

**BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL:
CUTTACK**

S.A. No. 197 (VAT) of 2018

(Arising out of order of the learned Addl. CST (Appeal), South Zone, Berhampur in Appeal No. AA (VAT)- 07/2017-18, disposed of on dated 20.06.2018)

Present: **Shri A.K. Das, Chairman**

M/s. Dash Enterprises,
Nehru Nagar, 7th Lane, Gosaninuagam,
Berhampur, Ganjam ... Appellant

-Versus-

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

For the Appellant : Sri R.P. Sahu, Advocate &
Sri K. Choudhury, Advocate
For the Respondent : Sri D. Behura, S.C. (CT)

Date of hearing: 25.07.2022 *** Date of order: 30.07.2022

O R D E R

The dealer-assessee has filed this second appeal challenging the order dated 20.06.2018 passed by the learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (hereinafter called as 'first appellate authority') in Appeal No. AA (VAT)- 07/2017-18 thereby confirming the order dated 22.02.2017 passed by the Deputy Commissioner of Sales Tax, Ganjam-I Circle,

Berhampur (in short, 'assessing authority') raising demand of ₹3,56,993.00 including penalty of ₹2,37,995.50 for the period 01.04.2013 to 31.03.2015 in the assessment framed u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act').

2. The facts relevant for adjudication of the present second appeal are that the dealer-assessee is engaged in purchase and sale of automobile parts and accessories, lubricants etc. on retail basis. During the material period, the dealer-assessee effected purchases from inside as well as outside the State of Odisha and it filed self assessed returns as per Section 33 of the OVAT Act on quarterly basis. Tax Audit in respect of the dealer-assessee was conducted on 19.01.2016 by the Audit Team headed by the Sales Tax Officer, Ganjam-I Circle, Berhampur pertaining to the tax period 01.04.2013 to 31.03.2015 as per the provisions contained u/s. 41 of the OVAT Act read with Rule 45 of the OVAT Rules, 2005 and after completion of the audit, the Audit Visit Report (AVR) in Form VAT- 303 was submitted under sub-rule (3) of Rule 45 of the OVAT Rules. In the AVR, the Audit Team outlined the following irregularities :-

- (i) ITC amounting to ₹8,73,125.77 should be disallowed as the selling dealer had not either shown or shown output tax collected from the purchasing dealer;
- (ii) Penalty of ₹16,700.00 should be imposed u/s. 34 of the OVAT Act for late filing of returns;
- (iii) Penalty of ₹2,600.00 should be imposed u/s. 65(2) of the OVAT Act for late submission of C.A. Audit Report; and
- (iv) Interest of ₹546.00 should be imposed u/s. 34(1) of the OVAT Act for delay in payment of admitted tax.

2(a). At the stage of assessment, the assessing authority found that the dealer-assessee could not furnish satisfactory compliance towards mismatch of ITC to the tune of ₹1,19,840.75 and accordingly, it disallowed such claim in accordance with Section 20(3)(a) of the OVAT Act read with Rule 11A of the OVAT Rules. Learned assessing authority also did not consider the explanation of the dealer-assessee for late filing of the return and submission of C.A. Audit Report and held the Audit Team to have taken appropriate action for levy of penalty and interest for such delayed filing of return. The assessing authority so observing, raised demand of ₹3,56,993.00.

2(b). The dealer-assessee being dissatisfied with the demand raised by the assessing authority, filed appeal

before the first appellate authority on the ground that the order of assessment was arbitrary and unjust; that the disallowance of ITC to the tune of ₹1,19,840.75 (₹1,04,805.32 for the year 2013-14 and ₹15,035.43 for the year 2014-15) on the ground that the seller has not uploaded returns properly was illegal and arbitrary; and that levy of penalty to the tune of ₹2,37,995.00 in the absence of any suppression of turnover is unwarranted. The first appellate authority considering the submission of the dealer-assessee and the materials on record, dismissed the appeal thereby confirming the order of assessment.

2(c). The dealer-assessee being further dissatisfied with the order of the first appellate authority has preferred the present second appeal mainly on the ground that the disallowance of the claim of ITC to the tune of ₹1,19,840.75 was illegal, arbitrary, unjust and against the sanction of law. No cross-objection has been filed by the State-respondent.

