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

S.A. No. 16(V) of 2018

(From the order of the ld. Addl. CST (Appeal), Odisha, Cuttack, in Appeal Case No. AA-125(V)/JCST/CUII/2010-11, dtd.26.07.2017)

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

M/s. Navin Agro Industries,
At/P.O.- New Industrial Estate,
Jagatpur, Dist.- Cuttack. ... Appellant

- V e r s u s -

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

For the assessment period: 01.03.2008 to 31.03.2009

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

Date of hearing: 27.08.2019 ******** Date of order: 28.08.2019

O R D E R

Challenge is the confirming order of assessment u/s.42(4) of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) relating assessee M/s. Navin Agro Industries in this second appeal u/s.78 of the OVAT Act at the instance of assessee.

2. The assessee-dealer as appellant questioned the sustainability of the impugned order on the following grounds:-

(i) The order of denial/reversal of ITC proportionate to the amount of by-product husk produced in the manufacturing of main product dal is illegal.

(ii) The assessment order is unsustainable since the Audit Visit Report (in short, the AVR) was not submitted within the period of seven days as per sec.41(4) of the OVAT Act read with Rule 45(3) of the OVAT Rules and the assessment was not completed six months as per sec.42(6) of the OVAT Act.

(iii) The imposition of penalty as per sec.42(5) of the OVAT Act in the case in hand is not sustainable as the dealer is not guilty of any suppression.

3. The facts relevant for the purpose of this second appeal are:- the assessee-dealer faced audit assessment u/s.42(4) of the OVAT Act on the basis of AVR containing allegations of erroneous claim of ITC. As per audit report, the dealer had effected tax exempted sale of by-product husk of Rs.17,91,338.00 but has not reduced the claim of ITC proportionately to the extent of said tax free sale. The assessing authority accepted the report of vigilance wing and denied ITC to the tune of Rs.22,176.07 as a result the dealer was asked to pay tax of Rs.22,117.47, penalty of Rs.44,234.94 totaling the demand at Rs.66,352.00.

As against the assessment, the dealer knocked the door of the first appellate authority but his ill luck the first appellate authority reiterating the view of the assessing authority confirmed the demand, hence this second appeal by the dealer.

4. The appeal is heard with Cross Objection from the side of the Revenue contending therein the impugned order as just and proper.

5. At the outset it is pertinent to mention here that, in the final hearing the dealer only pressed following questions for determination:-

(i) whether the first appellate authority has committed wrong by reducing the ITC proportionate to the sale of tax free goods like husk?

(ii) whether the penalty imposed in this case is not tenable in law?

Findings

6. The dealer is a manufacturer of Dal. In the process of manufacturing of dal out of pulses, he also produce by-product like husk. The husk is sold as tax free item as comes under entry Sl. No.3 of Schedule-A of the Rate Chart. When the dealer claimed entire amount of ITC accrued to him on purchase of pulses from out of the VAT, he collected on sale of dal, the taxing authority reduced the ITC by the amount proportionate to the sale of tax free item, husk. The dealer's plea is, husk is an unwanted but inhabitable by-product in the manufacturing of dal. So, the dealer should not be denied full amount of ITC accrued to him from out of the VAT collected on sale of main product, dal.

Both the authorities decided this question in negative to the dealer.

7. Learned Counsel for the dealer when placed reliance in the matter of one decision of this Tribunal, Single Bench in S.A. No.143(V) of 2015-16 dtd.25.07.2017, the Standing Counsel on the other hand placed reliance in the matter of State of Karnataka v. M.K. Agro Pack Pvt. Ltd. (2018) 52 GSTR 218 (SC) and in the matter of Jai Bhawani Oil & Flour Mill v. Union of India (2009) 14 SCC 63.

8. At the outset, it is pertinent to mention here that, there was an advance ruling by this Tribunal in A.R.A. No.13 & 14 of 2013 deciding this question in favour of the Revenue that, in case of sale of bi-product which are exempted from tax the input tax credit should be proportionately reduced. The order in A.R.A. was challenged before the Hon'ble Court in STREV No.13 & 14 of 2013. The Hon'ble Court had stayed the operation of advance ruling vide its order dtd.30.07.2013 but both the STREVs are disposed of on 01.05.2010 with liberty to the petitioner to revive this revision within thirty days. In consequence thereof, the stay order became infructuous.

Resultantly, it can safely be said that, the advance ruling became reinforced.

8.(a) Section 78A(6) reads as follows:-

> "The advance ruling so pronounced by the advance ruling authority shall have effect on other dealers situated in similar in facts and circumstance of any case."

The provision above mandates, when there is an advance ruling by this Tribunal it has got binding effect on all the dealers of the State having identical issue. Therefore, consequent upon the dismissal of STREV before the Hon'ble Court it can definitely be said that, the taxing authority is obliged under law to apply Rule 12 read with Rule 11 for determination of ITC admissible to the dealer as held in the advance ruling by this Tribunal in all similar cases. Undoubtedly the present one is of a case of similar nature.

