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

S.A. No. 33(V) of 2019
(Arising out of the order of the learned Addl.CST (Appeal), Central Zone, Odisha, Cuttack, in Appeal Case No. AA-106101810000065/18-19, disposed of on dtd.21.12.2018)

P r e s e n t: Shri A.K. Dalbehera, O.S.J.S.
M.A., LL.M.
1st Judicial Member

M/s. Utkal Sales,
Usha Lane, Meria Bazar,
Cuttack. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. B.C. Dash, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 20.05.2021 *** Date of order: 01.06.2021

O R D E R

This appeal is directed against the order dtd.21.12.2018 passed by the learned Addl. Commissioner of Sales Tax (Appeal), Central Zone, Odisha, Cuttack (hereinafter referred to as, the learned ACST) in Appeal Case No. AA-106101810000065/18-19, wherein he reduced the demand from Rs.3,20,724 to Rs.2,87,261.00 passed by the learned Joint Commissioner of Sales Tax, Cuttack I Range, Cuttack (hereinafter referred to as, the learned JCST) for the

assessment period 01.04.2013 to 30.09.2015 u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act).

2. The brief facts of the case are that, the appellant-dealer is engaged in trading of edible oil and vanaspati on wholesale as well as on retail basis. The appellant-dealer had branches outside the State and additional places of business at different places inside the State of Odisha. Proceeding u/s.42 of the OVAT Act was initiated by the learned JCST basing upon the Tax Audit Visit Report submitted by the DCST, Cuttack I City Circle. In response to the notice, the appellant-dealer along with its Advocate appeared in assessment and submitted the books of account for verification. It was pointed out by the audit in the Audit Visit Report (in short, the AVR) that on verification of purchase and sale invoices of the instant appellant-dealer for the aforesaid assessment period the sale price of Himani Best Choice Refines Oil of 15 kg. tin has been found less than the purchase price of the said commodity. The average purchase price of the item has been worked out by the audit team at Rs.924.00, whereas the corresponding sale price has been found at Rs.859.00 showing a difference of Rs.65.00 per one unit i.e. in one 15 kg. tin. So, the AVR had suggested for reversal of ITC on purchase of 15 kg. refined oil made during the month of September' 2014 and October' 2014. At the assessment, the appellant-dealer had produced purchase and sale registers along with purchase and sale invoices for the month of September' 2014 and October' 2014 for verification. After examination of accounts and invoices, the learned JCST

had observed that in no such case, the sale value was less than that of the purchase value. The learned JCST had referred a number of purchase invoices and sale invoices for the month of September' 2014 and October' 2014 for comparison of purchase and sale value of 15 kg. tin of refined oil. In each case of comparison, the sale value was found more than the purchase price as per the invoice. It was suggested in the AVR to disallow the ITC amounting to Rs.1,08,062.86 which the appellant-dealer had claimed on purchase of goods from M/s. Golden Valley Agrotech Pvt. Ltd. and M/s. Mother Dairy Food and Vegetable as the selling dealers did not upload the sale invoices in Col.57 of Form VAT-201. As per the AVR, the appellant-dealer had effected sale of damaged goods for Rs.11,08,930.47 at a discounted price against purchase value of Rs.11,26,455.21. But during filing of periodical returns, the appellant-dealer did not reverse the ITC on the differential purchase value of Rs.17,524.74. The learned JCST disallowed ITC amounting to Rs.876.24. So, the learned JCST determined the GTO at Rs.456,26,05,435.00 and TTO at Rs.434,53,38,510.00 after deducting the OVAT collected amount of Rs.21,72,66,925.00 from the GTO and taxed @ 5%. So, the output tax had been calculated at Rs.21,72,66,926.00. The appellant-dealer had been allowed adjustment towards ITC of Rs.20,86,40,158.00 and payment of tax for Rs.85,19,859.00 out of the tax liability and demand had been raised for the balance amount of Rs.1,06,908.00. The learned JCST also imposed two times penalty of Rs.2,13,816.00 u/s.42(5) of the OVAT Act. Thus tax and penalty altogether came to Rs.3,20,724.00.