3. Learned Counsel for the dealer-assessee vehemently urged that the assessing authority as well as the first appellate authority committed serious illegality in refusing to provide the benefit of ITC to the dealer-appellant

on the ground of mismatch and amendment of Rule 11A of the OVAT Rules. He further contended that both the forums below were incorrect in their approach in giving retrospective effect to the amending Rule 11A of the OVAT Rules which is contrary to law laid down by the this Tribunal as well as by the Hon'ble High Court and Hon'ble Apex Court in different judicial pronouncements. When the assessing authority was satisfied with books of account of the appellant with regard to the dealing with the registered selling dealer- M/s. Lucas India Services Ltd., disallowing the claim of ITC basing on VATIS report without any enquiry by the assessing authority, which was upheld by the first appellate authority, is illegal, arbitrary and unsustainable in the eyes of law. The dealer-appellant cannot be punished by disallowing benefit of ITC only for the fault of the selling dealer, who did not mention such fact in the return filed by him. The demand raised by the assessing authority amounts to double taxation and the same is contrary to law. He submitted to set aside the orders of both the forums below and remand the matter back to the assessing authority to reassess the tax liability of the dealer-appellant keeping in view the tax invoices produced by him.

4. On the contrary, learned Standing Counsel (CT) appearing on behalf of the State supporting the impugned order argued that the claim of ITC was correctly disallowed by both the forums below on account of mismatch in the return filed by the purchasing dealer and the selling dealer as per the statutory provisions under the OVAT Act. The dealer-appellant failed to discharge the burden on him that the tax paid under the OVAT Act relates to the goods purchased by him and its part of the input tax. There is no illegality and impropriety in the impugned orders of both the forums below warranting interference of this authority. He submitted to dismiss the appeal and confirm the orders of the forums below.

5. I have heard the learned Counsel for the parties, gone through the grounds raised in memorandum of appeal vis-a-vis the impugned orders of the forums below and the materials on record. In view of rival contention of the parties, the only issue that emerges before me for consideration is whether the fora below were correct in their approach in disallowing the claim of ITC on the ground that an amount of ₹1,19,840.75 claimed by the dealer as ITC did not match with output tax deposited by the selling dealer as

revealed from VATIS? On perusal of the orders of the forums below, it is revealed that the assessing authority on verification of VATIS found the selling dealers to have not paid due tax amounting to ₹1,19,840.75 for the period under assessment on which ITC was claimed by the dealer-appellant and on failure to adduce necessary evidence before the assessing authority, the ITC so claimed was disallowed. In appeal, the learned first appellate authority observed that though the amended Rule 11A of the OVAT Rules is not applicable to the instant tax periods under assessment, the admissibility of ITC has been clearly prescribed under Section 20 read with Section 95 of the OVAT Act, wherein it is mandatory on the part of the dealer-appellant to produce necessary evidence and documents in support of its claim of ITC before the authority and that since the disallowance of ITC has been made on the basis of verification of tax payment by the selling dealer from VATIS, the appellant is obliged to produce necessary evidence as pointed out by the Audit Team and also the assessing authority with regard to such claim of ITC.

6. Before addressing on the above issue and examining the legality and propriety of this finding of the

forums below, it would be profitable to discuss some relevant facts and to take note of some relevant provisions governing the field. Tax Audit in respect of the dealer under section 41 of the OVAT Act read with Rule 45 of the OVAT Rules, 2005 was conducted on 19.01.2016 by an Audit Team headed by Sales Tax Officer, Ganjam-I Circle, Berhampur pertaining to the tax period 01.04.2013 to 31.03.2015. The Audit Team pointed out irregularities in claim of ITC to the tune of ₹8,73,125.77 apart from other irregularities as the selling dealer has shown collection of less output Tax and suggested for disallowing such claim of the dealer. The assessing authority on verification of documents produced by the dealer opined that ITC to the tune of ₹1,13,198.09 claimed by the dealer towards purchase of goods from some dealers remained unreconciled and disallowed the claim of the dealer-assessee towards ITC to the tune of ₹1,19,840.75 due to such mismatch. The appellate authority simply confirmed the order of the assessing Authority.