8.(b) However, at the same time it is made clear that, any decision of the Hon'ble Court, in the event of revival of the STREV, the direction or order of the Hon'ble Court will necessarily have binding effect on all cases including present one.

9. For shake of brevity while delving into the question on merit, learned Standing Counsel, Mr. Agarwal placed reliance on the reported decision in **State of Karnataka Vrs. – M.K. Agro Pack Pvt. Ltd. (2018) 52 GSTR 218 (SC)**, which is squarely applicable to the case in hand. At Para-31 of the reported judgment his lordships has held as follows:

> "Fourthly, the entire scheme of the KVAT Act is to be kept in mind and section 17 is to be applied in that context. Sunflower oil cake is subject to input tax. The Legislature, however, has incorporated the provision, in the form of section 10, to give tax credit in respect of such goods which are used as inputs/raw materials for manufacturing other goods. Rationale behind the same is simple. When the finished product, after manufacture, is

> sold, VAT would be again payable thereon. This VAT is payable on the price at which such goods are sold, costing whereof is done keeping in view the expenses involved in the manufacture of such goods *plus* the profits which the manufacturer intends to earn. Insofar as costing is concerned, element of expenses incurred on raw material would be included. In this manner, when the final product is sold and the VAT paid, component of raw material would be included again. Keeping in view this objective, the Legislature has intended to give tax credit to some extent. However, how much tax credit is to be given and under what circumstances, is the domain of the Legislature and the courts are not to tinker with the same. This proposition is authoritatively determined by this court in series of judgments."

9.(a) While receiving at the conclusion above, the Apex Court has taken note of the decisions by the same Court in **Godrej & Boyce Mfg. Co Pvt. Ltd. v. Commissioner of Sales Tax (192) 87 STC 186 (SC)** and in **Hotel Balaji v. State of Andhra Pradesh and Jayram & Co. v. Assistant Commissioner, (2016) 96 VST 1 (SC).**

9.(b) Rules are the subservient to the Section. When section is unambiguous, then it must be followed scrupulously as it has been engrafted in the tax book and should be applied as it has been intended by the legislature. If that be, a harmonious reading of the statutory provisions mentioned above and giving regard to the authoritative pronouncement by the Apex Court in the **State of Karnataka Vrs. – M.K. Agro Pack Pvt. Ltd. (2018) 52 GSTR 218 (SC)**, the irresistible conclusion is, when it relates to sale of taxable goods and exempted goods, the calculation of ITC should be made in accordance to Rule 11(1)(4) of the OVAT Rules.

10. To put the dispute in other way it can be said that, the deciding factor for denial of ITC on the goods which are exempted

from tax produced in the manufacturing process is to be treated as finished, distinct, marketable goods or not ?

Learned Standing Counsel, Mr. Agarwal placed reliance in the matter of Jai Bhawani Oil & Flour Mill v. Union of India (2009) 14 SCC 63, in which their Lordships have held that,

> "The true test to ascertain whether a process is a manufacturing process producing a new and distinct article is whether the article produced is regarded in the trade, by those who deal in it, as a marketable product distinct in identity from the commodity/raw material involved in the manufacture. There can therefore be no doubt that when mustard seeds are subjected to the process of extraction whereby mustard oil as also the manufacture of oilcake. Oilcake is a distinct and different entity from mustard seeds and it has a separate name, character and use different entity from mustard seeds and it has a separate name, character and use different from mustard seed. Oilcake is not a waste to be thrown away, but a valuable product with a distinct name, character, use and marketability. There can thus be no doubt that the oilcake was finished goods eligible or transport subsidy, until it was specifically excluded by the Central Government in the year 1997. The respondents are directed to verify and release the subsidy amount due to the appellant in regard to oilcake exported out of the State."

11. It is, when we look into the rate chart of the VAT at entry Sl. No.3 of Part-I of the schedule has included husk in the category of wheat and groundnut including husk i.e. w.e.f. 01.07.2005. So for relevant entry it can be definitely said that, husk is a distinct product. Because it is distinct and marketable goods, particularly when the dealer has sold the same by the name called husk in the market and it is purchased accordingly, the ratio laid down in of Jai Bhagwan Oil & Flour Mill (supra) above can also successfully applied to the present case.

12. From the discussion above, taking cue from the authorities discussed hereinabove and as per the statutory obligations u/s.78A(6) of the OVAT Act, the irresistible conclusion is, the dealer, knowing fully well about the compulsory, inevitable production of bi-

product like Husk in the manufacturing of Dal has entered into business. 'Husk' is a distinct marketable goods, it should be treated as a finished goods for the purpose of trade and commerce. Therefore, when it is exempted from tax on sale, the input tax of the dealer should be proportionately reduced as per Rule 12(3) of the OVAT Rules read with Sec.20(3) proviso (c) of the OVAT Act. The mode of calculation should be **P X Q/R** method as per Rule 11(1) of the OVAT Rules.

