BEFORE THE DIVISION BENCH-II: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A.No.405 (V) of 2016-17

(Arising out of the order of the learned Addl. CST (Appeal), South Zone, Berhampur, in Appeal Case No.AA (VAT) 11/2015-16, disposed of on dtd.23.11.2016)

P r e s e n t: Shri A.K. Panda, 1st Judicial Member & Shri R.K. Pattnaik, Accounts Member-III

M/s. Airplaza Retail Holding Pvt. Ltd.,
At:- Plot No.7, W.M. Building,
Unit-II, Ashok Nagar,
Bhubaneswar. ... 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.K. Pattnaik, Advocate
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 27.06.2018 **** Date of order: 18.07.2018

O R D E R

This appeal is directed against the order dated 23.11.2016 passed by the learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (hereinafter referred to as, the learned ACST) in Appeal Case No. AA (VAT) 11/2015-16, wherein and whereby, he has allowed the first appeal in part by reducing the tax demand and penalty to Rs.8,00,775.00 from Rs.8,26,957.00 raised against the appellant-dealer by the learned Deputy Commissioner of Sales Tax, Bhubaneswar II Circle, Bhubaneswar (hereinafter referred to as, the learned DCST) in an assessment u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) for the assessment period from 01.04.2011 to 31.03.2013.

2. The appellant-dealer is a trader of grocery items, readymade garments, footwear, sarees, FMCG products, electronic items, glass wares, crockery items, cosmetics, plastic goods and soft drinks. Basing upon an Audit Visit Report (in short, the AVR), the learned DCST initiated a proceeding u/s.42 of the OVAT Act against the appellant-dealer for its assessment for the assessment period from 01.04.2011 to 31.03.2013 and issued a notice to appear and to produce the books of account and in response to the notice, the authorized representative of 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 DCST found out that, though the appellant-dealer has claimed ITC amounting to Rs.3,95,87,053.71 during the assessment period in question, an amount of Rs.1,53,479.10 relates to purchase from the dealers whose R.C. has been cancelled and an amount of Rs.60,270.65 relates to purchase from the dealers who have not filed their returns. Similarly, the learned DCST also found out that, though the appellant-dealer has supplied free gifts to the customers amounting to Rs.5,42,568.00 through offers on special occasions from the goods purchased inside the State, it has not reversed the ITC towards purchase of those goods. On confrontation, as the authorized representative of the appellant-dealer failed to clarify all these allegations leveled in the AVR, the learned DCST accepted the same as true and genuine on examination of the materials available on record and accordingly disallowed the claim of ITC in these respects. On consideration of all the transactions he determined the GTO at Rs.1,41,74,23,220.25 and after allowing proper deductions, determined the TTO at Rs.1,29,59,28,131.82 and levied tax @ 4%, 5% and 13.5% on different transactions which came to be Rs.9,02,01,866.70. Then, after allowing the admissible ITC amounting to Rs.3,93,11,402.29 and after considering the payment of tax amounting to Rs.5,06,14,812.00 made earlier, he raised the balance tax demand of Rs.2,75,652.41. Then, he also imposed a penalty of Rs.5,51,304.82, 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.8,26,957.00 in total, to be paid by the appellant-dealer.

3. After the assessment, being aggrieved with the order of the learned DCST, the appellant-dealer preferred an appeal before the learned ACST bearing Appeal Case No. AA (VAT) 11/2015-16. On hearing and on examination of the materials available on record, the learned ACST found out that, the appellant-dealer has purchased goods prior to the cancellation of R.C. of some dealers and as such he allowed the ITC relating to such purchases. But, at the same time, he did not accept any other contention of the appellant-dealer and finally his order resulted in reduction of the balance tax demand and penalty to Rs.8,00,775.00 from Rs.8,26,957.00 as raised earlier by the learned DCST. But, still 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 also submitted that, the assessment relates to the period from 01.04.2013 to 31.03.2015 and by that time sub-section (3a) of Sec.20 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. He further submitted that, by the time of the purchase of goods, the R.C.s of the selling dealers were valid and the same has properly been verified by it and as such the disallowance of ITC by the learned forums below on the ground of cancellation of the R.C.s of the selling dealers prior to the purchase of goods is not proper and hence the

