

BEFORE THE ODISHA SALES TAX TRIBUNAL (FULL BENCH), CUTTACK
S.A.No. 38(V)/2008-09

(Arising out of order of the Id. ACST, Cuttack-II Range, Cuttack, in
First Appeal Case No. AA/02/VAT/CUII/2006-07,
disposed of on dtd.20.02.2008)

&

S.A.No. 42(V)/2008-09

(Arising out of order of the Id.ACST, Cuttack-II Range, Cuttack, in
First Appeal Case No. AA/02/VAT/CUII/2006-07,
disposed of on dtd.20.02.2008)

P R E S E N T :

Sri Sashikanta Mishra
Chairman

Sri S. Mohanty &
2nd Judicial Member

Sri R.K. Pattnaik
Accounts Member-III

S.A.No. 38(V)/2008-09

M/s. Shiva Mettaliks Pvt. Ltd.,
Suniamuhan, Mancheswar,
Dist. Cuttack.

..... Appellant

-Versus -

State of Orissa, represented by the
Commissioner of Sales Tax,
Orissa, Cuttack

... Respondent

S.A.No. 42(V)/2008-09

State of Orissa, represented by the
Commissioner of Sales Tax,
Orissa, Cuttack

... Appellant

-Versus -

M/s. Shiva Mettaliks Pvt. Ltd.,
Suniamuhan, Mancheswar,
Dist. Cuttack.

..... Respondent

Appearance :

For the Dealer ... Mr. B.B. Panda, Advocate

For the State ... Mr. S.K. Pradhan, Addl. Standing Counsel (C.T.)

Date of Hearing: 17.05.2018

Date of Order: 22.05.2018

ORDER

Both the second appeals above have arisen out of one order of the
First Appellate Authority, hence, they are taken up together for sake of
convenience.

Second Appeal No. 38(V)/2008-09 is preferred by the dealer, whereas Second Appeal No.42(V)/2008-09 is preferred by the State.

2. The facts giving rise to these appeals are : the assessee-dealer M/s. Shiva Metalicks Pvt. Ltd. (renamed as “Virajaa Steel & Power Private Limited”), undertakes manufacturing and sale of sponge iron. It was subjected to audit assessment u/s.42(4) of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act) for the tax period 01.04.2005 to 31.12.2005 basing on the Audit Visit Report (AVR) submitted by the Audit team conducted as per Sec.41 of the OVAT Act. The Audit team reported about purchase suppression leading to sale suppression and wrong claim of ITC treating the Coal and Dolomite as inputs in the manufacturing process by the dealer. The AO on due confrontation of the AVR and in consideration of the books of account of the dealer, arrived at a conclusion that, the dealer was guilty of escapement of turnover and also guilty of wrong claim of ITC. It accepted the report of the Audit team that, on the date of visit, there was discrepancy of goods worth Rs.14,56,623/-. Thereafter, he enhanced the suppression by 10 times. On the other hand, the AO also accepted the suggestion of the Audit team that, the Coal and Dolomite purchased by the dealer should not be treated as input as per Sec.2(25) of the OVAT Act and accordingly denied the claim of the ITC by the dealer on purchase of these goods. The Audit assessment was resulted in demand of tax liability of Rs.5,98,517.88. Penalty to the tune of twice the same as per Sec.42(5) of the OVAT Act was added and thereby the total demand was raised at Rs.17,95,554/-.

3. Being dissatisfied with the assessment and tax demand, the dealer preferred First Appeal bearing No. AA/02/VAT/CUII/2006-07. Learned First Appellate Authority/Asst. Commissioner of Sales Tax, Cuttack-II Range, Cuttack (in short, ACST) as FAA re-visiting into the allegations in the AVR, documents of the dealer including the books of account and in consideration of the argument advanced by the dealer held that, the enhancement of suppressed turnover by 10 times as determined

by the FAA was excessive. Accordingly, he reduced it to 2 times. However, he did not interfere with the findings of the AO regarding the claim of ITC on Coal and Dolomite. As a result, the tax due became reduced to Rs.3,97,286/-.

4. Being aggrieved with the order of FAA above, State has preferred Second Appeal No. 42(V)/2008-09 with the contention that, the FAA has gone wrong by reducing the enhancement to 2 times and prayed for restoration of the enhancement as determined by the AA. On the contrary, the dealer has preferred Second Appeal No. 38(V)/2008-09 with the grounds that, enhancement of 2 times is also excessive and without basis. So it should be deleted. It is further contended that, the Coal and Dolomite used by the dealer as raw materials in the process of manufacturing. So the dealer has a bona-fide claim of ITC against purchase of these goods. Accordingly, the dealer has prayed for deletion of enhancement and tax thereupon and for allowance of ITC on the goods like Coal and Dolomite treating it as raw materials.

5. The following questions are framed for decision keeping in view the rival contentions in the appeal and cross-appeal by both the sides like (i) Whether the FAA was wrong in reducing the enhancement of the escapement turnover? (ii) Whether the FAA should have dropped the charge of suppression keeping in view the wrong method of measurement like eye estimation. (iii) Whether the FAA was wrong in not allowing the ITC on Coal and Dolomite ?