13. Coming to the question of penalty u/s.42(5) of the OVAT Act, argument of the dealer is there is no allegation of suppression of turnover. The disputed question is still in a fluid stage as different authorities have taken views on both way regarding admissibility of ITC in the event of sale tax free goods. So, looking at the bonafideness of the dealer, penalty is not warranted in this case.

Erroneous claim of ITC included in sec.42(1) of the OVAT Act to conduct audit assessment, penalty is the necessary consequence of tax liability if determined in the audit assessment. Hence there is no scope to hold that because there is no allegation of suppression, so penalty is not attracted u/s.42(5) of the OVAT Act. More to say, imposition of penalty in case of wrong claim of ITC is held time and again by this Tribunal, so the argument is not conceivable.

14. The next plunk of argument advanced by the learned Counsel for the dealer is, the provision u/s.42(5) of the OVAT Act has undergone change w.e.f. 01.10.2015. The provision as prevalent w.e.f. 01.10.2015 says, in case of penalty, it should be calculated at an amount equal to the amount of tax assessed under sub-section 3 or sub-section (4). The assessment before first appellate authority was done vide order dtd.26.07.2017. As such, by the date, the assessment order passed, the provision under law changed to penalty at one time of the tax assessed. The argument of the Revenue through learned Standing Counsel is, the audit visit conducted prior to the date 01.10.2015 should be guided by the provision as it was before the

amended provision effective from 01.10.2015. So, the dealer is liable to pay penalty at two times.

15. Well settled principle is, the rule of beneficial construction requires, ex-post facto law should be applied to reduce the rigorous sentence of the previous law on the same subject. Such a law is not affected by Article 20(1). The principle is based upon the legal maxim *"Salus Populi Est Suprema Lex"* which means the *"welfare of the people is the supreme for the law"*. It is inspired by principles of justice, equity and good conscience.

It is held by authorities that, even ex-post facto law of such a type should be applied to mitigate the rigour of the law. This principle is based both on sound reason and common sense. "A retrospective statute is different from an ex-post facto statute". Reliance is placed in the matter of **Smt. Dayawati v. Inderjit, AIR 1966 SC 1423 PARA 10.**

15.(a) The First Appellate Authority is an extended forum of assessment. In the present case, by the date of order of first appellate authority, there was omission of the word "twice" from the section u/s.42(5) of the OVAT Act. It is not the case of repeal of the entire provision but a word of the provision relating to quantum of penalty is omitted and in its place a reduced amount towards quantum of punishment is inserted.

The intention of the legislature will be frustrated if a liberal and pragmatic approach is not given. Connect of parity or equality before law will not be violated here because, it is certain, the changed quantum of penalty is an inevitable application to the assessment made after such change in the provision.

Law relating to taxation are undergoing changes time to time looking at the hardship and burden on the tax payer by a welfare state. Reduction in quantum of penalty is inserted in the said process by the legislature. Therefore, a tax payer in pending lis cannot be

debarred from enjoying the fruit of the change in law as he is one among them for whose benefit the change of law is made. An instruction in administrative side if any cannot debar the dealer from getting the benefit of the change in law. Keeping in view the discussion hereinabove, it is held that, the penalty is to be calculated at one time of the tax assessed only.

16. From a conspectus of above, in the case in hand, I conclude my finding as follows.

(i) The dealer's input tax admissibility can be re-determined on application of Sec.20(3) proviso (c) read with Rule 12(3) i.e. partial input tax credit on application of the method contemplated under sub-rule (1) clause (c) of Rule 11 of the OVAT Act such as **P X Q/R** method.

(ii) Wrong claim of ITC in the case in hand attracts penalty u/s 42 (5) of the OVAT Act but it should be calculated at one time of the tax due.

(iii) Order of the Hon'ble Court if any on the revival of STREV No.13 & 14 of 2013 will supersede in present order and both the parties have the liberty to re-agitate the issue in the light of order of the Hon'ble Court on the disputed question in the STREV following the ratio laid down in **Dinabandhu Sahoo vrs. Union of India & Others WP(C) No.1441 or 2018 dtd.1.2.2019.**

Accordingly, it is ordered.

The appeal is allowed in part. The impugned order is set aside. The matter be remitted back to the assessing authority for calculation of ITC as per Rule 12(3) read with Rule 11(1)(c) of the OVAT Rules. In case of tax liability the dealer is liable to pay penalty as per Sec.42(5) of the OVAT Act calculated at one time of the tax due. Realization of the demand as such is subject to the order of honourable court if any as observed above, unless the authority will proceed on realizing the demand as per law.

Dictated & corrected by me,

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

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