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

S.A. No. 197(V) of 2016-17

(Arising out of the order of the ld. Addl. CST (Appeal), South Zone, Berhampur, in Appeal Case No. AA (VAT)32/2014-15, disposed of on dtd.16.06.2016)

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

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

- V e r s u s -

M/s. Siva Shakti Flour Mill (P) Ltd., At:- Near 1st Gate, Aska Road, Berhampur. ... Respondent

For the assessment period: 01.09.2007 to 31.03.2010

For the Appellant ... Mr. M.L. Agarwala, S.C.
For the Respondent ... N o n e

Date of hearing: 28.06.2019 ******** Date of order: 29.06.2019

O R D E R

Order of reversal of ITC on the manufacturing loss treating the same as covered u/s.20(8)(f) read with sec.20(9)(b) of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) when altered by the first appellate authority, thereby allowed the dealer to avail ITC on the input including the loss in the manufacturing process, the order of first appellate authority became impugned is this second appeal at the instance of the Revenue.

2. The assessee-dealer M/s. Siva Shakti Flour Mill (P) Ltd. being a manufacturing unit effecting sale of the finished products like besan and residuary product like bran with empty bags inside the State in regular

course of it's business. It was subjected to audit assessment u/s.42(4) of the OVAT Act. But, in a later period, consequent upon the A.G. Audit objection, the assessment was reopened invoking provision u/s.43 of the OVAT Act by the assessing authority. In the reassessment, the assessing authority found the dealer had affected purchases both interstate and intrastate. The dealer had shown wastage in the manufacturing process to the tune of 183122 Kgs. out of total material consumed of 7578547 Kgs. including peas dal of 1792250 Kgs. The wastage was determined at 2.41% of the raw materials consumed. The assessing authority accepted the suggestion of the A.G. Audit team that, the dealer is not entitled to ITC on the wastage as availed. So, the reversal of ITC amount was determined to Rs.46,887.00 in accordance to sec.20(9) of the OVAT Act. Besides, reversal of ITC the dealer was imposed with penalty twice of the tax due at Rs.93,774.00. Thus, the tax due with penalty is calculated at Rs.1,40,661.00.

3. Being aggrieved, the dealer knocked the door of the first appellate authority who in turn vide impugned order held that, reversal of ITC on the wastage in the manufacturing process as held by the assessing authority is wrong and ultimately quashed the assessment order. Being aggrieved with the deletion of demand, Revenue preferred this appeal challenging sustainability of the impugned order.

4. It is contended by the Revenue that, in accordance to Sec.20(9) of the OVAT Act ITC is not available on wastage of the inputs. So, the order of first appellate authority being perverse in law is not sustainable.

The appeal is heard without cross objection from the side of the dealer.

5. The question framed for decision in this appeal is, whether ITC is not admissible to the dealer on the wastage/loss sustained in the manufacturing process?

6. Perused the impugned order, the first appellate authority has allowed the claim of the dealer and in the process of arriving at the conclusion, the first appellate authority has relied on decision of the Apex

Court in M/s. Multimetals Ltd. v. Assistant Collector, Central Excise, passed on 10th December 1991 reported in 57 ELT 209 (SC).

7. Learned Standing Counsel Mr. Agarwal vehemently argued that, the provision u/s.20(9) clearly prohibits the dealer to avail ITC in the event of any damage/loss. The relevant provisions under the Act are reproduced below:-

Sec.20(8)(f) of the OVAT Act:-

> "(f) in respect of goods purchased on payment of tax, if such goods are not sold because of any theft, damage and destruction;"

Sec.20(9)(b) of the OVAT Act:-

> "(b) are lost due to theft, damage or for any other reason, or"

8. On perusal of orders of both the fora below, it is found that, the assessing authority has taken consideration of the provision u/s.29 of the OVAT Act, whereas the first appellate authority has not taken into consideration of any of the statutory provisions but only relied on the decisions reflected in the impugned order.

It is submitted by the Counsel for the dealer that, the dealer has paid price for the inputs, so it goes to the intermediary or final activity or not, however, the cost of such input is taken into consideration for final price of the final product which includes the cost of the raw materials inclusive of wastage loss scrap. Therefore, the tax levied by the Revenue on the full rate irrespective of the wastage or loss at the purchase point and gets full rate of tax at the point of sale at the finished products. Therefore, both at the purchase and at the sale point, there is no loss to the Revenue from the point of view of levy of tax.

It is also the finding of the first appellate authority that, even in spite of the wastage in the manufacturing process, the output tax collected by the dealer on sale of the finished products is higher than the ITC claimed by the dealer, so the Revenue is not at loss.

9. When the question of ITC is under consideration, we are abide by the statute and statute is clear regarding no input tax credit when the

goods are not sold because of any theft, damage and destruction. The provision u/s.20(8) starts with the word 'no' by itself indicates, it is a disabling provision which cannot be interpreted to give any other meaning except denial of the ITC in case of theft, damage and destruction. On the other hand, if we take consideration of the provision u/s.20(9)(b) of the OVAT Act, it contemplates, if the goods purchased are loss due to theft, damage or for any other reason, the ITC availed in respect of purchase of such goods shall be deducted from the ITC admissible for the tax period during which any one or more of such event occurs. Now, such being the statutory mandate. It is only to be seen that, whether any loss in the manufacturing process is covered under the term theft, damage destruction etc. In the case in hand, it is the case that, the wastage is due to the failure on the part of the dealer to take proper care. The wastage in the manufacturing process is inhabitable and where it is not the intention of the dealer but is a mandatory consequence in the manufacturing process, in that case the dealer should not be suffered for no fault on his part. It is only to be seen that, the loss claimed by the dealer is invisible loss which is inevitable in the process of manufacturing of besan from dal or the claim is on higher side with an intention to evade tax. There is no standard format to ascertain manufacturing loss in the process of preparing besan. If the claim of the dealer for different tax periods are considered and the loss claimed by similar manufacturer are also considered, it can very well ascertained what should be the standard amount of loss a dealer sustain in the manufacturing of particular goods. In the result, if it is found that the percentage of loss is intentionally shown in higher side, in that case Revenue can discard the claim of the dealer. Unfortunately, the State has no such claim.

It is not the case of the Revenue that, the claim of the dealer is in higher than the output tax collected. Revenue has a simple case of no ITC in the event of manufacturing loss but the fact remains, loss in the process of manufacturing cannot be construed as destruction or damage or theft as contemplated under the statute. On the other hand, the important aspect to

be taken into consideration is, the overall output tax collected by the dealer is in no case lesser than the input tax credit claimed by the dealer. So, there is no chance of loss to the Revenue.

10. For the reasons hereinabove, it is believed that, the findings of the first appellate authority which is based on the decisions of the Apex Court suffers no illegality, hence confirmed.

In the result, it is ordered.

The appeal is dismissed as of no merit.

Dictated & corrected by me,

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

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