BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.
S.A.No. 187(V)/2017-18

(From the order of the ld.JCST (Appeal), Balasore Range, Balasore, in Appeal No. AA-182/BA-2016-17 (VAT), dtd.24.05.2017 modifying the assessment order of the Assessing Officer)

Present: Sri S. Mohanty
2nd Judicial Member

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

-Versus-

M/s. Utkal Flour Mill (P) Ltd., Dist. Bhadrak. .... Respondent

For the Appellant : Mr. M.L. Agarwal, Standing Counsel
For the Respondent : Mr. B.P. Mohanty, Advocate

(Assessment Period : 01.09.09 to 31.03.10 & 01.04.11 to 30.08.12)
Date of Hearing: 20.04.2019 *** Date of Order: 20.04.2019

ORDER

This is a dealer's appeal against a reversing order in an assessment u/s.42(4) of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act) questioning the sustainability of the impugned order by the learned First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Balasore Range, Balasore (in short, FAA/JCST) deleting

thereby the tax due and penalty raised by the Assessing Authority/Deputy Commissioner of Sales Tax, Balasore Circle, Balasore (in short, AA/DCST).

2. The facts relevant for the purpose of adjudication of this appeal are :

The assessee-dealer/respondent was a manufacturer of atta, maida, suji and chokada. It effects purchase of raw material like wheat from inside and outside the State seller. Acting upon the Audit Visit Report submitted by the Audit team with allegations of sale suppression and wrong claim of ITC, learned DCST, Balasore as AA assessed the dealer u/s.42 of the OVAT Act for the tax period from 01.09.2009 to 31.03.2010 and 01.04.2011 to 30.08.2012.

It is pertinent to mention here that, the audit assessment at first instance was challenged before the FAA, who in turn, remanded the matter with a direction for assessment afresh for the periods 01.09.2009 to 31.03.2010 and 01.04.2011 to 30.08.2012 because, there was assessment u/s.43 of the OVAT Act for the interim period from 01.04.2010 to 31.03.2011 was already done.

On the above backdrop, in the remand assessment, the AA held the dealer is liable to reverse the ITC proportionate to the sale amount against 'chokada', a by-product being a tax exempted goods. Similarly, the AA found the dealer

guilty of sale suppression also to the tune of Rs.81,800/- and then, in ultimate analysis, he re-determined the GTO for the aforesaid two tax periods at Rs.18,74,28,699/. Deduction of Rs.2,07,37,986/- and Rs.66,68,756/- towards tax exempted sale was given, then, the TTO was determined at Rs.16,00,21,957/-. The total tax due was calculated at Rs.66,68,842/-. The ITC to the tune of Rs.5,77,837/- was found admissible. Hence, the rest amount of Rs.60,91,005/- was determined as tax due from the dealer. However, the dealer having paid a sum of Rs.59,63,606/-, the balance tax due from the dealer was calculated at Rs.1,27,399/-. Penalty u/s.42(5) of the OVAT Act above the tax due was calculated at Rs.2,54,798/-. Resultantly, the total demand against the dealer was raised at Rs.3,82,197/-.

3. Being aggrieved, the dealer knocked the door of the FAA, who in turn, vide impugned order, held the dealer is entitled to ITC admissible to the entire amount as claimed and also held that, the determination of sale suppression is not well founded on cross verification of the details of the books of account of the dealer. In the result, the FAA deleted the demand and penalty. Consequently, the demand reduced to the return figure.

4. When the matters stood above, Revenue being aggrieved, preferred this second appeal. The contention of

the Revenue is, the FAA has committed wrong in interpretation of the provision u/s.20(8)(k) of the OVAT Act while allowing the ITC in full in the case in hand and further, the FAA is erroneous in its finding on the question of suppression against the determination by the AA.

5. The appeal is heard with cross objection. Supporting the impugned order, *inter alia,* the assessee-dealer has contended that, the FAA has rightly set-aside the order of reversal of ITC on the tax exempted goods and the authority was also correct in deleting the suppression as alleged.

6. The substantial question of law and facts raised for decision in this appeal are: (i) Whether the FAA has committed wrong in deleting the findings of sale suppression as determined by AA? and (ii) Whether the FAA has committed wrong in allowing ITC in reversing the findings of the AA regarding reversal of the ITC on the tax exempted goods?

Point No.(i)

7. The audit team detected some stock discrepancy. The AA held that, the dealer's claim of improper valuation of the stock cannot withstand for the reason that, on the date of AVR, it was not the plea of the dealer. The FAA has held that, in audit assessment, there was no scope for best

judgment assessment. There was no discrepancy in the item stacked in the bags. So, the estimation of stock suppression to the tune of Rs.81,600/- was not well founded. Needless to mention here that, the plea of the dealer before the FAA was, there was no proper valuation of the stock, which laid to a wrong impression that, there was stock suppression. The FAA being an extended forum of assessment, has the jurisdiction to make assessment afresh. On cross verification of the assessment of the AA, the explanation of the dealer, the allegation in the AVR, according to him the fact like stock discrepancy is not duly established. No new material produced from either side to form a different opinion on the question of fact. No valid reason supported by evidence produced before the Bench to make a fresh determination on the question of sale suppression. In that event, it only can be said that, in absence of any rebuttal and cogent evidence, there is no scope to interfere with the order of the FAA on the question of fact discussed above.

