BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No. 8 (V) of 2017-18

(From the order of the ld. JCST (Appeal), Cuttack II Range, Cuttack, in First Appeal Case No. AA/25/OVAT/CUII/2017-18, disposed of on dtd.10.10.2017)

Present: Sri S. Mohanty
2nd Judicial Member

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

- V e r s u s -

M/s. Akhandalamani Polythene,
23, New Industrial Estate, Jagatpur,
Dist.- Cuttack. ... Respondent

For the Appellant : Mr. M.S. Raman, ASC (CT)
For the Respondent : Mr. B.B. Panda, Advocate

Assessment Period ... 01.04.2005 to 31.12.2006

Date of hearing: 16.02.2019 ******** Date of order: 16.02.2019

O R D E R

Against a reversing order of the First Appellate Authority/Joint Commissioner of Sales Tax (Appeal), Cuttack II Range, Cuttack in an reassessment u/s.43 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act), the Revenue has preferred this second appeal.

2. The laconic facts giving rise to this second appeal are as follows:-

The instant dealer/respondent is a manufacturer and trader of polythene bags and plastic granules. For the tax period from 01.04.2005 to 31.12.2006, the dealer was subjected to audit assessment u/s.42(4) of the OVAT Act. In a later period, the assessment was reopened by the assessing authority on receipt of objection report from the A.G. Audit alleging improper allowance of ITC to the dealer. The assessing authority in consideration of the objection raised by the audit team assessed the dealer vide its' order dtd.22.09.2011. It was an exparte order since the dealer did not join the hearing in spite of receipt of the notice of assessment. The assessing authority had accepted the objection of the A.G. Audit that the dealer effected both taxable and tax exempted sale, so he is entitled to ITC in accordance to Rule 11(c) of the OVAT Rules (commonly known as PQR method). Consequently, the dealer was found liable to pay net tax due at Rs.59,613.87. Twice of the same was imposed as penalty as per sec.43(2) of the OVAT Act and thus the demand in totality raised to Rs.1,78,842.00.

3. On receipt of demand notice, felt aggrieved, the dealer preferred appeal before the first appellate authority. Learned JCST, Cuttack II Range, Cuttack as First Appellate Authority vide the impugned order dtd.10.10.2017 reversed the findings of the assessing authority with the findings that the overseas sale by the dealer against form 'H' is to be treated as zero rated tax, sale and as a result on redetermination of the GTO and TTO, he recomputed the tax due at Rs.396.87. Twice of it as penalty was imposed u/s.43(2) of the OVAT Act and thus the total demand became reduced to Rs.1,191.00 only.

4. When the matter stood thus, being aggrieved with the order of the first appellate authority, Revenue has preferred this second appeal.

5. Contentions of the Revenue are, reopening of the assessment in this case by the assessing authority is as per law. The dealer being a manufacturing unit is guided by sec.20(8)(k) of the OVAT Act and since the finished products are exempted from tax either whole or part, the

calculation of ITC by the assessing authority is correct and to that effect the calculation by the first appellate authority is wrong.

6. The respondent-dealer contested the appeal by filing cross objection contending thereby that the impugned order is passed in strict adherence with settled principles of law.

7. Questions struck for decision in this appeal are –

(i) Whether first appellate authority is wrong in holding that the reopening of the assessment in the case in hand is mere a change of opinion, hence not maintainable ?

(ii) Whether calculation of ITC admissible to the dealer should be guided by the method adopted by the assessing authority and to that effect the first appellate authority has gone wrong; and

(iii) What order-

8. The first point raised by the appellant-Revenue is the first appellate authority has mechanically accepted the A.G. Audit report. The plea of the dealer is, reopening is a change of opinion. Both sides filed some decisions out of many by the Apex Court and the Hon'ble Court deciding the question whether reopening of assessment in particular case is mere a change of opinion or not.

