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

S.A. No. 3(V) of 2018
(Arising out of the order of the ld. JCST, Puri Range, Puri, in First Appeal Case No.AA-106111711000030, disposed of on dtd.31.10.2017)

P r e s e n t: **Shri S. Mohanty,**
1st Judicial Member

M/s. Niranjan Sahoo,
At:- Damodarpur, P.O.-Birapratappur,
Dist.- Puri. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2013 to 31.03.2015

For the Appellant ... Mr. R.K. Mohapatra, Advocate
For the Respondent ... Mr. M.L. Agarwal, .S.C.

Date of hearing: 28.06.2019 ******** Date of order: 29.06.2019

O R D E R

In the appeal before first appellate authority when the pleas of the dealer could not succeed but the tax liability became reduced to some extent on recalculation, the dealer felt aggrieved challenged the impugned order of the first appellate authority by way of this second appeal with a prayer to delete the tax liability raised.

2. The assessee-dealer M/s. Niranjan Sahoo a registered TIN dealer engaged in purchase and sale of cement, iron bars, rods, A.C. sheets and hardware goods had faced audit assessment u/s.42 of the Orissa Sales Tax Act, 2004 (hereinafter referred to as, the OVAT Act) on the basis of Audit Visit Report (in short, the AVR) covering the tax period from

01.04.2013 to 31.03.2015. The allegations against the dealer as per the AVR are purchase suppression leading to sale suppression, wrong claim of ITC on damage stock and excess claim of ITC due to mismatch of the output tax shown by the selling dealer and input tax claimed by the assessee-dealer. The assessing authority on due verification of the books of account and connected documents, on confrontation of the AVR to the dealer, then on due consideration of the dealer's explanation found the allegation of suppression as brought in by the audit team is true and established. So far as wrong claim of ITC on damage goods, it is also found that, the dealer is not eligible to ITC on the damaged goods as per Sec.20(8)(f) of the OVAT Act and thirdly, it is found that, the dealer has advanced wrong claim of ITC since there was mismatch between the output tax shown by the selling dealer in comparison to input tax claimed by the assessee-dealer. It is found that, selling dealer has not shown output tax collected, there was a dealer whose registration was already cancelled and another dealer who had not filed return. Ultimately, the assessing authority determined the GTO and TTO including the suppression, then calculated the tax liability denying the ITC claimed on damaged goods and the amount of ITC mismatch. The balance VAT payable by the dealer determined at Rs.8,09,040.00. Besides tax, penalty of Rs.16,18,080.00 was imposed invoking provision u/s.42(5) of the OVAT Act, interest of Rs.397.00 was also levied u/s.34(2) of the said Act for delay filing of return. So, the demand raised against the dealer in total was at Rs.24,27,517.00.

3. Being aggrieved with the assessment and demand raised as mentioned above, the dealer carried the matter before first appellate authority who in turn confirmed the findings of the assessing authority but on re-determination, the tax liability became reduced as the tax already paid by the dealer was adjusted from the tax assessed and then on the balance amount of tax due penalty was imposed. So, the total liability towards tax and penalty became reduced to Rs.2,07,196.00.

4. On this backdrop, the dealer being aggrieved with the order of first appellate authority preferred this appeal challenging the sustainability

of the impugned order. The main contention of the dealer is, the original assessment order was an exparte order, so as the dealer was not provided with the proper opportunity of being heard, the order of assessment is not maintainable. The suppression detected by the authorities below for non-submission of purchase invoices of some items is wrong as the dealer could furnish the purchase invoices subsequently before the first appellate authority. The damaged stock kept in the business premises not yet sold should have taken consideration by the authorities below and the ITC should not have reversed. The findings of the mismatch of ITC and disallowance of the ITC claimed is not properly appreciated by the fora below as the fora below have not made any endeavor to summon the selling dealers to ascertain the genuineness of the transactions.

5. The appeal is heard with cross objection. In the cross objection Revenue has supported the order of assessing authority setting the dealer exparte on the ground that, since the assessment was to be completed within a stipulated period in one hand and on the other, for non-appearance of the dealer in spite of receipt of notice, the order of exparte was rightly passed. The disallowance of ITC on the damaged stock as per Sec.20(8)(f) of the OVAT Act is lawful. The burden of proof as per Sec.95 of the OVAT Act is on the dealer to adduce evidence regarding claim of the ITC. The purchase suppression detected and determined by the fora below is, for non-production of purchase invoices is rightly determined, hence the impugned order calls for no interference.

6. From the rival contentions, the questions struck for decision in this appeal are,

(i) whether the first appellate authority is correct in confirming the order of assessing authority determining the suppression for non-production of the purchase bills worth of Rs.15,400.00;

(ii) whether the first appellate authority was wrong in confirming the order of assessing authority by denying the ITC of Rs.1,485.00 on the damaged stock amounting to Rs.11,000.00;

(iii) whether the first appellate authority was wrong in disallowing the ITC amount of Rs.8,05,425.00 due to mismatch on account of non-filing of return, non-payment of output tax and canceled registration of the selling dealers.

