



OVAT Act. On the basis of audit visit report, the allegation against the dealer was, in absence of any proof regarding payment of tax to his selling dealer, the assessee-dealer has claimed ITC to tune of Rs.10,030.00. The assessing authority accepted the audit visit report as he found the selling dealer M/s. Mekong Rubber Pvt. Ltd. had not disclosed the fact of sale to the instant dealer in his periodical return. So, he denied the ITC as claimed by the assessee-dealer, resulting thereby, tax due at Rs.10,029.00 and penalty u/s.42(5) of the OVAT Act, twice of the tax due totaling thereby the demand raised at Rs.30,087.00.

3. Being aggrieved with such assessment, the dealer knocked the door of first appellate authority who in turn did not interfere with the order of assessing authority. As a result, the demand as raised remained undisturbed.

4. On the backdrop of the case as mentioned above, the dealer has preferred this appeal. The main contention of the dealer is, he had paid tax to his selling dealer M/s. Mekong Rubber Pvt. Ltd., said selling dealer is a registered dealer bearing TIN-21413000080. So, when the dealer has purchased goods by paying tax which is supported by tax invoices issued by the selling dealer, there is no reason to deny the claim of ITC as done by both the fora below here in this case.

5. The appeal is heard with cross objection. Revenue in his cross objection has supported the view of the first appellate authority with the contentions like, the burden of proof lies on the dealer to establish that, he had actually paid tax and the said tax is remitted to the taxing authority. In the argument, learned Counsel for the dealer argued that, he has filed original tax invoices in support of the proof of tax paid. On verification of the LCR, it is found that, a set up tax invoices in xerox is available. Learned Counsel for the dealer vehemently argued that, when the dealer had paid the tax which is evident from the tax invoices, there is no reason to disallow the ITC as claimed.

6. Per contra, learned Addl. Standing Counsel submitted that, filing tax invoice is not sufficient. The dealer is required to furnish other evidences.

He has given stress on the requirement u/s.95 of the OVAT Act which states about burden of proof. Learned Addl. Standing Counsel further argued that, the claim of the dealer regarding the validity of the registration certificate of the selling dealer as raised by the counsel for the assessee-dealer is out of context for the reason that, it is the selling dealer had not disclosed the sale in favour of instant dealer in its regular return and that is why both the fora below have denied the ITC as claimed. Once the tax invoices are produced, there is no reason why to disbelieve the claim of the dealer. What kind of evidence were felt required by the assessing authority or the first appellate authority is not mentioned in the respective orders. The assessing authority should have asked for any further information or confirmation from the selling dealer if needed.

7. In *Commissioner of Trade & Taxes, Delhi and others Vs. Arise India Limited and others*[TS-2-SC-2018-VAT], the Hon'ble Apex Court in SLP before it upheld the view of the Hon'ble High Court that, Sec.9(2)(g) of the Delhi VAT Act to the extent it disallows input tax credit to purchaser due to the default of the selling dealer in depositing tax, as violative of Article 14, 19(1)(g) of the Constitution of India.

Treating both, the guilty purchaser and the innocent purchaser at par is violative of the Article 14 of the Constitution. A bona fide purchaser cannot be denied because of the intentional or intentional default of the selling dealer over whom the purchasing dealer has no control. The taxing authority is not handicapped under law to collect tax from the defaulting dealer and punish the defaulting dealer also. It is only to be seen that, the selling dealer is a registered dealer or not. Once the purchasing dealer has demonstrated that, he has complied with the requirements, he cannot be denied ITC only because the selling dealer fails to discharge his obligation under the Act. The selling dealer ought to have deposited the tax collected under the law.

In the matter of **Shanti Kiran India Pvt. Ltd. v. Commissioner of Trade Tax Department, 2013 (2) TM 180** which was later on confirmed by the Hon'ble Supreme Court it is observed that, it is not the dealer's

liability to see whether the tax was deposited before the taxing authority or not.

In view of the authoritative pronouncement mentioned hereinabove, it is held that, unless there is an allegation of fraud in collusion with selling dealer, original tax invoices issued by a registered dealer is sufficient to decide the entitlement of dealer's claim of ITC. Nil return filed by the selling dealer cannot disentitle the instant dealer for its bona fide claim of ITC. Accordingly, it is ordered.

8. The appeal is allowed. The impugned order to the extent of denial of ITC is set aside. The assessing authority is to recompute the tax liability and raise demand accordingly.

Dictated & corrected by me,

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

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1<sup>st</sup> Judicial Member