At the outset, it is pertinent to mention here that, the impugned order as it revealed the first appellate authority has not made any observation in express term, whether he has treated the reassessment as a change of opinion. The first appellate authority has reflected the authorities cited by the dealer in the impugned order and in ultimate analysis he has determined the tax liability. Once he fixed liability being an extended forum of assessment then, it cannot be said that he has held, the reopening of the assessment is illegal otherwise, he would have vitiated the entire proceeding. However, the order is self-contradictory and ambiguous.

9. Coming to the merit of the submission by rival sides, no doubt it is the view of the Hon'ble Court time to time that the assessing authority cannot adopt and act upon the report of the A.G. Audit mechanically. He is

to apply his mind independently and is required to form an opinion in conscious to the statutory requirements unless it can be said that, the authority has simply swayed away by the A.G. report which is not recognized by the authorities like Hon'ble Court and Apex Court time to time.

Learned Counsel, Mr. B.B. Panda for the dealer argued that, the reopening of the assessment u/s.43 of the OVAT Act in this case is mere a change of opinion on the basis of materials which were already on record and considered at the time of audit assessment. So, in absence of new fresh materials brought to the notice of the authority, the reopening is not maintainable. He placed his reliance in the matter of **Indure Limited v. Commissioner of Sales Tax (2006) 145 STC 61 (Ori.)** and **State of Uttar Pradesh & Others v. Aryaverth Chawl Udyog & Others (2016) 91 STC 1 (SC)**.

Per contra, learned Addl. Standing Counsel, Mr. Raman placed reliance in **Amar nath Om Parkash Vrs. State of Punjab, (1986) 62 STC 130 (SC), Regional Manager Vrs. Pawan Kuma Dubey, AIR 1976 sc 1766**.

Keeping in mind the ratio laid down by the authorities mentioned above, adverting into the merit of the case in hand, it is found that, the dealer was subjected to audit assessment initiated on the basis of the audit visit report vide order dtd.21.04.2007, it was initiated on 31.01.2007. The assessment order reopened vide order dtd.26.04.2011 on the basis of A.G. Audit report. Reassessment proceeding is continued with same case record as per LCR and argued that judgments are not to be construed as statute. The assessing authority has simply issued notice for escape turnover assessment to the dealer under form VAT-307 on 26.04.2011. The order is completely silent about application of mind to the audit report by the assessing authority in any manner. It is merely a mechanical order in furtherance to A.G. Audit report.

On the other hand, the perusal of 42 assessment, it does not indicate the fact of admissibility of the ITC was taken care of consciously by the assessing authority. It is the assessing authority had accepted the plea of the dealer that the dealer had effected overseas sale and the authority

had held that the dealer was entitled to exemption on furnishing of form 'H' against such export sale. At the same time, it is found that, the assessing has not mentioned in any manner that the dealer was assessed initially and the questions raised by the A.G. Audit team were not taken into consideration in the original assessment but the fact remains that, this question has raised in the A.G. Audit was not considered by the assessing authority. In the case of **Commissioner of Income Tax, Delhi vs. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)**, wherein this Court has held as under:-

> "Before interfering with the proposed re-opening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed re-assessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the re-assessment proceedings."

It is not out of place to mention here that, sec.43 of the OVAT Act attracts when there is wrong claim of ITC i.e. as per sec.43(1)(ii) of the OVAT Act. To sum up in this case, for the foregoing reasons above, it is held that, the reopening in this case is not a change of opinion. However, the assessing authority is found accepted the A.G. Audit report mechanically which is against the principle laid down by the Apex Court. Hence keeping view the authoritative pronouncement relied above, here it is held that the reopening being not preceded by a reasoned order, it is not sustainable in law. The finding of forums below is reversed accordingly.

