

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

S.A. No. 238 (V) of 2017-18

(From the order of the Id. JCST, Bhubaneswar Range (Appeal),
Bhubaneswar, in First Appeal Case No. AA-106221722000101,
disposed of on dtd.31.07.2017)

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. Orissa Diesel Engines (P) Ltd.,
Plot No.A/5, Mancheswar Industrial Estate,
Bhubaneswar. ... Respondent

For the Appellant : Mr. S.K. Pradhan, ASC (CT)
For the Respondent : Mr. A.K. Sahu, A/R

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

ORDER

Revenue has challenged the order of the First Appellate Authority (Appeal), Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (hereinafter referred to as, the FAA) in First Appeal Case No. AA-106221722000101 in this second appeal on the contentions like keeping view the ITC mismatch between the instant and his selling dealer and when there is no proof that the tax collected by the selling dealer for the instant dealer and as it was not remitted to the Government treasury in that case, allowance of ITC to the instant dealer by the first appellate authority is not in accordance to law.

2. The instant dealer was subjected to audit assessment u/s.42 of the Orissa Value added Tax, 2004 (in short, the OVAT Act) for the tax period 01.04.2013 to 31.03.2015. The audit team had reported about irregular claim of ITC of Rs.90,26,618.00. The assessing authority on cross verification of the declarations by the dealer and on reconciliation of the mismatch as reported ultimately found the dealer not entitled to ITC of Rs.67,125.00. As a result, the dealer was found required to pay Rs.68,616.00 as balance tax due to the Revenue. Besides that, penalty u/s.42(5) of the OVAT Act was raised at Rs.1,37,238.00.

Being aggrieved with the assessment as above, the dealer knocked the door of the first appellate authority. The first appellate authority has accepted the plea of the dealer that, for the fault of the selling dealer the instant dealer should suffer and accordingly he allowed ITC as claimed. Inconsequence thereof the balance tax due of the dealer was calculated at Rs.1,491.00. He raised the said amount and dues of it as penalty. Thus the total demand became reduced to Rs.4,473.00 from Rs.2,05,848.00 (determined by the assessing authority).

Felt aggrieved with such reduction, the Revenue has preferred this appeal on the contentions mentioned above.

3. The case of the Revenue, is it is the bounden duty of the dealer to give proof of payment of tax to his selling dealer and deposit of the tax collected from him, as such before the Government treasury by those selling dealers i.e. according to sec.95 of the OVAT Act.

Gone through the impugned order. The learned authority below placing reliance 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 not the dealer's liability to see whether the tax was deposited by the taxing authority or not.

It is an well settled principle in view of the authoritative pronouncements that, denial of ITC for the default of the selling dealer in depositing the tax is violative of Article 14 and 19(1)(g) of the Constitution of India. The innocent purchaser cannot be treated at par with guilty purchaser and input tax credit cannot be denied to a bona-fide purchaser only because of the default of the selling dealer over whom the purchasing dealer has no control.

Adverting to the impugned judgment in hand, it is noticed that the disputed ITC during the tax period between 01.04.2010 to 31.03.2015 whereas the Notification No.1465/dtd.16.01.2016 came into force w.e.f. 01.10.2015. Similarly it is also found that, the FAA has discussed the burden of proof as envisaged u/s.95(1) of the OVAT Act and the provision inserted by the amendment dtd.24.09.2015 under sub section 3(a) in Sec.20 w.e.f. 01.10.2015 (mentioned above) and held that, in the case in hand, the dealer is entitled to ITC. The FAA on the basis of a threadbare discussion arrived at a conclusion that, the dealer is entitled to ITC and he cannot be denied to claim such bona-fide right under law because of the fault of the selling dealer. As such the findings of the FAA being lawful and being supported with the authoritative pronouncement calls for no interference. Similarly it is also said that, mismatch of ITC never can be a ground to disallow the ITC. However, the fact remains, in the event it is found that, the selling dealer is a fake dealer where there is no question of collection and payment of output tax in the event it is nothing but a fact of commission of fraud and to that effect, the question of ITC cannot arise. While arriving at such conclusion, it is held that, this is a fit case where the power of the Tribunal to remand the matter to the AO is to be invoked and the matter

should be remitted back for a limited purpose i.e. to enquire about the identity of the selling dealer and to determine the legitimacy of the claim of ITC.

With the observation above, it is hereby ordered.

The appeal is allowed in part. The matter be remanded back to the AO for the limited purpose of investigation into the allegation of fake selling dealer. In the event the selling dealer's identity is doubtful, ITC can be denied against the purchase from those fake dealers. Further, it is made clear that, ITC cannot be denied to the assessee-dealer, where there is mismatch and where the selling dealers are found guilty of non-disclosure of such sale in their return.

Dictated & corrected by me,

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

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