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

S.A.No. 271(V)/2017-18

(From the order of the ld.JCST (Appeal), Cuttack-II Range, Cuttack, in Appeal No. AA/23/OVAT/CUII/2016-17, dtd.27.07.2017, confirming the assessment order of the Assessing Officer)

Present: Sri S. Mohanty
2nd Judicial Member

M/s. Purvi Bharat Steels Ltd.,
Regd. Office :
Kandoi House, Mathasahi,
Chauliaganj, Dist. Cuttack,
Works : Bainchua, Tangi,
Dist. Cuttack. ... Appellant

-Versus-

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

For the Appellant : Mr. R.P. Kar &
Mr. A.N. Ray, Advocates
For the Respondent : Mr. M.L. Agarwal, S.C. (C.T.)

(Assessment period : dt.01.04.2013 to dt.31.03.2015)

Date of Hearing: 19.01.2019 *** Date of Order: 25.01.2019

ORDER

This second appeal is preferred by the assessee-dealer against a confirming order of the learned First Appellate Authority/ Joint Commissioner of Sales Tax (Appeal), Cuttack-II Range, Cuttack (in short, FAA) wherein and whereby the ld.FAA has upheld the findings of Assessing Authority, Cuttack-II Circle, Cuttack (in short, AA) relating to ITC mismatch between the selling dealer and instant dealer and wrong claim of ITC against purchases from a dealer, whose registration certificate has been suspended/cancelled, determined in

an audit assessment u/s.42 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act) for the tax period 01.04.2013 to 31.03.2015.

2. The assessee-dealer was subjected to audit assessment u/s.42 of the Act on the basis of Audit Visit Report (AVR). The AA accepted the AVR to the extent that, the dealer is not entitled to claim ITC on the purchases from M/s. Baba Akhandalamani Enterprises, as at the relevant period of transaction the Registration Certificate(RC) of selling dealer was under suspension. Similarly the AA has also accepted the AVR to the extent that, the mismatch in ITC i.e. the tax deposited by the selling dealer and ITC claimed by the instant dealer against the purchases from selling dealer like Mahabali Alloys Pvt. Ltd. and M/s. Chitanya Industries Pvt. Ltd. and thereafter on ultimate analysis, the taxable turnover was determined upon which the tax liability was calculated at Rs.53,53,843/- after adjustment of due ITC admissible. The dealer having paid tax at Rs.32,66,340/-, the balance tax due was calculated at Rs.20,87,503/-. Besides, the tax due, penalty u/s.42(5) at Rs.41,75,006/- was also imposed. Resultantly, the total demand against the dealer was raised to Rs.62,62,509/-.

4. Felt aggrieved, the dealer knocked the door of FAA, who vide impugned order confirmed the assessment and thereby, the demand remained undisturbed. On this backdrop, the dealer has challenged the concurrent finding of both the fora below in this second appeal.

Dealer's contention :

It is contended by the appellant-dealer that, disallowance of ITC against purchases on the plea that, Registration Certificate (RC) of M/s. Baba Akhandalamani Enterprises was under suspension at the relevant time is illegal because, the fact of such suspension or cancellation of R.C. was never notified as per the procedure and for the

reason, as it was not within the knowledge of the assessee-dealer. The assessee-dealer being a bona-fide purchaser having paid the tax as evident from the tax invoices should not be disallowed from ITC. It is further contended that, as because the selling dealer like M/s. Mahabali Alloys had not shown or deposited the correct amount of tax in it's return leading to mismatch of the figure between the selling dealer and the instant dealer, the instant dealer should not suffer as because the defect or fault if any lies with the selling dealer and in the case in hand, the AA or the FAA has not made any endeavour in accordance to law to procure the attendance of the selling dealer to verify/scrutiny the documents of the selling dealer in comparison to the assessee-dealer. It is also contended that, the penalty as imposed by the authorities below is not sustainable in the eye of law as there was no deliberate mistake or defiance of law by the assessee-dealer and the assessee-dealer being acted bona-fide is not liable for penalty u/s.42(5) as imposed.