10. Delving into the next question for determination i.e. the admissibility of the ITC to the dealer in the case in hand. It is the case of the dealer is, it has exported goods and the exported goods carries tax at zero rate, so the dealer cannot be denied to avail ITC paid by him on purchase of

the inputs, said view is accepted by the learned first appellate authority. Per contra, the plea of the Revenue is ITC admissibility to the dealer in the case in hand should be guided by sec.20(8)(k) read with Rule 11(c) of the OVAT Rules. To appreciate the disputed question, it will be beneficial to produce the relevant provisions hereunder below:-

Sec.20(8)(k) of the OVAT Act-

> "(k) in respect of raw materials used in manufacture or processing of goods, where the finished products are exempt from tax;"
>
> (as it was prevalent during the tax period in question)

Rule 11(c) of the OVAT Rules –

> "(1) Where a dealer effects sales of goods both, subject to tax and exempt from tax, under the Act, the following calculation for claiming input tax credit shall apply-
>
> (a) xxx xxx xxx
>
> (b) xxx xxx xxx
>
> (c) Where a part of the sales effected by a dealer in a tax period are subjected to tax and the remaining part of the sale are exempt from tax under the Act, the amount that can be claimed as input tax credit shall be calculated from the following formula:
>
> $$\frac{P \times Q}{R}$$
>
> Where-
>
> ***"P"*** is the total amount of input tax;
>
> ***"Q"*** is the taxable turnover of sales including zero-rated sales; and
>
> ***"R"*** is the total amount of all sales including exempt sales: during that tax period.
>
> (d) xxx xxx xxx
>
> (e) xxx xxx xxx"

Section 17 of the OVAT Act –

> "The sale of all goods specified in Schedule A shal be exempt from tax subject to conditions and exceptions set out therein."

Conversely the provisions quoted by the learned Counsel for the dealer produced hereunder:-

> "***18. Zero rated sales.-***

The rate of tax on the sale of goods subject to levy of tax shall be zero when such goods are sold-
(a) in course of inter-State trade or commerce; or
(b) in course of export out of the territory of INdia; or
(c) to a dealer having business under-
(i) a SEZ; or
(ii) a STP; or
(iii) a EHTP; or
(d) to an EUO.

Explanation.-
For the purpose of this section, the sale of goods to a dealer referred to in clause (c) or an EOU referred to in clause (d) shall mean and always be deemed to have meant the sale of such goods intended to be used as capital goods referred to in clause (8) of Section 2 or used for manufacturing of goods by such dealer or EUO."

Keeping in mind the provisions relevant for the purpose of this disputed questions as mentioned above, adverting into the case in hand, the argument of the dealer is, he has effected export sale covered u/s.18(b) when the goods under sale carries zero tax. It is not an exemption on furnishing form 'H' but by virtue of the mandate of the provision when there is an export sale the rate of tax will be zero. Sec.20(3)(c) says input tax credit shall be allowed in purchases made within the state from a registered dealer holding a valid certificate of registration in respect of goods intended for the purpose of sale of goods as per sec.58(1)(a) of the OVAT Act, where any return filed under this Act shows any amount to be refundable to a dealer on account of sales referred to in clauses (b), (c) and (d) of Section 18, the dealer may make an application to the assessing authority for refund of that amount in the manner and form as may be prescribed. The provision u/s.18(b) read with Sec.58 and Rule 65 say about payment of tax and refund of the same on application. It will be beneficial to produce the relevant provisions u/s.58(1)(a) of the OVAT Act and u/r.65(1) of the OVAT Rules:

"***58. Refund of tax under special circumstances.-***
(1) *(a)* Where any return filed under this Act shows any amount to be refundable to a dealer on account of sales referred to in clauses (b), (c) and (d) of Section 18,

> the dealer may make an application to the assessing authority for refund of that amount in the manner and form as may be prescribed:"
>
> ***"65. Refund under special circumstances.-***
>
> "(1) (a) Where any dealer claims refund in the return furnished for a tax period on account of sales as specified in clause (b) of Section 18, he shall make an application through electronic mode only to the assessing authority within thirty days from the date of furnishing such return:"

Thus, from the provisions above, it is found established that when there is an export sale the dealer is liable to pay tax but at the rate of zero percentage. On the other hand, as per sec.20(3)(c) of the OVAT Act the dealer is entitled to ITC as against payment of tax on purchase.