3. Being aggrieved by the order of the learned JCST, the appellant-dealer preferred an appeal before the learned ACST who reduced the demand to Rs.2,87,261.00. Being further aggrieved by the order of the learned ACST, the appellant-dealer has preferred the second appeal.

4. The appellant-dealer has come up with this second appeal on the grounds that the impugned order is illegal, arbitrary and bad in law; that the only dispute is regarding disallowance of ITC claim of Rs.82,064.72 against purchase from M/s. Mother Dairy Food and Vegetable Pvt. Ltd. which has shown collection of VAT at Rs.91,428.01 in the returns filed by it and due to the mismatch the differential amount of Rs.82,064.72 has been disallowed; that this fact was brought to the notice of the learned ACST at the time of hearing of the appeal and a clarification letter from M/s. Mother Dairy Fruit and Vegetable Pvt. Ltd. was produced confirming the collection of VAT amount of Rs.1,73,492.61 and deposit into Govt. exchequer but the same was not considered by the learned ACST which is illegal and arbitrary; that when the selling dealer M/s. Mother Dairy Fruit and Vegetable Pvt. Ltd. has issued sale bills showing collection of VAT and the purchaser i.e. the present appellant has posted all the purchase invoices in its books of account and availed Rs.1,73,462.61 as ITC duly confirmed by the selling dealer, rejection of claim due to computer mismatch is illegal and arbitrary; that for the factual mistake of the selling dealer in filing the returns, the purchasing dealer cannot be penalised by disallowing the ITC claim; that for no fault of the appellant-dealer, disallowance of claim of ITC amounting to Rs.82,064.72 is illegal, arbitrary

which is liable to be deleted and that when the appellant-dealer has reflected all the purchases and sales transactions effected from M/s. Mother Dairy Fruit and Vegetable Pvt. Ltd., levy of penalty u/s. 42(5) of the OVAT Act is illegal and arbitrary.

5. Heard the learned Counsel for the appellant-dealer and the learned Addl. Standing Counsel appearing for the Revenue. Perused the materials available on record including the orders of both the fora below. I also perused the grounds of appeal and the plea taken in the cross objection. From the rival contentions and submissions of both the parties the following question is raised:-

> Whether the learned ACST has committed wrong in denying the ITC due to mismatch of figure between the selling dealer and purchasing dealer ?

6. From the appeal record it is evident that the appellant-dealer had submitted a letter issued by M/s. Mother Dairy Fruit and Vegetable Pvt. Ltd. but the same has not been taken into consideration by the learned ACST. As per the said letter M/s. Mother Dairy Fruit and Vegetable Pvt. Ltd. had sold goods to the appellant-dealer amounting to Rs.36,43,372.00 in which VAT amounting to Rs.1,73,492.61 was collected and the said VAT amount has already been deposited in Govt. Exchequer. So far as mismatch of ITC and disallowance of ITC thereon is concerned, it can be said that the impugned order is a non-reasoned one. The learned ACST disallowed the ITC due to the reason of mismatch but has not elaborately discussed as to who was at fault and how this mismatch was

calculated. The learned ACST in his order in para-7 held as follows:-

> "Again, the dealer has purchased goods from M/s. Mother Dairy Fruit and Vegetable Pvt. Ltd. For Rs.36,43,372.60 which includes VAT of Rs.1,73,692.61. The said selling dealer has shown collection of VAT for Rs.91,428.01 in his return against the sales to the instant dealer. In view of the above, ITC has been considered for disallowance to the tune of Rs.82,064.72. The dealer appellant did not submit any further evidence regarding ITC mismatch of Rs.82,064.72 against M/s. Mother Dairy Fruit and Vegetable Pvt. Ltd. in this forum. So, ITC of Rs.82,064.72 has been disallowed."

