the alternative prayers in the written submission is just to avoid the litigation since the dealer wants to put an end to the dispute.

7. The provision as per sec.19 of the OVAT Act read Rule 10 and form VAT-201A relates to regular return but the mode of calculation of the tax liability under audit assessment should necessarily be in accordance to form VAT-312 as per Rule 53 of the

OVAT Rules. The relevant portion of the form is reproduced here for better appreciation.

"**FORM VAT-312**

ORDER OF ASSESSEMNT

[Refer Rule 53]

01.	xxx	xxx	xxx
02.	xxx	xxx	xxx
03.	xxx	xxx	xxx
04.	xxx	xxx	xxx
05.	xxx	xxx	xxx
06.	(a) ITC claimed as per return (b) ITC allowed in the order		
07.	(a) Output tax admitted as per return (b) Output tax as determined		
08.	(a) Output tax net of ITC as per return [7(a) – 6(a)] (b) Output tax net of ITC as determined [7(b) – 6(b]		
09.	Tax paid		
10.	Balance tax due/excess payment, if any [8(b) – 9]		
11.	Interest levied under Section –		
12.	Penalty levied under Section –		
13.	xxx	xxx	xxx"

A bare reading of the aforesaid columns in the form VAT-312, it clearly indicates the balance tax due is to be calculated in accordance to Col. No.10 which indicates the tax due must be adjusted from out of deposit towards tax, the ITC admissible determined as per Col. No.8(b). In consequence thereof, it can safely be said that, the dealer is entitled to adjust its output tax liability from its admissible input tax credit for

the assessment year under consideration. After adjusting the ITC against its output tax liability of the assessment year under consideration, if still there is any input tax credit available with the dealer/assessee, a dealer is entitled to carry forward such balance input tax credit to the subsequent year and that is the scheme of VAT Act and Rule more particularly with respect to input tax credit. Therefore, merely because while submitting the return and raising the claim of input tax credit, the assessed had claimed more/excess ITC then admissible the same itself is not a ground to deny assessee-dealer to adjust the same from out of the admissible ITC in hand. Here in this case, the dealer claimed ITC on certain items wrongly which is found to be incorrect or wrong and thereby necessarily assessment u/s.42(1) of the OVAT Act is maintainable under law. But, when the assessment is ended with no tax due because of the fact that, the tax due can be successfully adjusted from out of the ITC in hand of the dealer, in that case, a nil assessment cannot empower the assessing authority to raise interest or penalty. In this context, the very often relied and applied authority in the matter of Jindal Stainless Ltd. v. State of Orissa and Others (2012) 54 VST 1 (Orissa) has laid down the principle above.

8. Here, the consequential effect of the order above on the subsequent period of assessment may be looked into. Once the tax liability is adjusted from out of the carry forward ITC, it will necessarily lead the parties to reopen the assessment of subsequent years since the carried forward of ITC in the hands of the dealer is necessarily going to be disturbed. So, for the sake of convenience, it is held that, the dealer is at liberty to pay the balance tax due as determined in the assessment without asking for adjustment of the same from out of the carried forward ITC so as to avoid the reopening of the assessments of subsequent periods.

With the observation hereinabove, it is hereby ordered.

ORDER

The appeal is allowed in part. The impugned order is modified to the extent that, the dealer is liable to pay the balance tax due, whereas, the interest and penalty as levied is deleted hereby. The demand be raised accordingly. The cross objection is disposed of accordingly.

Dictated & corrected by me,

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

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