6. When we consider question No.1 and 2, it is found that, the Audit team had visited the dealer's unit on 06.12.2005. The Audit team had prepared a chart showing discrepancy in physical stock as per book balance and value of the goods (reflected in the assessment order). Drawing attention of this forum to the chart, learned Counsel for the dealer argued that, the physical stock in round figure as taken by the Audit team indicates that, they had not made actual measurement but had made eye-estimation only and on this score, the suppression should be deleted. Conversely,

learned Addl. Standing Counsel, Mr. Pradhan argued that, the Audit team on due physical verification and confrontation of the chart to the dealer has determined the suppression. So it cannot be said that, it is unfounded.

Admittedly, the dealer has challenged the eye estimation method before the AA as well as the FAA. But the fact remains, the dealer had not challenged the same before the Audit team while giving his statement. On the other hand, when there is an eye estimation, then it is always probable that the measurement must be in round figure. It is only when there is exact measurement, then only the exact weight in unit can be determined. So, the argument by the learned Counsel for the dealer seems unreasonable. Learned Counsel further argued that, when the measurement is on eye estimation and when there is every possibility of wrong calculation or wrong judgment, then it should be reduced to the figure, which is suggested in the AVR. The assessment order as it reveals, taking into consideration of the AVR, the AO enhanced the suppression by 10 times, whereas the FAA by giving reason elaborately arrived at a conclusion that, the enhancement must be confined to 2 times. Both the authorities below have the jurisdiction for assessment. The findings on fact by the FAA, which is based on volume of the transaction of the dealer and in consideration of the allegation of books of account and assessment by the AO, is found to be more credible, reasonable and reliable. There is no reason before us to depart from the findings of the FAA without any basis or without any supporting evidence, which were admittedly not considered by the FAA. In absence of any new evidence before us, the findings on fact by the FAA in the case in hand, is undesirable. Hence, we are constrained to accept the determination of suppression as calculated by the FAA in the impugned order to be just and proper in the case in hand.

7. Coming to the next question raised by the dealer i.e. the Coal and Dolomite it should be treated as raw materials incorporated in the process of manufacturing and to that effect, the dealer is entitled to claim ITC. Learned Counsel for the dealer argued that, for the self-same tax period

there was another proceeding u/s.43 of the OVAT Act, which was carried by the dealer upto the Hon'ble Court in W.P. (C) No. 11735/2009. The Hon'ble Court had remanded the matter to the AO for re-determination of the question i.e. whether the Coal and Dolomite used by the dealer should be treated as input or not ? Sec.2(25) of the OVAT Act says, when a goods can be termed as "Input". The dealer's argument like the Hon'ble Court view in **M/s. Bhusan Power and Steel Ltd. Vrs. State of Orissa (2012) 56 VST 50 (Ori)** like, Coal and Dolomite are to be treated as raw materials in the production of sponge iron for the manufacturing of steel product is factually incorrect. The Hon'ble Court has held that, for the purpose of manufacturing, raw materials has ultimately to get a new identity by virtue of manufacturing process either of its own or in consumption with raw materials. Therefore, the Coal and Dolomite are not a raw material and any product i.e. sponge iron. Reverting to the case at hand, it is found that, in W.P.(C) No. 11735/2009 vide it's Order dtd.18.08.2009, the Hon'ble Court has remanded the matter to the AO with a direction to assess afresh in the light of decisions rendered in **M/s. Reliance Industrial Limited Vrs. Assistant Commissioner of Sales Tax and Others** reported in **2008 (Supp.1) OLR-1101** and in the case of **M/s. Paradeep Phosphates Ltd. Vrs. State of Orissa & Others** (W.P. (C) No.3613 of 2007).

8. Consistency is the rule in taxation law. Once it is the order of the Hon'ble Court to decide the question whether the Coal and Dolomite to be treated as "input" for the same tax period for the same dealer, then we have no option but to abide by the direction of the Hon'ble Court for determination of the same question in the same manner. Hence, we are of the view that, the question relating to claim of ITC on Coal and Dolomite should be kept open and the matter should be remanded to the AA for determination of this question in accordance with the findings given in the proceeding u/s.43 of the OVAT Act in the remand assessment case of the dealer.

With the findings above, it is hereby ordered.

The appeal preferred by the dealer is allowed in part, whereas the appeal preferred by the State is dismissed as of no merit. The suppression determined by FAA is contained. The matter is remanded back to the AA for determination of the question if the Coal and Dolomite used by the dealer should be treated as input and if the dealer is entitled to ITC on purchase of such goods in accordance with the determination of the same question in the proceeding u/s.43 of the OVAT Act on the direction of the Hon'ble Court.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

Sd/-
(S. Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Sashikanta Mishra)
Chairman

I agree,

Sd/-
(R.K. Pattnaik)
Accounts Member-III