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

S.A. No. 343(V) of 2016-17

(Arising out of the order of the ld. DCST (Appeal), Bhubaneswar Range, Bhubaneswar, in First Appeal Case No. AA-106221522000060, disposed of on dtd.21.11.2016)

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. Anuja Ceramics Pvt. Ltd., Sector-A, Mancheswar Industrial Estate, Bhubaneswar. ... Respondent

For the assessment period: 01.04.2011 to 31.03.2013

For the Appellant ... Mr. M.L. Agarwal, S.C.
For the Respondent ... Mr. A.K. Roy &
Mr. S.K. Satpathy, Advocate

Date of hearing: 25.06.2019 ******** Date of order: 25.06.2019

O R D E R

The taxing authority has preferred this second appeal against the confirming order of first appellate authority relating to the respondent-dealer in an audit assessment u/s.42(4) of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) with a prayer to deny the ITC to the dealer on coal used as a fuel in the manufacturing unit of the dealer.

2. It is the assessee-dealer M/s. Anuja Ceramics Pvt. Ltd., a registered dealer under the Act engaged in manufacturing and trading of stone wire pipe and fittings faced audit assessment on the basis of audit visit report with four numbers of allegations, such as, irregular claim of ITC,

wrong claim of ITC, wrong claim of concession in rate of tax without furnishing declaration form 'C' against interstate sale and suppression. The assessing authority accepted the audit report regarding the first allegation i.e. irregular claim of ITC, since the dealer in its periodical return for the year 2012-13 had not claimed ITC but claimed in a later period, such a claim was disallowed. The next allegation was ITC on coal, the assessing authority declined the audit report and accepted the dealer plea that, the coal was used by the dealer in his manufacturing unit as fuel and in the light of authority in National Aluminium Co. Ltd. v. Deputy Commissioner of Commercial Taxes, Bhubaneswar III Circle, Khurda (2012) 56 VST 68, the ITC admissible was allowed. Third allegation of non-submission of declaration form 'C' was decided in favour of the dealer as the dealer could produce the necessary declaration forms. Fourth allegation i.e. suppression to the tune of Rs.1,63,042.00, the dealer again could explained the same by necessary evidence, hence the assessing authority also accepted the dealer's plea and dropped the charge accordingly. Thus, as against the four numbers of allegations, the assessing authority found the allegation No.1 i.e. irregular claim of ITC found established. However, in ultimate analysis while determining GTO and TTO and tax liability, it was found that, the dealer had made an excess payment much prior to the initiation of audit assessment. So, the dealer was found already made excess payment of Rs.72,917.00. However, the assessing authority while determining the dealer's liability at nil did not pass any order relating to refund of excess payment.

3. Being aggrieved, the dealer knocked the door of first appellate authority with a prayer for refund of the excess payment and further claim of ITC which was declined by the assessing authority. The first appellate authority vide impugned order confirmed the order of assessing authority so far as the charges established and dropped before the first appellate authority and finally allowed the refund of a sum of Rs.72,917.00 in favour of dealer.

This order of the first appellate authority became the cause of action for the Revenue to knock the door of second appellate authority.

4. The contention of the Revenue is, allowance of ITC on coal contradicts the provision u/s.20(1-a)(i) of the OVAT Act, the judgment relied by the authority below is distinguishable as the provision under law has undergone change after that judgment of National Aluminium Co. Ltd. (supra) case which is applicable to the case in hand.

5. The appeal is heard without cross objection but the respondent-dealer supported the findings of assessing authority in the argument.

6. The question raised for decision in this case is,

(i) Whether the authorities below are correct in allowing ITC on coal used as fuel in the manufacturing unit of the dealer.

7. The perusal of the impugned order as well as the order of the assessing authority, it is found that, both the authorities below have relied on the authority in National Aluminium Co. Ltd. (supra) case of our Hon'ble Court and treated the coal used as fuel used by the dealer in his manufacturing unit as consumable i.e. an input as per sec.2(25) of the Act.

Revenue advanced two plunk arguments, one is, the decision of the Hon'ble Court is distinguishable, the decision of the Hon'ble Court is challenged by the State before the Apex Court which is still subjudiced. So, the ratio as per the decision is not applicable to the case in hand and in view of the amendment u/s.20 as incorporated as 1-a w.e.f. 01.08.2012, ITC cannot be allowed in case of coal.

8. So far as the first point of argument i.e. the applicability of the authority in NALCO case, in respectful disagreement with the learned Standing Counsel it is stated that, the ratio laid down by the Hon'ble Court has got binding effect on this Tribunal until and unless the ratio is overruled by any authority competent. So this argument has no legs to stand.

So far as the amended provision of the sec. 20(1-a)(i) is concerned, it has incorporated in the text book w.e.f. 01.08.2012. The period of assessment in the case in hand is 01.04.2011 to 31.03.2013 that

means if the amended provision is found applicable, it is applicable to a particular part of the assessment period taken for consideration in the present case.

9. To appreciate the argument, the relevant provision of the amended provision is reproduced below:

> "(1-a) Notwithstanding anything to the contrary contained in this Act, a dealer shall not be entitled for input tax credit in respect of purchase of the following taxable goods subject to the circumstances mentioned against each such goods.
>
> (i) Coal when used for generation of electricity for sale and captive use."

The backdrop of this amendment is the decision of the Hon'ble Court, where coal used in captive power plant was held as consumables and ITC was allowed to the dealer. After the said decision, the taxing authority brought a notification No.34/2009 dtd.27.01.2009, whereby they wanted to bring coal used in captive power plant under the tax net. But, in a later period the validity of the notification was challenged and discarded by the Hon'ble Court in VISA Steel Ltd. and others v. State of Orissa and others (2010 (II) ILR-CUT-830.

10. On this backdrop, the authority made the change to the statutory provision. Coming to the provision itself, as it revealed, when coal used for generation of electricity for sale and captive use ITC is not available. This is a statutory provision and necessarily have got binding effect but, the question remains the coal used by the instant dealer in his manufacturing unit of ceramic pipe if comes under the purview of the aforesaid use? Here, the coal is used as a fuel i.e. an admitted fact. Coal is not used here for generation of electricity for sale or for any captive use but manufacturing of pipes. In that view of the matter, it is held that, even though a part of the tax period in question is covered under the amended provision but the amended provision will not come to the add of Revenue in the case in hand, because the coal is used by the dealer as fuel is not covered under the intention of the legislature behind this amended provision.

To sum up here in this case, it is found that, the impugned order calls for no interference and the dealer's entitlement of refund is uninterceptible. Accordingly, it is ordered.

11. The appeal is dismissed on contest as of no merit.

Dictated & corrected by me,

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

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