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

S.A. No. 25(V) of 2018

(Arising out of the order of the ld. JCST, Bhubaneswar Range, Bhubaneswar, in Appeal Case No.AA-106221622000069/ BH-I/2016-17, disposed of on dtd.30.11.2017)

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

M/s. ADD-ON,
Plot No.349/1487, Cuttack Road,
Bhubaneswar. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2013 to 31.03.2015

For the Appellant ... Mr. S.K. Mishra, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

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

O R D E R

This appeal is directed the order of first appellate authority reducing thereby the demand raised against the dealer towards tax and penalty assessed in an assessment u/s.42(4) of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) for the tax period 01.04.2013 to 31.03.2015 preferred by the assessee-dealer.

2. The dealer was engaged in retail and wholesale distribution of automobile parts and accessories. On the basis of audit visit report submitted by STO, Tax Audit Unit, Bhubaneswar I Circle, Bhubaneswar, the dealer was assessed u/s.42(4) of the OVAT Act. The allegations in the audit visit report against the dealer are,

mismatch of ITC, claim of inadmissible ITC and physical stock discrepancy leading to escapement of turnover. In course of the assessment, on verification of the ITC claimed by the dealer and ITC as per the returns by the selling dealers the assessing authority found discrepancies. As a result, he disallowed the ITC to the extent of mismatch detected. Similarly, the assessing authority also determined the escapement in turnover and ultimately he re-determined the GTO and TTO of the dealer for the tax period at Rs.84,42,288.00 and Rs.74,44,972.00 respectively. The dealer was found to have collected output tax of Rs.9,97,316.00 but allowed admissible ITC of Rs.8,40,526.00. The balance tax payable by the dealer was calculated at Rs.1,56,790.00, penalty was imposed accordingly, twice of the tax due at Rs.3,13,580.00 invoking provision u/s.42(5) of the OVAT Act. Adjusting the VAT deposited by the dealer from the liability, the balance due from the dealer was calculated at Rs.4,49,339.00.

3. Felt aggrieved with such assessment and demand raised, the dealer knocked the door of first appellate authority who in turn vide impugned order took a view that, as per sec.95 of the OVAT Act duty caste upon the dealer to give sufficient proof against the claim of ITC which is not done in the case. But, he accepted the voluntary disclosure by the dealer as per sec.33(5) of the OVAT Act even after receipt of notice of tax audit. Further, while determining the stock suppression, the first appellate authority found the allegation is not sustainable as the tax period under consideration is from 01.04.2013 to 31.03.2015, whereas the dealer's unit was visited on 27.04.2015 i.e. after submission of periodical return for the quarter ending March, 2015. In the result, the tax liability and penalty was re-calculated and determined at Rs.2,28,116.00.

4. Still being aggrieved with the order of first appellate authority, the dealer knocked the door of this forum by way of second appeal. The main contention of the dealer is, the mismatch of ITC and disallowance of ITC as held by both the fora below is erroneous. The

imposition of penalty u/s.42(5) of the OVAT Act in the case in hand also not sustainable.

5. The appeal is heard with cross objection from the side of the Revenue. In cross objection, the Revenue has taken the plea in support of the order of the first appellate authority regarding disallowance of ITC and imposition of penalty.

6. The questions framed for decision are,

(i) whether both the fora below have committed wrong in calculation of ITC admissible to the dealer; and

(ii) whether the first appellate authority is wrong in confirming the penalty u/s.42(5) of the OVAT Act imposed on the dealer in the case in hand.

7. At the outset, it is pertinent to mention here that, the question regarding mode of calculation of the tax liability and acceptance of voluntary disclosure u/s.33(5) of the OVAT Act as held by the first appellate authority is not questioned by either sides. So, no need to interfere with the finding of the authorities below being not called in question.

8. So far as the mismatch of ITC is concerned, it has been decided time and again by this authority that, for the fault of the selling dealer the purchasing dealer cannot had liable.

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 o 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 by the taxing authority or not.

Here, we can be benefited for the notification of CCT. The Notification No.1465/dtd.16.01.2016 came into force w.e.f. 01.10.2015. Sec.20(3)(3a) as inserted w.e.f. 01.10.2015 read as follows:-

> "Notwithstanding anything contained in this Act, no amount of input tax credit shall be allowed to a registered dealer on any purchase of goods in excess of the amount of such tax actually paid under the Act."

The above notification is indicative of the intention of the legislature to allow the dealer claim of ITC to the extent of tax it has paid to his selling dealer.

The burden of proof as envisaged u/s.95 of the OVAT Act and the provision inserted by the amendment above under sub section 3(a) in Sec.20 came into force w.e.f. 01.10.2015 are relatable to each other. So the legal obligation under law as per Sec.95 of the OVAT Act is not applicable to the case in hand. If that be, the findings of both the fora below is not inconsonance to the authoritative pronouncements mentioned above, hence cannot withstand in law. Here, it is held that, mismatch of ITC never can be a ground to

disallow the ITC to the bona fide purchasing dealer acted in good faith. 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 and in the event, it is nothing but a fact of commission of fraud there, the question of ITC cannot arise. While arriving at such conclusion, adverting to the case in hand it is found that, the authorities below have not made any endeavor with due diligence to enquire the fact of sale/purchase, payment of tax and collection of output tax by the selling dealer and remission of the same to the Government treasury as well. Once it is established that the selling dealer is a registered dealer and the assessee-dealer could produce the original invoice against the claim of purchase, then there is no scope left in the hands of the taxing authority to deny ITC.

In view of the authoritative pronouncements by the Hon'ble Apex Court and discussions hereinabove, delving into the case in hand it only can be said that, the authority should relook on the calculation of ITC admissible to the dealer.

9. So far as the penalty u/s.42(5) of the OVAT Act is concerned, it being mandatory in nature when there is wrong claim of ITC, no need to interfere with the order of first appellate authority as in case of wrong claim of ITC, penalty u/s.42(5) is warranted. It has been supported by plethora of the authorities, hence the finding of the first appellate authority on this question is confirmed.

It is hereby ordered.

10. The appeal is allowed in part. The matter is remitted back to the assessing authority for calculation of the ITC admissible keeping view the observation hereinabove and to raise tax liability and penalty to which the dealer is found liable in the result.

Dictated & corrected by me,

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

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