5. The appeal is heard with cross objection from the side of the Revenue, whereby the Revenue has stood by the findings of both the fora below strongly resided upon Sec.20, 95 & 98 of the OVAT Act.

Findings :

6. The essential questions raised for decision are : (i) If in the facts and circumstances of the case in hand, the dealer should be denied ITC on purchases from selling dealer Ms/. Baba Akhandalamani Enterprises , whose registration certificate was under suspension during the period of sale/purchase? (ii) Whether the assessee-dealer is not entitled to ITC for deposit of the tax collected from him by the selling dealer M/s. Baba Akhandalamani Enterprises.

Both the questions above are decided against the dealer by the fora below. The plea of the dealer is, suspension/cancellation of

registration certificate was not within his knowledge as it was not duly notified by the authority as per the procedure laid down in the act. The plea was negated by the fora below placing reliance on the provision u/s.20(3) of the OVAT Act and ITC was disallowed. Similarly, the fora below has also denied ITC due to mismatch of tax against the sale/purchase between M/s. Mahabali Alloys Pvt. Ltd. and the assessee-dealer. In spite of the summons, when the selling dealer M/s. Mahabali Alloys did not turn up and on the contrary, when the assessee-dealer failed to adduce proof of payment of tax. The ITC was denied.

It is an admitted fact in the case in hand is, the disputed transaction between the assesseee-dealer and selling dealer M/s. Baba Akhandalamani Enterprises took place during the period when the selling dealer's registration was under suspension. The RC of the selling dealer was suspended w.e.f. 25.10.2013 followed by cancellation w.e.f.12.02.2015. Selling dealer has filed return up to Quarter ending September, 2015 showing Nil transaction for three years and it is during that period only the appellant-dealer had purchased goods from him and claimed ITC as against the tax paid.

Sec.20(3) of the OVAT Act speaks that, the ITC shall be allowed for purchases made within the State from a registered dealer holding a valid certificate of registration in respect of goods intended for the purpose of sale or resale by him.

Plea of the Revenue is, on the date of purchase the selling dealer was not having any valid license of registration, whereas the plea of the dealer on the other hand is, he was in dark about the suspension of the registration of the selling dealer. On good faith, in a regular course of transaction as usual he had purchased goods paying necessary tax and accordingly he raised claim of ITC. Learned Counsel

for the dealer capitalized his argument on the provision u/s.30(4) of the Act as prevalent during the period and 30(10) of the Act. The provisions are reads as follows :

> **"Sec.30(4)** Where the certificate of registration of a dealer is suspended or is restored after such suspension, the information shall be widely publicized through publication in the Commercial Tax Gazette and in any other manner as may be prescribed.]"
>
> **"Sec.30(10)** The registering authority shall, at intervals of one month, publish in the Commercial Tax Gazette such particulars, as may be prescribed, in respect of every dealer whose certificate of registration has been cancelled under the provisions of this Act during the intervening period."

His main plunk of argument is, when the fact of suspension or cancellation was not notified, then, at no stretches of imagination it can be believed that, the purchasing dealer was aware of such fact of suspension and in that event, his purchases covers under the umbrella of "bona-fide purchaser on good faith". Learned Counsel further argued that, in absence of any procedure laid down under the Act to be followed by the purchasing dealer in such contingencies, he cannot be penalized as because he has not found to have violated any provision.

Per contra, learned Standing Counsel has drawn the attention to the provision under Rule 32(5) of the OVAT Rule as it was effective before 01.10.2015.

> "(5) In all cases, where the certificate of registration is suspended, restored or cancelled, the registering authority shall display the fact in the office notice board, publish such fact in the Commercial Tax Gazette and the official website of the Commissioner of Commercial Taxes, Orissa."

It is argued that, the purchasing dealer is under obligation to see the status of the dealer from the official website (VATIS). The fact of suspension followed by cancellation of R.C. was duly notified in VATIS in this case. However, there is no evidence relating to notification of the fact of suspension in website is adduced and proved.

