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

S.A. No. 100 (V) of 2017-18

(Arising out of the order of the learned Addl. CST (Appeal), Odisha, Cuttack, in Appeal Case No. AA-106101610000164/2016-17, disposed of on dtd.15.05.2017)

P r e s e n t: Shri A.K. Panda,
1st Judicial Member

M/s. Trishul Automobiles,
At/P.O.- Duga Bazar, Jagatsinghpur,
Dist.- Jagatsinghpur. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. P.K. Jena, Advocate
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 26.06.2018 **** Date of order: 12.07.2018

O R D E R

This appeal is directed against the order dtd.15.05.2017 passed by the learned Addl. Commissioner of Sales Tax (Appeal), Odisha, Cuttack (hereinafter referred to as, the learned ACST) in Appeal Case No. AA-106101610000164/2016-17, wherein and whereby he has dismissed the first appeal by confirming the order of the learned Joint Commissioner of Sales Tax, Cuttack II Range, Cuttack (hereinafter referred to as, the learned JCST) passed in an assessment u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) in respect of the appellant-dealer for the assessment period from 01.04.2013 to 31.03.2015 raising a balance tax demand and penalty amounting to Rs.1,15,338.00.

2. The appellant-dealer is a trader of motorcycle and its spare parts and accessories and in course of business transaction it used to effect

purchase both from inside as well as from outside the State and used to sale the goods only inside the State. Basing upon an Audit Visit Report (in short, the AVR), the learned JCST initiated a proceeding u/s.42 of the OVAT Act against the appellant-dealer for its assessment for the assessment period from 01.04.2013 to 31.03.2015 and issued a notice to appear and to produce the books of account and in response to the notice, the appellant-dealer appeared and produced the books of account which were duly been examined in the light of the allegation of the AVR. On examination, the learned JCST found out that, the appellant-dealer has already paid due interest in compliance of the allegation relating to the delay filing of the returns for certain period. Similarly, as regard the allegation of the excess claim of ITC, he found out that, certain mismatch have been found out in the returns of the appellant-dealer and the returns of its selling dealers in view of the entry of the purchases by the appellant-dealer in the subsequent month of the purchase. However, on examination of the available materials in detail, the learned JCST considered this aspect and allowed the ITC in this regard. But, so far as the allegation relating to the claim of ITC amounting to Rs.38,447.00 is concerned, the learned JCST found out that, there is difference of the said amount between the claimed ITC and the payment of output tax by the selling dealers and as such he disallowed the ITC in this regard. The detail of the differences between the claimed ITC and the payment of output tax by the selling dealers as found out by the learned JCST are as follows:-

Sl. No.	Dealer name	TIN No.	ITC Claimed	Output Shown	Difference (B-A)	Remarks	Period
1	M/s. Pradip Automobiles	21033400026	7,039	0	- 7,039	ITC claimed, but output tax not shown by the dealer	2014-15
2	M/s. Sai Auto Agency	21062601263	2,616	0	- 2,616	- do -	2013-14
3	- do -	21062601263	2,093	0	- 2,093	- do -	2013-14
4	- do -	21062601263	1,368	0	- 1,368	- do -	2014-15
5	- do -	21062601263	2,736	0	- 2,736	- do -	2014-15
6	M/s. Arora	21631122524	16,405	16,274	- 131	Shown	2013-14

	Automobiles					less tax collected by seller.	
7	M/s. Vijaylaxmi Auto Spares	21664500581	22,464	0	- 22,464	ITC claimed, but output tax not shown by the dealer	2013-14
Total:			54,721	16,274	- 38,447	(2013-14&2014-15)	

Finally, on consideration of the entire transactions, the learned JCST determined the GTO and TTO at Rs.55,60,32,014.00 as shown by the appellant-dealer in its return and levied tax thereon @ 13.5% which came to be Rs.7,50,64,321.89. As against the claim of ITC advanced by the appellant-dealer, the learned JCST disallowed the same to the tune of Rs.38,447.00 and as such the tax payable by it came to be Rs.7,27,72,433.89. As the appellant-dealer had already paid tax to the tune of Rs.7,27,33,988.00, he raised the balance tax demand of Rs.38,446.00 and also imposed a penalty of Rs.76,892.00, equal to twice of the balance tax demand u/s.42(5) of the OVAT Act and as such both the balance tax demand and penalty came to be Rs.1,15,338.00 in total, to be paid by the appellant-dealer.

