

**BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL:CUTTACK**

**S.A.No.67(V)/2017-18**

(Arising out of the order of the learned JCST, Puri Range,  
Puri in First Appeal Case No. 106111611000046,  
disposed of on 28.02.2017.)

**Present: Shri Subrat Mohanty**  
**Judicial Member-II**

**Shri P.C. Pathy**  
**Accounts Member-I**

M/s. Satyasai Enterprisers,  
Balagandi, Puri.

... Appellant.

**-Versus-**

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

... Respondent.

For the Appellant: : Mr. K. C. Sahu, Advocate

For the Respondent: : Mr. S. K. Pradhan, Addl. S.C. (C.T.).

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Date of Hearing: 09.05.2018

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Date of Order: 11.05.2018  
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**ORDER**

This second appeal has been filed against the impugned order of learned First Appellate Authority /Joint Commissioner of Sales Tax, Puri Range, Puri (in short, 'the Ld. FAA/JCST') passed in appal case no. 106111611000046 dated 28.02.2017 confirming the order dated 16.11.2011 raising demand of Rs.4,65,735.00 by the learned Sales Tax Officer/Assessing Authority, Puri Circle, Puri (in short, 'the Ld. STO/ AA') for the period from 01.04.2013 to 31.03.2015 under section 42 of the Odisha Value Added Tax Act, 2004 (in short, 'the OVAT Act').

2. The dealer-appellant in the instant case is engaged in trading of crokery, glass wares and plastic goods on retail basis. The assessment has been completed by the Ld. STO, Puri Circle, Puri basing on the points raised in the Audit Visit Report (AVR) on exparte due to non-cooperation of the dealer-appellant in participating in the hearing for assessment.

The Ld. STO has disallowed the claim of input tax credit reversal of ITC of Rs.793.00 in view of the damaged (unsalable) stock, purchase suppression to the tune of Rs.1,09,215.00 due to discrepancy in the value of stock held by the dealer as on 31.03.2015 with reference to the figures disclosed through periodical returns, purchase suppression due to non-reflection of goods purchased from M/s. Gopinath Trader to the tune of Rs.11,000.00 as revealed from the fact of payment as per the bank statement. Sale suppression has been arrived at Rs.1,22,321.00 and Rs.12,320.00 respectively by the Ld. STO for the aforesaid two allegations by adding 12% towards margin of profit . These apart, the Ld. STO has disallowed the claim of ITC to the tune of Rs.1,36,736.00 erroneously availed against purchases effected from 11 numbers of selling dealers during the relevant period due to the following reasons:- (i) The ITC claimed by the instant dealer is in excess of the output tax shown by the selling dealer (ii) the output tax shown by the selling dealer against the instant dealer is in excess of the ITC claimed by the instant dealer (iii) the instant dealer claims ITC but the selling dealer does not show output tax against the instant dealer (iv) the instant dealer claims ITC but the selling dealer has not filed return. Accordingly the assessment was completed resulting in demand of Rs.4,65,735.00 including penalty imposed under section 42(5) of the OVAT Act. This led the dealer to file appeal against the order of the Ld. STO before the Ld. JCST.

3. Being aggrieved with the order of the Ld. STO the instant dealer preferred first appeal before the Ld. JCST, Puri Range, Puri. The Ld. Advocate on behalf of the dealer vehemently disputed the impugned order of assessment as arbitrary, illegal and unsustainable and urged to accept the figures returned by the appellant. The Ld. Advocate on behalf of the dealer stated to have filed following grounds of appeal before the ld. JCST, Puri Range, Puri.

- (i) The order as passed by the Ld. STO, Puri Circle, Puri is not just and legal on the facts and in the circumstances of the case.
- (ii) The Ld. STO should have given sufficient opportunity before passing the order exparte.
- (iii) The Ld. STO should have considered that there is no stock discrepancy as shown by the dealer/appellant as on 31.03.2015.
- (iv) The Ld. STO should not have concluded on the wrong calculation of audit team regarding stock that there is a stock discrepancy of Rs. 1,09,215.00 as on 31.03.2015.
- (v) The average profit margin incurred is 5% and not 12%.
- (vi) The dealer/appellant has purchased goods for his personal use and has paid Rs.11,000.00 which should not have included in his turnover.
- (vii) The Ld. STO should have confronted the selling dealers who have sold goods to the dealer/appellant against tax invoice and not filling the returns or showing the less output tax and they should have given opportunity to revise their returns.
- (viii) The determination of GTO and TTO as made by the Ld. STO is illegal, baseless and arbitrary.
- (ix) The order is otherwise bad in law and liable to be quashed on the above grounds.