We can summarize the issue in following hypothetical situations:

(i) There may be a situation where the registration has been suspended or cancelled with retrospective effect,

(ii) there may be a situation where the selling dealer has not paid the tax collected from the purchasing dealer,

(iii) there may be a situation that, the selling dealer suppressed the fact of suspension or cancellation of registration and committed fraud on the purchasing dealer by selling the goods and collected the tax from him and

(iv) there may be a situation the selling dealer and purchasing dealer connived with each other to defraud the Revenue by not paying the required tax in one hand and claiming ITC on the other which amounts to unjust enrichment.

Authorities are almost equivocal in their views in situations No.(i) and No.(ii) above, that if the registration certificate is cancelled with retrospective effect, then the purchasing dealer cannot be said to be at fault. Similarly, if the selling dealer though collected the tax, but has not paid the tax, in that event also, the purchasing dealer cannot be held responsible for the fault or mischief by the selling dealer. Reliance is placed in **Commissioner of Trade Tax Department vrs**. **Shanti Kiran India Pvt. Ltd.TS-2-SC-2018-VAT.** However, in the event it is found that, the selling dealer and the purchasing dealer both have connived with each other in order to defraud the Revenue i.e. the situation No.4 above, in that case it can be said that, the

assessee-dealer/purchasing dealer cannot take the plea of bona-fides and being a wrong doer, who has attempted to commit fraud on the Revenue in connivance with the selling dealer is not entitled to ITC.

In the event of the situation No.iii above i.e. when the selling dealer has suppressed the fact of cancellation or suspension of his certificate and continued with the sale transaction with the assessee-dealer and the assessee-dealer when entered into such transaction validly and duly paid tax without knowing the fact of such suspension or cancellation of the certificate of his selling dealer, then one view emerges here is, when the selling dealer has committed fraud on the purchasing dealer, it is in the event the selling dealer has committed fraud on the assessee-dealer and collected tax from him but not remitted the same to Revenue, in that case, the State deprived of the tax to that extent is not obliged to give ITC benefit to the assessee-dealer. Here, the assessee-dealer could definitely file a suit for recovery of the tax amount collected from him against the selling dealer, but having not received the tax at the first instance of sale, there is no obligation on the State to grant ITC. It is a *interse* dispute between the selling dealer and the purchasing dealer, where the selling dealer has committed fraud on the purchasing dealer, which can be resolved in a dispute in between the dealers before proper forum. The Revenue cannot be held liable for commission of fraud by the selling dealer on purchasing dealer.

Conversely, if we look into the provisions under the Act in the light of the submission advanced by learned Counsel that, when there is any suspension or cancellation of the registration certificate of a dealer, the appropriate taxing authority is under obligation to notify the same as per the procedure laid down under the Act. Incorporation of the specific provisions in the statute book as per Sec.30(4) and

Sec.31(10) of the OVAT Act mandate, the taxing authority has a duty under law to comply. Failing to do so, the taxing authority cannot escape from the consequence thereof, because non-observation of the statutory obligation led the purchasing dealer to continue with business transaction with suspended dealer on good faith. Putting it in other way, when the statute does not prescribe any procedure to be followed or adopted by the purchasing dealer in the event of purchases, when the purchasing dealer cannot be held responsible for any wrong or fraud committed by the selling dealer like purchasing dealer and Revenue both. In a normal business transaction the sale/purchases takes place in a continuous process between two dealers and it is when the selling dealer has sold the goods issuing invoices depicting his registration as valid and continuing one, in that case, the purchasing dealer has acted only in good faith. On the other hand when the Revenue has failed to comply the requirments u/s.30 and 31 of the Act, then it cannot be said that, the Revenue is innocent. As the provision has cast a duty on the Revenue for making such notification, then it is the Revenue is at fault and in that case, the Revenue cannot say that the dispute is an *interse* one only between the purchasing dealer and selling dealer. When the Revenue has a role to play in case of giving ITC benefit and he has failed to perform that role in accordance to law, then a bona-fide purchaser like the assessee-dealer should not be denied with ITC. Why not, Revenue should proceed against the selling dealer for such misrepresentation or fraud committed by claiming that his registration is valid on the date of sale u/s.82 of the OVAT act. The case of an unregistered dealer posing himself as a registered dealer and the case of a registered dealer, whose certificate has been suspended and a case where the dealer whose certificate has been cancelled are different from each

other, but when it is found that, the purchasing dealer has acted bona-fide and has paid tax in that event, ITC cannot be denied to him. In **Shanti Kiran India Pvt. Ltd. -Vrs.- Commissioner of Trade Tax Department, 2013 (2) TM 180** Hon'ble Delhi High Court has held as follows :

