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

S.A. No. 288(V) of 2017-18

(Arising out of the order of the ld. Addl. CST (Appeal), South Zone, Berhampur, in Appeal Case No. AA (VAT)-09/2016-17, disposed of on dtd.31.08.2017)

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

M/s. Subhalaxmi Agencies Pvt. Ltd.,
At:- Gopinath Sahi, Rajasunakhala,
Nayagarh. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2013 to 31.03.2015

For the Appellant ... Mr. B.N. Joshi, Advocate
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 03.07.2019 ******** Date of order: 10.07.2019

O R D E R

A confirming order of assessment u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) denying ITC to the dealer as per the claim is under challenge in this second appeal at the behest of the dealer. It is prayed to set aside the impugned order with the order of assessing authority as well and to delete the demand raised for mismatch of ITC between the selling dealer and purchasing dealer.

2. The assessee-dealer M/s. Subhalaxmi Agencies Pvt. Ltd., a registered TIN dealer was subjected to audit assessment u/s.42 of the OVAT Act on the basis of Audit Visit Report (in short, the AVR) covering a tax period from 01.04.2013 to 31.03.2015. In the assessment, the learned assessing officer found there was mismatch of ITC when the claim by the assessee-dealer is compared to output tax either shown or not shown by the selling dealers. The assessing authority has prepared a comparative chart, such as, a chart of the ITC claimed by the assessee-dealer as against purchases from different sellers against the output tax shown by those selling dealers and found that, in some cases the selling dealers have not shown output tax collected and in some cases the selling dealers has shown less tax collected from the assessee. Ultimately, the allowable ITC to the dealer was re-determined, the balance amount was raised as tax due upon which penalty as per sec.42(5) of the OVAT Act and interest was also imposed u/s.34(1) of the OVAT Act. The demand comprising tax, interest and penalty added together was calculated at Rs.20,433.00.

3. In appeal before the first appellate authority, the argument of the dealer was turned down and in the result the order of assessing authority became confirmed.

4. Being unsuccessful before both the fora below, the dealer has preferred this appeal. The main contention of the dealer is, both the fora below has denied the ITC claimed without following the due procedure. Since the selling dealers are registered dealers having TIN number, without inquiring into the fact of sale/purchase, the assessing authority has simply denied the ITC to which the assessee-dealer is entitled to. It is also contended that, penalty is not warranted in the circumstance when there is tax liability due to mismatch of the ITC figure only.

5. The appeal is heard with cross objection from the side of the Revenue. In the cross objection, Revenue has supported the findings of first appellate authority.

6. The question framed for decision in this appeal are,

(i) whether the first appellate authority is wrong in confirming the order of assessing authority by denying the ITC as claimed on the plea that, the selling dealer have not shown to have collected output tax or have collected less amount of output tax in comparison to the claim of the purchaser, the present assessee;

(ii) what order?

7. As mentioned above, the present case is evolves around the only the question i.e. whether the disallowance of ITC to the dealer by the authority below is lawful and binding. The allegations against the dealer is, the selling dealers either have not shown to have collected tax or they have shown collection of less amount of tax.

8. On perusal of the order of the assessing authority, it is found that, the dealer had produced original purchase invoices. It is for sake of brevity, the relevant portion of the order of assessing authority is reproduced below-

> "I have meticulously examined the purchases made by the dealer assessee. It is not controverted that the dealer assessee has claimed ITC by exhibiting all the purchases in his periodic return. On examination of the related purchase invoices it was seen that all the sellers were real and registered as VAT dealers assigned with TIN. The ITC ledger depicts that even if the assessee being a registered purchaser has disclosed the purchases; the corresponding sellers have not exhibited the sales and output tax collected against such sales in the periodic returns. Hence the net result is claim of excess input tax by the assessee and as per the provision of the O VAT Act the claim of ITC is restricted to the output tax shown by the dealer."

From above, there can be no dispute that the assessee-dealer has produced document in support of the claim of payment of tax to his selling dealer. The impugned is silent whether the purchase invoices

produced by the assessee-dealer are fake. No reason is given under what circumstance the original invoices are not believed.

9. With this backdrop of the case in hand, when you look into the authorities relied by the dealer such as, **Sri Vinayaga Agencies v. Asst. Commissioner (CT), Vadapalani-I, Assessment Circle, Chennai and another [2013] 60 VST 283 (Mad.)**, whereby 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."

10. 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.

Here, we can be benefited for the notification of CCT. The Notification No.1465/dtd.16.01.2016 came into force w.e.f. 01.10.2015. Sec.20(3)(3a) as inserted w.e.f. 01.10.2015 read as follows:-

> "Notwithstanding anything contained in this Act, no amount of input tax credit shall be allowed to a registered dealer on any purchase of goods in excess of the amount of such tax actually paid under the Act."

The above is indicative of the intention of the legislature to allow the dealer claim of ITC to the extent of tax it has paid to his selling dealer.

The burden of proof as envisaged u/s.95 of the OVAT Act and the provision inserted by the amendment above under sub section 3(a) in Sec.20 came into force w.e.f. 01.10.2015 are relatable to each other. So the legal obligation under law as per Sec.95 of the OVAT Act is not applicable to the case in hand. If that be, the findings of the FAA being lawful and being consonance to the authoritative pronouncements mentioned above, it can withstand in law. Here, it is held that, mismatch of ITC never can be a ground to disallow the ITC to the bona fide purchasing dealer acted in good faith. However, the fact remains, in the event it is found that, the selling dealer is a fake dealer where there is no question of collection and payment of output tax and in the event, it is nothing but a fact of commission of fraud there, the question of ITC cannot arise.

12. With the well settled principle discussed above, as laid down by the authorities, adverting to the case in hand, it is found that, there is no dispute that the dealer could furnish the original purchase invoices in support of payment of tax by him on purchase. So, for the fault of the

selling dealer, the present dealer should not be punished. Resultantly, it is held that, denial of ITC to the dealer as claimed is not based on fact and law, hence the impugned order is successfully interceptible.

13. In the result, it is or ordered.

14. The appeal is allowed on contest. The appellant-dealer is entitled to ITC as claimed, calculation of tax due, if any be made accordingly.

Dictated & corrected by me,

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

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