11. It is a normal experience that the taxing authority, very often, treat the export sale as exempted and they also accepted the return filed by the dealer allowing admissible ITC on such export sale. But the provision as it mandates, export sale carries tax at zero rate, in that event, the dealer is to apply for refund on due application. In the case in hand also, we have seen the assessing authority as the first appellate authority has mentioned exemption in tax as well as zero rated tax at different places in the body of the order. Once the dealer has established that he has effected export sale and the same is supported with form 'H' then, sec.18 will necessarily come into play. Inconsequence thereof, the dealer is found entitled to ITC as admissible u/s.20(3)(c) read with sec.18 of the OVAT Act but not in accordance to Rule11(c) of the OVAT Rules read with section17 of the OVAT Act as claimed by the Revenue. Hence, it is held that the first appellate authority is not wring in his finding on this question.

12. Coming to the question of penalty, it will be beneficial to reproduce the provision u/s.43 as it was by then during the period effective after amendment on 01.06.2008:-

> "(1) Where, after a dealer is assessed under Section 39, 40, 42 or 44 for any tax period, the assessing authority, on the basis of any information in his possession, is of the opinion that the whole or any part of the turnover of the dealer in respect of such tax period or tax periods has-

(a) escaped assessment, or
(b) been under-assessed, or
(c) been assessed at a rate lower than the rate at which it is assessable;
or that the dealer has been allowed-
(i) wrongly any deduction from his turnover, or
(ii) input tax credit, to which he is not eligible.
the assessing authority may serve a notice on the dealer in such form and manner as may be prescribed and after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he deems necessary, proceed to assess to the best of his judgment the amount of tax due from the dealer.

"(2) If the assessing authority is satisfied that the escapement **or under-assessment of tax on account of any reasons(s) mentioned in sub-section (1) above** is without any reasonable cause, he may direct the dealer to pay, by way of penalty, a sum equal to twice of the amount of tax additionally assessed under this section."

The provision u/s.43(2) before amendment effective from 01.10.2010 i.e. the period of assessment in this case -

"(2) If the assessing authority is satisfied that the escapement is without any reasonable cause, he may direct the dealer to pay, by way of penalty, a sum equal to twice of the amount of tax additionally assessed under this section."

The provision u/s.43 has undergone into amendment w.e.f. 01.10.2010 by virtue of it, in sub-section (1) "**sec.42 & 44 assessment" was included and in sub-section (2) "besides escapement, underassessment of tax on account of any reason (s) mentioned in subsection (1) above"** is inserted. The case relates to the assessment years 01.04.2005 to 31.12.2006 thereby, it can safely said that, the right vested on the dealer as per the provision which was effective on the date of assessment is to be taken into consideration for the purpose of determination of the disputed questions by the assessing authority including this second appellate forum.

If we take the provision u/s.43(2), originally it was covering the case of 'escaped assessment' as per sub-section (1). Then by virtue of amendment of the year 2010 w.e.f. 01.10.2010, it covered escaped assessment and underassessment as per Sec.43(1) of the OVAT Act. But, all through these amendments, sec.43(2) does not cover any case other than the escaped assessment and underassessment. The present one is the case of wrong claim of ITC.

Therefore, wrong claim of ITC even though is a ground for reopening of the assessment u/s.43 but it does not attract penalty u/s.43(2) of the OVAT Act. Accordingly, here in the case in hand, it is held that, the assessing authority and the first appellate authority have committed wrong in imposing penalty which need to be set aside. Needless to mention that though the question of penalty is not raised by either side but, this being a question of law is taken up.

13. From the discussion in the foregoing paragraphs, it is held that, the appeal has no merit. Hence dismissed. Further, the penalty u/s.43(2) being levied erroneously, the same is deleted.

Dictated & corrected by me,

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

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