3. After the assessment, being aggrieved with the order of the learned JCST, the appellant-dealer preferred an appeal before the learned ACST bearing Appeal Case No. AA-106101610000164/2016-17. On hearing and on consideration of the materials available on record, the learned ACST did not accept the contention of the appellant-dealer that it is no way responsible for the non-payment of the output tax by the selling dealers and hence is entitled to avail the ITC on due purchases from the registered dealers on the strength of tax invoices and accordingly dismissed the appeal by confirming the order of the learned JCST. Thus, again being aggrieved with the order of the learned ACST, the appellant-dealer has preferred this second appeal.

4. Cross objection has been filed by the respondent-Revenue supporting the order of the learned ACST.

5. Heard both the sides. The learned Counsel appearing for the appellant-dealer submitted that, the appellant-dealer has purchased the goods in question from the registered dealers by obtaining valid tax invoices and as such the disallowance of ITC on the ground of non-payment of output tax by the selling dealers is not proper and justified. He further submitted that, the assessment relates to the period from 01.04.2013 to 31.03.2015 and by that time Sec.20(3)(a) of the OVAT Act was not in existence and the same has been inserted subsequently by the Orissa Value Added Tax (Amendment) Act, 2015 (Orissa Act 7 of 2015) (hereinafter referred to as, the Amendment Act) w.e.f. 01.10.2015 and hence the disallowance of ITC on purchase of the goods in question is not sustainable in the eye of law and as such the order passed by the learned ACST in this regard is liable to be set aside and the appeal preferred by the appellant-dealer is liable to be allowed. In support of his contention, he relied upon in the case of **Commissioner, Department of Trade and Taxes, Government of NCT v. S.K. Steel Traders (2017) 101 VST 172 (Delhi)**. On the other hand, the learned Standing Counsel appearing for the respondent-Revenue supported the order of the learned ACST and urged for dismissal of the appeal.

6. Perused the materials available on record including the orders of both the learned forums below. There is no dispute that the appellant-dealer has purchased certain goods from some of the registered dealers on due payment of tax and by obtaining tax invoices in token of the same. There is also no dispute that, on verification of the VATIS, the learned JCST found out that, the selling dealers have not shown the transactions in their returns and have also not paid due output tax relating to the goods in question. Thus, taking note of the statutory provisions and also taking note of certain case laws, the learned JCST has disallowed the claim of ITC amounting to Rs.38,446.00 as advanced by the appellant-dealer and the same has further been confirmed by the learned ACST at the first appeal stage.

7. To adjudicate the matter properly, here, it is beneficial to refer to the relevant provisions of the OVAT Act, which speaks as follows:-

"***20 Input tax credit. –***

(1) Subject to the provisions of this Act, for the purpose of calculating the net tax payable by a registered dealer for any tax period, an input tax credit as determined under this section shall be allowed to such registered dealer against the tax paid or payable in respect of all sales or purchases taxable under this Act, other than sales or purchases of goods specified in Schedule C and Schedule D.

(2) The input tax credit to which a registered dealer is entitled under sub-section (1) shall be the amount of tax paid by the registered dealer to the seller on his turnover of purchase of goods during the tax period, calculated, subject to the provisions contained in sub-sections (3), (4) and (5), in such manner as may be prescribed.

(3) Input tax credit shall be allowed for purchases made within the State from a registered dealer holding a valid certificate of registration in respect of goods intended for the purpose of –

(a) sale or resale by him in the State;

(b) use as inputs or as capital goods in the manufacturing of goods within the State, other than those specified in Schedule A and Schedule C and Schedule D for sale;

(c) sale of goods subject to levy of tax at zero rate under Section 18;

(d) for use as containers or material for packing of goods, other than those exempt from tax under this Act, for sale or resale; or

(e) transfer of stock of taxable goods other than by way of sale, to any place outside the State;

Provided that-

(a) the input tax credit on purchases intended for the purpose of clause (e) shall only be allowed in respect of the amount of tax paid or payable in excess of tax at the rate of four per centum;

(b) if goods purchased are used partially for the purposes specified in clause(e), input tax credit shall be allowed proportionately to the extent they are used for such purposes; and

(c) where a registered sells or despatches goods, both taxable and exempt under this Act, the input tax credit shall be allowed proportionately only in relation to the goods which are not so exempt.

