

BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL:CUTTACK

S.A.No.128(V)/2015-16

(Arising out of the order of the learned DCST (Appeal), Sambalpur Range, Sambalpur in First Appeal Case No. AA 11/JSG/VAT/2014-15, disposed of on 19.01.2014)

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

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

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

... Appellant.

-Versus-

M/s. Nitin Marketing, Main Road,
Jharsuguda.

... Respondent.

For the Appellant: : Shri M. L. Agarwal. S.C. (C.T.)
For the Respondent: : Shri U. Behera, Advocate.

Date of Hearing: 31.05.2018

Date of Order: 08.06.2018

ORDER

This second appeal is filed against the order of learned First Appellate Authority/ Deputy Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur (in short, 'the ld. FAA/DCST') passed in first appeal case No. AA 11/JSG/VAT/2014-15, reducing the demand to 41,841.00 from Rs.2,97,579.00 raised by the learned Assessing Authority/ Sales Tax Officer, Jharsuguda Circle, Jharsuguda (in short, 'the ld. AA/STO') in his order passed on dtd.19.01.2014 for the period 01.04.2011 to 31.03.2013 under section 42 of the Odisha Value Added Tax Act, 2004 (in short, 'the OVAT Act').

2. The respondent in the instant case is engaged in resale of electrical goods like Bajaj CFL, Bajaj Bulb, Eurolex Ceiling fan, Havells CFL, Havells REO, Torch and Tube etc on retail basis. Both purchases and sales are effected within the State

of Odisha. The assessment order under the OVAT Act is passed basing on suggestions of Audit Visit Report (in short, AVR) submitted by the STO, (Audit) of Jharsuguda-I Circle, Jharsuguda. The dealer has effected purchase of goods to the tune of Rs.81,48,661.00 with payment of tax of Rs.9,22,759.00 and has effected sale of goods worth Rs.78,48,126.00 with collection of output tax to the tune of Rs.8,60,544.00. The AVR has observed physical stock discrepancy of two numbers of 85 watts CFL worth Rs.1200.00 and non-reversal of ITC to the tune of Rs.99,033.00 on receipt of credit note from M/s. Bajaj Electricals. The Id. STO observed that the dealer-respondent has reversed ITC to the tune of Rs.35,324.00 while filing of the periodical returns towards return of goods in case of M/s. Havells India ltd. However, no reversal has been made against credit notes received from M/s. Bajaj Electricals, Kharbelanagar, Bhubaneswar, TIN-21951106246 towards returns of goods for Rs.4,51,976.45 and Rs.1,93,955.00 for the period 2011-12 and 2012-13 respectively. Ld. STO while passing the order determined reversal of ITC as per section 23 of OVAT Act, 2004 at Rs.99,033.00. The Id. STO observed that the opening ITC as on 01.04.2011 stands at Rs.58,265.00, closing carried forward ITC stands at Rs.85,154.00 as on dated 31.03.2013 and determined ITC reversal for receipt of Credit Notes at Rs.1,34,357.00. Considering the figures, the net eligible ITC was determined at Rs.7,61,513.00 which were allowed as adjustment towards output tax collection by the dealer for Rs.8,60,706.00 and determined the differential tax payable at Rs.99,031.00 with imposition of penalty as per section 42(5) of the OVAT Act, 2004. Accordingly the assessment was resulted in demand of Rs.2,97,579.00 including penalty of Rs.1,98,386.00 U/s. 42(5) of the OVAT Act.

3. Being aggrieved with the order of assessment, the instant dealer preferred first appeal. The ld. FAA while disposing the appeal, accepted the purchase and sale transactions and also the quantum of reversal made by the ld. AA U/s. 23 of the OVAT Act, 2004. But while dealing with the opening and closing ITC as on 01.04.2011 and 31.03.2013 respectively, the ld. DCST failed to appreciate the fact of carried forward ITC as on 31.03.2013. On careful consideration the ld. FAA has reduced the demand from Rs. 2,97,579.00 to RS. 41,841.00. This led the Revenue to come in for second appeal.