7. At the outset, the first question raised by the dealer that, proper opportunity of being heard was not provided by the assessing authority is taken up. The assessment order was an exparte order but, as the dealer had preferred appeal before the first appellate authority against the exparte order which is an extended forum of assessment, they are the first appellate authority has taken consideration of all the pleas and explanations advanced by the dealer before him, then it never can be said that, proper opportunity of being heard was not provided to the dealer. Once an exparte order is challenged in appeal and appeal is decided then, there is no question of setting aside the exparte order. Hence, the plea of the dealer is not tenable in the eye of law.

So far as the question of suppression as determined by by both the fora below, it only can be said that, the fora bellow have held that, the dealer could not produce the purchase bills.

Learned Counsel for the dealer argued that, there was no scope for the dealer to produce the purchase bills before the assessing authority as it was an exparte order but before the first appellate authority they had produced the purchase bills. Though it is claimed that, they had produced the purchase bills but in the hearing they failed to appreciate the plea by supporting evidence. The determination of suppression on the basis of AVR by both the fora below is a subjective satisfaction on due scrutiny of the documents and registers. So, necessarily it calls for no interference by this second appellate authority unless rebuttal evidence. However, if the dealer is able to produce the original purchases invoices, the authorities below can reconsider the facts on due scrutiny to determine the suppression.

As regards the reversal of ITC on damaged stock, the relevant provisions on this questions are sec.20(8)(f) and sec.20(9)(b) of the OVAT Act, both the provisions are reproduced herein below-

Sec.20(8)(f) of the OVAT Act:-

> "(f) in respect of goods purchased on payment of tax, if such goods are not sold because of any theft, damage and destruction;"

Sec.20(9)(b) of the OVAT Act:-

> "(b) are lost due to theft, damage or for any other reason, or"

The provisions above mandates in case of loss due to theft and damage caused to the goods, the dealer is not entitled to the ITC. The provisions u/s.20(8) starts from the term 'no' which implies there was no liberal interpretation be attributed to the provision. Hence, it can safely be said that, the finding of both the fora below regarding reversal of ITC on damaged stock is in accordance to law which calls for no interference.

8. So far as the claim of mismatch of ITC, the findings of both the fora below as it revealed, in some cases the selling dealers had not filed return, in some cases the selling dealer has not shown collection of output tax and in one case the selling dealer is not registered dealer or his registration is already cancelled.

9. In ***Commissioner of Trade & Taxes, Delhi and others Vs. Arise India Limited and others[TS-2-SC-2018-VAT],*** the Hon'ble Apex Court in SLP before it upheld the view of the Hon'ble High Court that, Sec.9(2)(g) of the Delhi VAT Act to the extent it disallows input tax credit to purchaser due to the default o the selling dealer in depositing tax, as violative of Article 14, 19(1)(g) of the Constitution of India.

Treating both, the guilty purchaser and the innocent purchaser at par is violative of the Article 14 of the Constitution. A bona fide purchaser cannot be denied because of the intentional or intentional default of the selling dealer over whom the purchasing dealer has no control. The taxing authority is not handicapped under law to collect tax from the defaulting dealer and punish the defaulting dealer also. It is only to be seen that, the selling dealer is a registered dealer or not. Once the purchasing dealer has demonstrated 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. The selling dealer ought to have deposited the tax collected under the law.

In the matter of **Shanti Kiran India Pvt. Ltd. v. Commissioner of Trade Tax Department, 2013 (2) TM 180** which was later on confirmed by the Hon'ble Supreme Court it is observed that, it is not the dealer's liability to see whether the tax was deposited by the taxing authority or not.

Here, we can be benefited for the notification of CCT. The Notification No.1465/dtd.16.01.2016 came into force w.e.f. 01.10.2015. Sec.20(3)(3a) as inserted w.e.f. 01.10.2015 read as follows:-

> "Notwithstanding anything contained in this Act, no amount of input tax credit shall be allowed to a registered dealer on any purchase of goods in excess of the amount of such tax actually paid under the Act."

The above is indicative of the intention of the legislature to allow the dealer claim of ITC to the extent of tax it has paid to his selling dealer.

The burden of proof as envisaged u/s.95 of the OVAT Act and the provision inserted by the amendment above under sub section 3(a) in Sec.20 came into force w.e.f. 01.10.2015 are relatable to each other. So the legal obligation under law as per Sec.95 of the OVAT Act is not applicable to the case in hand. If that be, the findings of the FAA being lawful and being consonance to the authoritative pronouncements mentioned above, it can withstand in law. Here, it is held that, mismatch of ITC never can be a ground to disallow the ITC to the bona fide purchasing dealer acted in good faith. However, the fact remains, 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 and in the event, it is nothing but a fact of commission of fraud there, the question of ITC cannot arise.

Keeping in mind the principle above, adverting to the case in hand, it is believed that this is a fit case where the matter should be remitted back to the assessing authority for proper enquiry into the

genuineness of the transactions. It is made clear that, in any case, for the fault of selling dealer, the assessee-dealer cannot be held liable.

In the result, it is ordered.

10. The appeal is allowed in part. The impugned order is set aside to the extent of disallowance of ITC on mismatch and determination of suppression. The assessing authority will do well to re-determine these two points and calculate the tax liability of the dealer in the remand assessment as per the observation hereinabove.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

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