4. The Ld. JCST after carefully considering the grounds taken by the Ld. Advocate on behalf of the instant dealer and order passed by the Ld. STO has come to the conclusion that the order does not suffer from any infirmity. The assessment order passed by the Ld. STO narrates the reason of reversal of ITC of Rs. 793.00 under sub-section 8 of section 20 of the OVAT Act and any interference on this score is uncalled for. On account of non-incorporation of purchases, and inaction on the part of the instant dealer to reconcile the mismatch of input tax

credit before the Ld. JCST, the Ld. JCST has confirmed the order passed by the Ld. STO. This led the appellant to come in second appeal before this forum. The dealer-appellant assailed the order of the Ld. JCST on the following grounds:-

(a) For that the order as passed by the Ld. JCST, Puri Range, Puri on dt.28.02.2017 by confirming the assessment order is not just and legal on the facts and in the circumstances of case.

(b) For that the learned JCST should have considered that whatever purchases made by the dealer/appellant has duly entered in the purchase register and accordingly the return has been filed.

(c) For that the dealer/appellant should not be penalized for non-entering of sale invoices by the selling dealers in their sale register and shown in the annexure of VAT return.

(d) For that the learned Court below should have confronted those selling dealers who have not entered the sale invoices in their sale register.

(e) For that the dealer-appellant is no way default by entering the purchase invoices in his books of accounts.

(f) For that the order is otherwise bad in law and liable to be quashed on the above grounds.

5. The State has filed memo of cross objection contending therein that:-

(i) There is no reasonable merit in the second appeal filed by the instant dealer which is not sustainable in the eyes of law.

(ii) The Ld. STO as well as the Ld. JCST have rightly completed the assessment/appeal basing on the statutory provisions under the Act and Rules to the extent the dealer has raised the point.

(iii) It is a cardinal principle that burden of proof lies with the assessee for filing of return and availing ITC and ensure

that the tax collected from it is remitted as observed by the Hon'ble Court in the case of M/s. Packwell Industries.

- (iv) Similarly in the case of M/s. Mahalaxmi Cotton Ginning Vrs. State of Maharashtra, Hon'ble Court held that "set off" of ITC is to be allowed only if tax is actually paid by selling dealer to the Govt. Treasury. Reduction of output tax in the case of purchasing dealer amounts to remission of revenue which is conditional, when the tax invoice is there but without being backed by the seller's deposits. Allowing remission of revenue under the circumstances is not just and proper.
- (v) The order of the Ld. JCST is crystal clear with respect to the other points raised by the dealer. He has dealt each and every item which is self explanatory & requires no further interference.

6. Mr. K. C. Sahu, the Ld. Advocate appearing on behalf of the dealer-appellant vehemently challenged the order of the Ld. JCST in confirming the assessment order which is not just and legal on the facts and the circumstances of the case. He has reiterated the grounds of appeal filed before the Tribunal. He argued that the dealer should not be penalised for non-entering of sale invoices by the selling dealer in their sales register or to show the figures in the Annexure of VAT return. The instant dealer has duly entered the purchases made in the purchase register and filed returns accordingly. He further took the contention that the Ld. Forum below should have confronted selling dealers who have not entered the sale invoices in their sale register. The order of the Ld. JCST is bad in law and liable to be quashed. From the grounds of appeal filed by the Ld. Advocate before the Ld. JCST, Puri Range, Puri it has been agitated that the Ld. STO has not given sufficient opportunity before passing the order exparte, that there is no stock discrepancies as on 31.03.2015. The Ld. STO should have considered that there is no discrepancy as on 31.03.2015 to the tune of Rs. 1,02,915.00 as

estimated wrongly by the Audit Team. The Ld. STO should have confronted the selling dealer who have sold the goods to the instant dealer against tax invoices not filing the returns and showing the less output tax and they should have given opportunity to revise their returns. The determination of G.T.O. and T.T.O. made by the Ld. STO is illegal, baseless and arbitrary. The order is otherwise bad in law and liable to be quashed.

7. Mr. S. K. Pradhan, the Ld. Addl. Standing Counsel (C.T.) appearing on behalf of the State strongly contended that obligation is cast on the dealer to avail ITC in the cases where the selling dealer has already deposited the output tax collected through tax invoice into the government account. He further argued that the dealer has not participated in the process of hearing of the assessment and the Ld. JCST has already touched all points and confirmed the order of the Ld. STO as just and proper warranting no interference. The Ld. Addl. Standing Counsel (C.T.) also argued regarding disallowance of claim of ITC made by the Ld. STO and confirmed by the Ld. JCST as just and proper citing the cases of M/s. Packwell Industries and M/s. Mahalaxmi Cotton Ginning Vrs. State of Maharashtra.