> "This Court is of the opinion that in the absence of any mechanism enabling a purchasing dealer to verify if the selling dealer deposited tax, for the period in question, and in the absence of notification in a manner that can be ascertained by men in business that a dealer's registration is cancelled (as has happened in this case) the benefit of input credit, under Section 9(1) cannot be denied. Furthermore, this Court notices that the cancellation of both selling dealer's registration occurred after the transactions with the appellant. The VAT authorities observed that the scanty amount deposited by the selling dealers was in commensurate with the transactions recorded, and straightaway proceeded to hold that they colluded with the appellant. Such a priority conclusions are based on no material, or without inquiry, and accordingly unworthy of acceptance."

The above view is approved by the apex court in SLP preferred by revenue reported in **Commissioner of Trade Tax Department vrs**. **Shanti Kiran India Pvt. Ltd.TS-2-SC-2018-VAT.** However, it is made clear that, the documents produced by the assessee-dealer/purchasing dealer must show if there was actual payment of tax by him, which was duly received by the selling dealer against the sale/purchase in question and it should be ascertained that, the selling dealer has committed fraud on the Revenue by not depositing the same. The genuineness of this transaction is to be verified from the document produced by the purchasing dealer (assessee-dealer in this case) and in that event only the ITC will be admissible. In application of the later view to the case in hand it is held that, the matter should be scrutinize afresh on the limited aspect. It is felt necessary because,

here both the fora below found simply guided by the suspension or cancellation of R.C. of the selling dealer.

6. Next point for determination in this appeal is, disallowance of ITC against the purchases from M/s. Mahabali Alloys by the assessee-dealer. The claim of the assessee-dealer was denied by the assessing authority with the reason that, the selling dealer Mahabalai Alloys had not filed return and has not deposited VAT if any collected from the assessee-dealer as ascertained from the VATIS data base. While dealing this issue, the FAA has summoned the selling dealer Mahabali Alloys invoking provision u/s.92 of the OVAT Act, when the summons through registered post could not be served on the selling dealer and for non-appearance of the selling dealer, the FAA had chosen to accept the view of the AA and the disallowance of ITC was confirmed.

Learned Counsel for the dealer has drawn the attention of the forum to the mandate of the provision u/s.92 of the OVAT Act and the power of the authority to make the attendance of dealers before him. It is argued that, when the authority was not handicapped, due to non-service of summons through registered post, it can be said that, the authority have not exercised the jurisdiction vested on them and thereby, the decision arrived at is erroneous. While dealing with issue No.1 involved in this appeal, it has been categorically held that, due to the fault of the selling dealer, the assessee-dealer should not suffer. Once the authority has decided to scrutinize the documents of selling dealer and summoned the selling dealer, then because the selling dealer did not turn up, the issue cannot be decided against the assessee-dealer mechanically. Learned Counsel placed reliance in **K.V. Mohammad vrs. STO, Cuttack, STC Vol.109 Page 530,** which is about the procedure to be adopted for attendance of witness. Here the

effort by the FAA is casual. It is the authority either should exercise the jurisdiction vested on him in law to make the selling dealer appear before him and to explain whether he has collected the tax from the assessee-dealer and remitted to Government or in alternative the authority is bound to rely upon the documents produced before them in support of the claim that, the assessee-dealer has paid tax to the selling dealer if the documents were found genuine.

Resultantly, it is believed that, the matter should be remitted back to the AA for the limited purpose of summoning the selling dealer to verify if the selling dealer had collected tax from the assessee-dealer. In the event of failure of the authority to make the selling dealer appear before him, then the benefit will go in favour of the assessee-dealer only on scrutiny of the genuineness of the payment of tax by the assesse-dealer.

Dictated and Corrected by me,

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

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