4. Being aggrieved the State has filed the grounds of appeal as follows:-

The goods returned should be within stipulated period as prescribed under statute. Similarly the reversal of ITC if applicable should be made within that specified period not in the sweet will of the dealer or of the ld. FAA. Secondly, in the VAT regime no such regular or, successive assessment is there to track actually the reversal was there or not? Besides that for every period same assessing authority is not there to look after it. In other words, it can only be inferred that every assessment or, its period is an independent entity. The authority has no discretion to encroach the jurisdiction beyond/prior to his period of assessment. So the reversal of ITC on 01.04.2011 has no way concerned with the period of 01.04.2011 to 31.03.2013 because he had received credit note of Rs.4,51,976.45 for the year 2011-12 & Rs.1,93,955.00 for 2012-13. So how he had adjusted reversal of ITC pertaining to 2011-12 on the 1st day of 2011-12 i.e. on 01.04.2011. It appears to be after thought activities to reduce the demand because no one can foretell the exact amount of goods returned from the beginning of the year while it will occur in any part of the year. So

the reversal ITC on 01.04.2011 is definitely related to goods return pertaining to 2010-11 if you will adjust the same on 2011-12. Then the dealer is benefited twice from it as there is no such continuous & successive assessment. So it appears to be unjust enrichment on public money and likely to be quashed. The order of the ld. FAA may be set-aside & that of the STO may be restored.

5. At the time of hearing Shri M. L. Agarwala, the ld. Standing Counsel (C.T) appearing for Revenue reiterated the points taken in the grounds of appeal. He vehemently opposed to the findings of the ld. DCST that he has only allowed the opening ITC as on 01.04.2011 without making any deduction of ITC which was considered to be excess and carried forward to next tax period and has not explained the reason of taking differential rate of tax. He urged for restoration of order by the ld. STO.

6. Shri U. Behera, ld. Advocate appearing on behalf of the dealer-respondent took the contention that the ld. DCST has passed the appeal order which is just and proper and needs no interference. He brought to the notice of the Bench the order of the Hon'ble Supreme Court of India passed in case of M/s. Andhra Agencies Vrs. State of A.P. on 18.11.2008 in connection with issues involving credit notes. He has further taken the contention that the returned amount under the credit notes includes a part of the tax that was already collected since the tax collected was inseparable part of the sale consideration. However, he failed to adduce any cogent or valid evidence in support of his claim for allowance of credit notes. The dealer-respondent has not filed any cross objection.

7. Considered the rival contentions, grounds of appeal filed, the impugned orders of assessment and appeal, the records pertaining to the assessment and appeal and the judgment of the

Hon'ble Apex Court cited by the ld. Advocate on behalf of the dealer-respondent. The Ld. DCST has observed in the order that; "On examination of materials available on record and electrically printed materials produced by the appellant-dealer in course of hearing of appeal, it is revealed that as on 01.04.2011 the appellant-dealer had carried forward ITC of Rs.58,265.00. Further ITC of Rs.6,38,793.00 relating to purchase of 4 and 5% taxable goods and Rs.2,83,966.00 relating to 12.5 and 13.5% taxable goods totalling to Rs.9,81,024.00 including carried forward ITC of Rs.58,265.00". Though the net ITC including opening carried forward ITC of Rs.58,265.00 is arrived at Rs.9,81,024.00 and tallied with that determined by ld. AA, the ld. FAA has taken a different figure for tax rate wise quantum of ITC. The ld. FAA only allowed the opening ITC as on 01.04.2011 without making any deduction of ITC which has been considered to be excess ITC by the appellant and carried forward the same to next tax period for adjustment as per the order of assessment of the ld. AA, which needs further examination with reference to the return filed by the dealer-respondent.

In view of infirmity noticed in so far tax rate wise quantum of purchase and its corresponding ITC in the order of assessment passed by the ld. AA and as well as the first appeal order are concerned, this forum finds it proper to remand back the matter to the ld. AA to re-examine the turnover of purchase and sale, opening and closing ITC for the period covered under the impugned order and also the provisions envisaged in the Act for reversal of ITC for receipt of credit notes and accordingly dispose of the case. Due to non-production of evidence the contention taken by the ld. Advocate on behalf of the dealer-respondent merits no consideration. We, therefore, find considerable force in

submission of Shri M. L. Agarwal, Standing Counsel (C.T.) on behalf of the Revenue that the impugned order cannot be sustained in the eyes of Law and hence need to be interfered with. Therefore, we are inclined to interfere with the impugned order and set aside the same and remand the matter for fresh consideration by the ld. STO in the light of the observations made above.

8. In the result, the appeal is allowed. The impugned order is set aside and the matter is remanded to the ld. STO for de novo assessment accordingly within a period of four months from the date of receipt of this order.

Dictated and 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