8. Considered the rival contentions, the grounds of appeal, the orders of the Ld. JCST and the Ld. STO, the assessment record and the cross objections filed by the respondent-State. The order was passed by the Ld. STO on ex parte due to non-cooperation of the dealer-appellant. The order of the Ld. STO was confirmed by the Ld. JCST on the ground that the Ld. Advocate appearing on behalf of the dealer-appellant produced no documentary evidences with a view to reconcile the mismatch of ITC. The Ld. JCST has not discussed about the alleged purchase suppression of Rs.11,000.00 established by the Ld. STO and his observation that the non-incorporation of purchase involving Rs.1,09,215.00 in the books of accounts as well as in the periodic returns is a serious lapse on

the part of the instant dealer appears not to be a fact. It is observed that neither the Ld. STO nor the Ld. JCST have discussed the adverse points/issues stated in the AVR threadbare. In connection with purchase suppression established on the basis of which sale suppression has been estimated, it is found that the purchase suppression was arrived at by taking into consideration physical stock position and adoption of margin of profit for arriving at sale turnover through mark up exercise. There is no concrete evidence of suppression of purchase to the tune of Rs.1,09,215.00 as alleged in the AVR and accepted by the forum below. So far as the purchase suppression of Rs.11,000.00 is concerned, no enquiry was made to ascertain the goods involved either from the instant dealer or from the reported selling dealer on account of which payment was reflected on the bank statement. It was not clear as to whether the goods purchased has anything to do with the business of the dealer or the goods purchased for personal use by the instant dealer as the figure was reported on verification of payment reflected in the bank statement. Hence in both cases there is no reason to hold that the dealer is engaged in suppression of purchases of goods in absence of concrete materials/documentary evidence to the effect. The alleged purchase suppressions cannot be sustained as the same was based on guess work and assumption and without any concrete and valid evidence. So far as reversal of ITC Rs.793.00 is concerned it is considered just and proper as the same is in accordance with the provisions under the law. So far as claim of ITC by the dealer is more than the output tax disclosed by the selling dealer are concerned the same is just and proper for purchasing dealer is not entitled to claim more ITC than the output tax collected by the selling dealer by raising tax invoice for the goods sold. Availment of ITC by the purchasing dealer is sine qua non with the deposit of output tax by the selling dealer. It is not ascertainable from the orders of the fora below as to what is

the amount involved in cases where the instant dealer has claimed or availed more ITC than the output tax charged on the tax invoices issued by the selling dealer. However, in cases where the selling dealers are registered dealers and have collected output tax on the body of tax invoices inquiry is required to be conducted to ascertain from the concerned circle about filling of returns and payment of tax by the selling dealer for the transactions under dispute. On the above grounds it is evident that the fora below have not passed reasoned and speaking order and the Ld. STO has passed the assessment *exparte*. This forum consider it just and proper to interfere in the orders passed by the Ld. JCST. The issues concerning mismatch of ITC requires further enquiry to ascertain properly the non deposit of tax by the concerned selling dealers as it has been alleged that the selling dealers have not filed returns. However the dealer-appellant cannot be allowed to avail more ITC than the output tax disclosed by the selling dealers and the ITC availment should be limited to the output tax figures disclosed through return by the selling dealers. Accordingly the Ld. STO is directed to conduct necessary inquiry into the limited point of mismatch of ITC in the cases where the selling registered dealers have not filed returns thereby not paid the VAT due for the transactions against which the instant dealer claims ITC. In cases where it would be found that the selling dealers though collected output tax but has not filed return thereby not paid the tax due to government the matter ought to be reported to the concerned circles for taking necessary action against the erring selling dealers in accordance with the provisions under the law. The dealer-appellant cannot simply absolve itself from the duty of adducing sufficient evidences in support of its claim of ITC for availment of ITC, as a matter of fact, is dependent upon deposit of output tax by selling dealers with the government account.

9. In the result, the appeal is allowed in part. The order of the Ld. JCST is set aside and the case

is remanded to the Ld. STO for fresh adjudication extending reasonable opportunity of hearing to the dealer-appellant in accordance with law keeping in view our observations made above within a period of four months from the date of receipt of this order. The cross objections are disposed of accordingly.

Dictated & corrected by me,

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

**I agree,**

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

**Sd/-**  
**(Subrat Mohanty)**  
**Judicial Member-II**