From the aforesaid observation of the learned ACST is seen that the learned ACST did not bother to notice the selling dealer to ascertain about the mismatch of ITC although a letter issued by M/s. Mother Dairy Fruit and Vegetable Pvt. Ltd. is available on record as narrated supra. Thus, the impugned order is a mechanical one and the learned ACST did not bother to apply his mind to the grounds of appeal. Thus, it can be said that the findings of the learned ACST is not proper in the eye of law. It is apt to mention here that as per the settled position of law, in the event of mismatch of ITC figure the purchasing dealer should not be denied to avail ITC for the fault of selling dealer in depositing the output tax in his return.

7. The claim of the dealer-appellant was denied by the assessing authority. It is to be remembered that due to the fault of the selling dealer, the assessee-dealer should not suffer. The authority has also to rely upon the documents produced before him in support of the claim that the assessee-

dealer has paid tax to the selling dealer (if any) if the documents are found genuine.

The claim of ITC can only be set off from the output tax under the OVAT Act and no set off can be allowed otherwise. The allowance of set of ITC is conditional in nature as per the provisions of the Act. The amount of set off of ITC is only from the output tax under the Act and there is no independent right to a set off. The entitlement to a set off is created by the taxing statute and the terms on which a set off is granted by the legislation must be strictly observed. In view of such discussion I rely on the decision of our own Hon'ble High Court as reported in **(2012) 56 VST 68 (Orissa) in the case of National Aluminium Company Ltd. v. Dy. Commissioner of Commercial Taxes, Bhubaneswar III Circle, Khurda**, where the Hon'ble Court have highlighted about the set off as follows-

> "Input" has been defined in Section 2(25) to mean that 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) defines "input tax" to mean tax collected and payable under this Act in respect of sale to a registered dealer of any taxable goods for use in the course of his business, but does not include tax collected on the sale of goods made to a

commission agent purchasing such goods on behalf of such dealer. "Input-tax credit" as defined under Section 2(27) of the OVAT Act 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.

On a conjoint reading of Section 2(25), Section 2(26) and Section 2(27) of the OVAT Act, it is amply clear that a registered dealer under the OVAT Act shall be entitled to set off the tax paid on the purchase of goods effected by such dealer either for resale or for use in execution of works contract or for manufacture and processing against the output tax, that is the tax payable on sale of any taxable goods."

8. It is the settled principle of law that no ITC can be allowed on billing, bogus transactions and when genuineness of the transactions are doubtful. The onus for claim of ITC is on the dealer-purchaser to be proved beyond reasonable doubt. In **Commissioner of Customs (Import), Mumbai v. M/s. Dilip Kumar and Co. (2018) 9 SCC 1** the Hon'ble Apex Court held that exemption has to be strictly construed and to be proved by the person who claims the same to avail the benefit.

A bonafide purchasing dealer cannot be denied his claim because of the intentional default of the selling dealer over whom the purchasing dealer has no control. The taxing authority may also as per law collect tax from the defaulting dealer and punish him, but it is to be seen whether the selling

dealer is a registered dealer or not. If the purchasing dealer has shown 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 by not depositing the tax collected under the law.

9. It is held that mismatch of ITC can never be a ground to disallow ITC to a bonafide purchasing dealer who has acted in good faith. But 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, in that event it is nothing but a commission of fraud and the question of ITC shall not arise. Hence this is a fit case where the matter should be remitted back for a limited purpose of enquiry into the identity of the selling dealer and to determine the legitimacy of the claim of ITC. As regards the question of imposition of penalty it is the mandate of the provision u/s.42 of the OVAT Act that in case of wrong claim of ITC or erroneous claim of ITC, the dealer can be assessed u/s.42(3) or 42(4) of the OVAT Act. Further, Sec.42(5) of the OVAT Act speaks of penalty as a mandatory consequence in case the dealer is found liable to pay tax in an assessment u/s.42(3) or 42(4) of the OVAT Act. Thus when there is an assessment u/s.42 of the OVAT Act and there is a wrong claim of ITC, then penalty can be imposed in that case. However, in the case in hand, the question of penalty will arise only when it is found that the claim of the dealer for the admissible ITC is found wrong.