(d) the input tax credit on purchase on purchase when sold in course of inter-State trade or commerce shall be allowed only to the extent of the Central sales tax payable under the Central Sales Tax Act, 1956 (74 of 1956).

(4) Notwithstanding anything contained in this section or elsewhere in this Act, and subject to conditions and restrictions and in such manner, as may be prescribed,

input tax credit may be allowed partially or in phased manner, in respect of such goods or such class of dealers or in such cases, as may be prescribed.

(5) xxx xxx xxx

(6) Input tax credit shall not be claimed by the dealer for any tax period until the dealer receives the tax invoice in original evidencing the amount of input tax:

Provided that for good and sufficient reasons to be recorded in writing, the Commissioner may, in the prescribed manner, allow such credit subject to such conditions and restrictions as may be specified in the order allowing the credit.

xxx xxx xxx"

8. On a bare reading of all these provisions, it is seen that, a registered dealer is entitled to avail input tax credit against the tax paid or payable in respect of all sales or purchases taxable under this Act and the same shall be allowed for purchases made within the State from a registered dealer holding a valid certificate of registration in respect of the goods intended for the purpose of sale or resale by him in the State. However, sub-section (8) of section 20 of the OVAT Act creates certain bar for claim of ITC by a registered dealer. But, the non-payment of the output tax by the selling dealer has never been considered to be a bar under this sub-section. Of course, subsequently section 3(a) was inserted in the OVAT Act by virtue of the Amendment Act which speaks of allowance of ITC to a registered dealer on purchase of goods in excess of the amount of such tax actually paid under this Act. But the said provision was given effect from 01.10.2015, whereas the present proceeding relates to the assessment period from 01.04.2013 to 31.03.2015. Therefore, insertion of Section 3(a) of the OVAT Act subsequently by virtue of the Amendment Act can never be considered to be a bar to allow ITC to the appellant-dealer on the ground of non-payment of output tax by the selling dealers. In the case of **Commissioner, Department of Trade and Taxes, Government of NCT v. S.K. Steel Traders (supra)**, relying upon its earlier case of **Shanti Kiran India Pvt. Ltd. v. Commissioner Trade & Tax Department [2013] 57 VST 405 (Delhi)**; the Hon'ble Delhi High Court has held that:-

> "… The negative list, as it were, is restrictive and is in the nature of a proviso. As a result, this court is of the opinion that the interpretation placed by the Tribunal that there is statutory authority for granting input-tax credit, only to the extent tax is

> deposited by the selling dealer, is unsound and contrary to the statute. It is also iniquitous because an onerous burden is placed on the purchasing dealer – in the absence of clear words to that effect in the statute-to keep a vigil over the amounts deposited by the selling dealer. The court does not see any provision or methodology by which the purchasing dealer can monitor the selling dealer's behaviour, vis-à-vis the latter's VAT returns. Indeed, section 28 stipulates confidentiality in such matters."

9. During course of argument, the learned Standing Counsel appearing for the respondent-Revenue advanced an alternate argument that allowance of ITC in a case of this nature will cause heavy loss of revenue. But, this argument advanced by the learned Standing Counsel bears no substance as because the respondent-Revenue is not remediless to recover the output tax from the selling dealers under the provisions of the OVAT Act. Further, on this ground a dealer cannot be deprived of his right granted by law. The respondent-Revenue has every right to collect tax and also to deny ITC to a dealer. But the same should be strictly within the four corners of the statute. Therefore, the alternate argument advanced by the learned Counsel is of no substance and as such needs no consideration.

10. In view of the aforesaid discussion, the order passed by both the learned forums below relating to the disallowance of ITC amounting to Rs.38,447.00 is not sustainable in the eye of law. As the balance tax demand and the consequential penalty imposed u/s.42(5) of the OVAT Act relates only to this aspect, the same is also found to be not sustainable in the eye of law.

11. In the result, the appeal is allowed. The order passed by both the learned forums below relating to disallowance of ITC amounting to Rs.38,447.00 is hereby set aside and consequently the tax demand and penalty were reduced to nil. The cross objection is disposed of accordingly.

Dictated & corrected by me,

Sd/-
(A.K. Panda)
1st Judicial Member

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