Point No.(ii)

8. The next point is, Whether the FAA was wrong in allowing the ITC to the dealer as claimed? Admittedly, the dealer was a manufacturer of 'atta', 'maida', 'suji' and 'chokada'. In the process of manufacturing 'atta', 'maida', 'suji' and 'chokada' are incidentally a by-products. 'Chokada'

is a tax exempted goods and the dealer has sold 'chokada' against which he has not collected any tax. But in the assessment, the dealer has claimed ITC to the full extent accrued to him on the strength of purchase. Learned Standing Counsel strenuously argued that, as per the provision u/s.20(3) Proviso 'c' of the OVAT Act read with Rule 11(1)(4) of the OVAT Rule, when the dealer sales goods both taxable and tax exempted under the Act, the ITC shall be allowed proportionately only in relation to the goods which are not so exempted.

> "Sec.2(25) of the OVAT Act says, the meaning of "Input" in the process of manufacturing Sec.2(29) says about output tax i.e. the tax leviable and payable against sale of any taxable goods in course of business. Rule 12(3) reads as follows : -(3) Where the processing or manufacturing activity of a dealer results in the production of both taxable goods and goods exempt from tax, input tax credit admissible shall be determined by applying the principles as provided under sub-rule (1) of Rule 11 in respect of each tax period".
>
> Rule 11(1)(c) postulates the method of calculation of ITC in the contingencies under Rule 12(3) whereas, as mentioned above, Sec.20(3) proviso 'c' which is a rider to the Section and is a mandatory one says:- (c) where a registered dealer sales 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".

Above being the provisions under law relevant, learned counsel Mr. B.P. Mohanty for the dealer argued that,

Tribunal cannot overlook the provision Rule 12(1) of the OVAT Rules, which reads as follows :

> **12. Partial input tax credit.-**
> (1) The Government may, by notification, specify such goods or such class of dealers, subject to such conditions and restrictions, as may be specified in that notification, to be allowed input tax credit partially.

Learned Counsel harped on this provision and submitted that, in absence of any Gazette Notification, the input tax credit cannot be allowed partially. On the other hand, 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."

While arriving 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).**

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. Resultantly, it is held that, the FAA has committed wrong by not following the statutory mandates. Hence, the finding on this question is reversed. The dealer is liable to reverse the ITC available proportionately to the amount of sale of tax exempted goods.

9. Coming to the question of penalty u/s.42(5) of the OVAT Act, here in this case, it is found that, there was no scope before the FAA to give any finding on the justification of the imposition of penalty as the demand of balance tax due was not there. The AA on the other hand, is found to have imposed penalty in a routine manner. Sec.42(5) of the OVAT Act is necessarily a consequence to the tax due as calculated in the audit assessment. Here it is found that, the dealer is not guilty of any suppression but is guilty of wrong claim of ITC.

10. The next question relates to quantum of penalty u/s.42(5) of the OVAT Act. Learned counsel for the dealer advanced manifold arguments to establish that, in the case in hand in particular, penalty is not warranted or if warranted the quantum should be one time of the tax due. According to him, here it is not the claim of erroneous claim

of ITC by the dealer because the dealer has claimed ITC admissible as per the judgment prevailing at the relevant period. This Tribunal on earlier occasions in S.A.No.95(C)/2009-10 has held that, the ITC is available in full in the sale of taxable goods or tax exemption goods. Similarly there was authorities like M/s. Agrotech Pvt. Ltd. Vrs. State of Karnataka (2015) 77 VST 153 (KAR) to the effect that, there cannot be decrease of admissible ITC proportionate to the tax exempted goods. It is a fact that, the latest view on the disputed question is ruled by the Apex Court in the State of Karnataka Vrs. Mr. Agro (supra) i.e. overturning the decision of Karnataka High Court mentioned supra, deciding the disputed question in favour of the Revenue. But once the principle is well settled as per the Apex Court as above then it never can be said that, the dealer should be given relaxation from paying penalty.

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 in the case in hand was done vide order dtd.08.01.2016. As such, by the date, the assessment order

passed, the provision under law mandates penalty at one time on 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.

The argument as advanced by the learned Counsel for the dealer is quite convincing since on the date of assessment the provision under law has got its application.

We can analyse this question from another angle i.e. Sec.42(5) of the OVAT Act has undergone changes w.e.f. 01.10.2015. The provision as it was prior to the date, the penalty was calculated at two times. The word "twice" is omitted and no new word/term has been inserted in place of it. There comes a question, what is the effect from such Commission in the eye of law?

Omission/repeal/amendment or substitutions are all not having the same legal effect. When it is not repeal but an omission then in absence of any saving clause under the Act by expressed term it is to be treated as if the term omitted was not there in the provision at all. On the other hand, provision u/s.6 of the General Clauses Act, which provides an omnibus saving clause cannot come to the rescue, as it covers

only repeal but not omission. In **Royal Corporation Pvt. Ltd. & Others -Vrs.- Director of Enforcement (1970) AIR 494**, the Apex Court has held as follows :

> "Section 6 of the General Clause Act cannot obviously apply on the omission of Rule 132(A) of the BIRS. For the second above reason, Sec.2 applies to repeals and not to omission and applied allegation report is of a Central Act or Regulation and not of a Rule."

Well settled principle is: The rule of beneficial construction requires that 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.

The rule of beneficial construction requires 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. This finds support in a passage that "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.**

From the discussion above, it can be said that, the date when the assessment order was passed already there was omission of the word "twice" from the section u/s.42(5) of the OVAT Act, then, in the event of imposition of penalty, it should be confined to one time only. Further, it also can be said that, the provision as it is prevailing today is applicable in general when there is a question of imposition of penalty u/s.42(5) of the OVAT Act keeping view the legal effect of the omission of the term 'twice' discussed above. Hence, the penalty is to be calculated at one time of the tax assessed only. Accordingly, it is ordered.

The appeal is allowed in part. The dealer is liable to reverse the ITC as assessed by the FAA. Besides he is liable to penalty u/s.42(5) of the OVAT Act at one time of the tax assessed. The demand be raised accordingly, on fresh calculation.

Dictated and Corrected by me,

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

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