10. Recently this Tribunal in its order vide S.A. No.138(VAT) of 2018, disposed of on dtd.16.03.2021 in the

case of M/s. Seetal Automobiles vs. State of Odisha held as follows:

> "Section 20 of the Act deals with ITC. In fact, sub-section (3) thereof provides that ITC 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 sale or resale inside the State and under other contingencies stated therein. Sub-section (6) of Section 20 specifies that ITC shall not be claimed by a dealer for any tax period, until it receives tax invoice in original evidencing the amount of input tax. It is also provided in sub-Section (7) thereof that a dealer who intends to claim ITC shall, for the purpose of determining the amount of ITC, maintain accounts and such other records as may be prescribed in respect of the purchases and sales effected and stock held. The circumstances under which ITC shall not be claimed stand clearly enumerated in sub-Section (8) of Section 20 of the Act. From the above, it is clear and conspicuous that there is no any statutory obligation on the part of a buying dealer not to avail ITC unless the selling dealer deposited the entry tax in the Government exchequer. In fact, the Tribunal (FB) in its order dated 15.09.2020 supra, by referring to a decision of the 6 Hon'ble Delhi High Court in the case of Commissioner, Department of Trade and Taxes, Government of NCT Vs. S.K. Steel Traders reported in (2017) 101 VST 172 (Delhi) held that ITC cannot be disallowed or for that matter, rejected on the ground that the selling dealer had not deposited the entry tax. In said decision of the Hon'ble Delhi High Court, it has been held and observed that statutory authority granting ITC only to the extent of tax deposited by the selling dealer is an interpretation which is unsound and contrary to law and it is also iniquitous, since an onerous burden is placed on purchasing dealer to keep a vigil over the amounts deposited by the selling dealer, that too when, there is absence of any clear intendment in

> the statute. It is also held therein that in the event the selling dealer fails to deposit the tax after being collected from a purchasing dealer, the only remedy would be to proceed against the defaulter and not to reject ITC in favour of the purchasing dealer, who is otherwise entitled to it. In so far as Section 95 of the Act is concerned, no doubt burden always lies on the dealer, who claims ITC, which can be discharged on production of invoices for having purchases made. In other words, once invoices are produced by a dealer showing payment of entry tax, the burden of proof, as envisaged under Section 95 of the Act, stands satisfactorily discharged for the purpose of availing ITC which cannot, by any stretch of imagination, be disallowed for the selling dealer's default in depositing the tax."

11. The learned Counsel for the appellant-dealer submitted that the present appellant cannot be subject to double taxation. This Tribunal in the case of M/s. Seetal Automobiles Vrs. State of Odisha (narrated supra) also held that if a tax is paid by a dealer and again it is demanded, it would certainly result in collection of tax twice which is not at all comprehended in law and any such demand shall definitely be in flagrant violation of Article 265 of the Constitution of India, 1950. In the said case the Tribunal also held that the dealer-assessee said to have submitted the invoices with regard to the purchases made from the selling dealer and then availed ITC and in the considered view of the Tribunal, the authorities below grossly erred in disallowing it on the plea that there was no evidence about the selling dealer to have deposited the same.

12. From the aforesaid discussion it is clear that it is a fit case where the matter should be remitted back to the

learned JCST for determination of tax liability of the appellant-dealer. The selling dealer in question should be summoned and the appellant-dealer has to prove the genuineness of his purchase according to Sec.20 read with Sec.95 of the OVAT Act for claim of ITC in the light of the analysis made in the foregoing paragraphs. Accordingly, it is ordered.

13. The appeal is allowed to the extent indicated above and the impugned order is hereby set aside. The matter is remanded to the learned JCST to ascertain the genuineness of the claim of the appellant-dealer and to pass a fresh order of assessment on consideration of the entire observations made above. The selling dealer should be noticed to ascertain the genuineness of the claim of the appellant-dealer. The appellant-dealer is directed to appear before the learned JCST sou motu. The fresh assessment has to be completed within three months from the date of receipt of this order. The cross objection is disposed of accordingly.

Dictated & corrected by me,

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

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(A.K. Dalbehera)
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