appeal preferred by the appellant-dealer is liable to be allowed. In support of his contention, he relied upon in the case of **Damson Technologies Pvt. Ltd. v. commissioner of Trade & Taxes, Delhi and another** passed by the Hon'ble Delhi High Court in **W.P.(C) No.6583/2016 & CM No.26973/2016**. 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. In support of their respective contentions, both the parties have filed their written submissions.

6. Perused the materials available on record including the orders of both the learned forums below. So far as the reversal of ITC amounting to Rs.5,42,568.00 relating to supply of gift items to the customers from the purchase goods is concerned, the appellant-dealer has not disputed the same. Thus, the first dispute relates to the disallowance of ITC amounting to Rs.60,270.65 on the ground of non-payment of output tax by the selling dealers. In this regard, it is seen 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, the learned DCST 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 DCST has disallowed the claim of ITC amounting to Rs.60,270.65 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 sub-section (3a) of Sec.20 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 **Damson Technologies Pvt. Ltd. v. commissioner of Trade & Taxes, Delhi and another**; **W.P.(C) No.6583/2016 & CM No.26973/2016,** the Hon'ble Delhi High Court has held that:

"The result of such reading down would be that the Department is precluded from invoking Section 9(2)(g) of the

DVAT to deny ITC to a purchasing dealer who has *bona fide* entered into a purchase transaction with a registered selling dealer who has issued a tax invoice reflecting the TIN number. In the event that the selling dealer has failed to deposit the tax collected by him from the purchasing dealer, the remedy for the Department would be to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC. Where, however, the Department is able to come across material to show that the purchasing dealer and the selling dealer acted in collusion then the Department can proceed under Section 40A of the DVAT Act."

9. Further, in the case of **Commissioner, Department of Trade and Taxes, Government of NCT v. S.K. Steel Traders (2017) 101 VST 172 (Delhi)**, 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. In view of the aforesaid discussion, the order passed by both the learned forums below relating to the disallowance of ITC amounting to Rs.60,270.65 is not sustainable in the eye of law and as such the same is required to be rectified.

10. Another dispute relates to the disallowance of ITC for certain amount which relates to purchase of goods from the dealers whose R.C.s has

been cancelled. In this regard, the appellant-dealer has taken the stand that, by the time of the purchase of goods, the R.C.s of the selling dealers were valid and the same has properly been verified by it. As per the provisions of law, a purchasing dealer is entitled to avail ITC on purchase of goods from a registered dealer on due payment of tax. Though, the appellant-dealer has produced the documents showing that the R.C.s of some of the selling dealers were valid by the time of purchase of goods by it, the same needs a proper verification by the learned assessing authority before passing an appropriate order in that regard.

11. In view of the discussion made above, the appeal is allowed to the extent indicated above. The order passed by the learned forums below is hereby set aside. The matter is remanded to the learned DCST to ascertain the genuineness of the claim of the appellant-dealer relating to the validity of the R.C.s of the selling dealers by the time of purchase of goods by it and to pass a fresh order of assessment on consideration of the entire observations made herein. There is no necessity of issuance of any further notice to the appellant-dealer by the learned DCST. The appellant-dealer is directed to appear before the learned DCST *suo motu* within two months of receipt of this order to receive further instruction from him. The learned DCST is further directed to complete the proceeding within a very reasonable period. The cross objection is disposed of accordingly.

Dictated & corrected by me,

Sd/-
1st Judicial Member,
Odisha Sales Tax Tribunal.

Sd/-
1st Judicial Member,
Odisha Sales Tax Tribunal.

I agree,

Sd/-
Accounts Member-III,
Odisha Sales Tax Tribunal.