6(a). Section 2(25) of the OVAT Act defines 'Input' means any goods purchased by a dealer in the course of his business for resale or for use in the execution of works

contract, in processing or manufacturing, where, such goods directly goes into composition of finished products or packing of goods for sale, and includes consumables directly used in such processing or manufacturing. Section 2(26) of the OVAT Act defines 'Input tax' which means the tax collected and payable under this Act in respect of sale to him of any taxable goods for use in the course of the business. Section 2(27) of the OVAT Act defines 'Input tax credit' which means the setting off of the amount of input tax or part thereof under Section 20 against the output tax, by a registered dealer other than a registered dealer paying turnover tax under Section 16.

6(b). On a conjoint reading of these provisions, it becomes abundantly clear that a registered dealer under the OVAT Act shall be entitled to set off of the tax paid on purchase of goods effected by such dealer either for sale or for use in execution of works contract or for manufacturing, processing, against the output tax, i.e. the tax payable on the sale of any taxable goods.

6(c). There is no dispute at bar that the purchasing dealer is entitled to set off of tax paid on purchase of the goods effected either for resale or for use in

execution of works contract or for manufacturing or processing against the output tax. Section 2(27) of the OVAT Act specifically says about such set off of the input tax or part thereof against the output tax. The claim of the purchasing dealer for set off of ITC against the output tax cannot be disallowed only on the ground that the selling dealer did not mention such transaction in the return filed by him. The dealer-assessee cannot be allowed to suffer for the fault of the selling dealer in reflecting the transaction made between him and the purchasing dealer in the return filed by him. A bonafide purchasing dealer cannot be denied of his claim because of fault of the selling dealer over whom the former has no control. There are different provisions in the Act to collect tax from the defaulting dealer and punishing him. If the selling dealer defaults in filing the return truthfully reflecting all the transactions, he is to be punished in accordance with law. But for the mistake of the selling dealer, the purchasing dealer cannot be punished. In the instant case, both the forums below on examining the documents more particularly the purchase invoice produced by the dealer-appellant did not find any discrepancy or manipulation in the same. The assessing authority in page 5

of the order has categorically observed that dealer produced relevant purchase invoice in which no discrepancy was noticed. The first appellate authority neither disagreed with such finding of the assessing authority nor disbelieved the purchase invoice produced by the dealer. When purchase invoice shows payment of input tax, claim of ITC could not have been disallowed only on the ground of mismatch, which has been reiterated by this forum in number of cases. At this juncture, reference is made to the order dated 12.05.2021 passed by this forum in case of **M/s. Bharatia Distributors Pvt. Ltd. Vs. State of Orissa (S.A. No. 13 (VAT) of 2019 & S.A. No. 5 (ET) of 2019)** and order dated **10.07.2019 in case of Patil Rail Infrastructure Pvt. Ltd. Vs. State of Orissa (S.A. No. 286(V) of 2017-18)**. If the assessing authority had any doubt in his mind with regard to the claim of dealer towards ITC, it could have issued notice to the selling dealer to ascertain the genuineness of such claim. Both the forums below have disallowed the claim of ITC in a very whimsical and arbitrary manner. When a claim is made by the dealer-assessee, duty is cast on the assessing authority to examine the genuineness of such claim on the basis of the materials to be produced by the dealer

concerned and not to disallow such claim only for the fault of somebody else. The ground on which the forums below disallowed the claim of the dealer-appellant is untenable in the eye of law. This is a fit case where the matter is to be remitted back to the assessing authority who shall examine the genuineness of the tax invoices produced by the dealer-appellant for the material period and decide the claim of the latter (dealer-appellant) for set off of ITC against the output tax according to law.

7. In view of the discussions made above, the appeal filed by the dealer-appellant is allowed and the impugned orders of the forums below are hereby set aside. The matter is remitted back to the assessing authority for recomputation of tax liability keeping in view the observations made herein above within a period of three months from the date of receipt of this order.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman