BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 138 (VAT) of 2018

(Arising out of order of the learned Additional CST (Appeal),
Bhubaneswar in First Appeal Case No. 106221722000254
disposed of on dated 13.03.2018)

Present: Shri R.K. Pattanaik,
Chairman

M/s. Seetal Automobiles,
A-56, Mancheswar Industrial Estate,
Bhubaneswar ... Appellant

-Versus-

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

For the Appellant : Sri B.P. Mohanty, Advocate
For the Respondent : Sri D. Behura, Standing Counsel (CT)

Date of hearing: 23.02.2021 ***** Date of order: 16.03.2021

O R D E R

Present appeal in terms of Section 78(1) of the Odisha Value Added Tax Act, 2004 (hereinafter referred to as 'the Act') read with Rule 93 of the Odisha Value Added Tax Rules, 2005 is at the behest of the dealer assessee assailing the impugned order dated 13.03.2018 promulgated in Appeal Case No. 106221722000254 by the learned Additional Commissioner of Sales Tax (Appeal), Bhubaneswar (in short, 'FAA'), who confirmed the order of assessment dated 15.11.2017 passed under Section 42 of the Act by the learned Deputy Commissioner

of Sales Tax, Bhubaneswar-II Circle, Bhubaneswar (hence called 'AA') for the tax period from 01.04.2014 to 31.03.2015 on the grounds inter alia that it is not ex-facie illegal and arbitrary and thus, liable to be interfered with in the interest of justice.

2. The dealer assessee is a proprietorship concern and has been registered under the Act w.e.f. 25.07.1991 having its places of business inside the State of Odisha. It is involved in business activities, such as, sales and service of three wheelers, spare parts and running hotel and restaurants. As revealed from the record, the dealer assessee was subjected to an audit inspection and finally on receipt of an Audit Visit Report (in short, 'AVR'), assessment proceeding under Section 42(1) of the Act for the tax period 01.04.2014 to 31.03.2015 was initiated. The dealer assessee appeared and caused production of books of account and other documents before the AA, who, ultimately, after its examination and considering the observations of the AVR, reached at a decision that it is liable to pay additional tax of ₹44,470.00 including penalty levied under Section 42(5) of the Act by disallowing ITC amounting to ₹14,824.00 on the ground that the seller had not admitted the same. The dealer assessee being dissatisfied, filed an appeal under Section 77(1) of the Act before the FAA, who observed that since the disputed tax was not actually paid by the selling dealer, the set off which is claimed is inadmissible and resultantly, confirmed the order of assessment dated 15.11.2017. Thereafter, the dealer assessee preferred the present appeal against disallowance of ITC to the extent of ₹14,824.00 and also for demanding additional tax of ₹44,470.00.

3. According to the dealer assessee, ITC can only be disallowed as per sub-section (8) of Section 20. It is contended that the authorities below could not have rejected ITC on the ground that the selling dealer was at fault in depositing the tax. It is further contended that the original tax invoices were produced and as such, the obligation was discharged in order to avail the ITC and it was in no way connected or concerned with the selling dealer, whether, to have paid the tax or not. Further urged that it is not incumbent upon the dealer assessee to satisfy regarding deposit of entry tax by the selling dealer, who, in case of default, may be prosecuted under Section 82(4) of the Act. The contention is that the dealer assessee discharged its burden of proof as per Section 95 of the Act and disallowance of ITC and further demand on any such ground would result in double taxation which is not prescribed in law and shall be violative of Article 265 of Constitution of India, 1950. Lastly, it is contended that if the statement of objects and reasons of the Act are read and properly understood, the essence of VAT is that it is a destination based multi-point levy providing set off of tax paid earlier on the purchases by way of ITC and when, the dealer assessee submitted the invoices supported by books of account, no other documentation to be necessary and therefore, disallowing ITC to the tune of ₹14,824.00 and demanding additional tax of ₹44,470.00 as has been directed by the AA and confirmed by the FAA is without jurisdiction.

4. By way of cross-objection, it is contended by the State that the grounds of the dealer assessee as to disallowance of ITC as selling dealer failed to

discharge the tax liability in juxtaposition to the assertion that no obligation rests upon it on account of a default by the seller were rightly addressed with reference to the ratio laid down by the Hon'ble Apex Court in the case of State of M.P. Vs. Indore Iron & Steel Mills Pvt. Ltd. reported in AIR 1998 SC 3050. It is also contended that sale is a contract, where parties are obliged to discharge the tax liability, as every input available by a purchasing dealer must have a corroborative output tax collected and paid by the selling dealer and keeping in view such aspect of the matter, the authorities below correctly arrived at a conclusion disallowing ITC and therefore, the grounds so raised by the dealer assessee are devoid of any merit. As regards imposition of penalty, it is contended that irrespective of any mens rea proved, it has to be levied being a statutory requirement, as has been enunciated by the Hon'ble Supreme Court in the case of Union of India and Others Vs. Dharmendra Textile Processors and others reported in (2008) 18 VST 180 (SC). With the above contention, the State claimed that the appeal is misconceived and hence, deserves to be dismissed.

5. The learned Counsel for the dealer assessee contended that the authorities below wrongly applied the decision of the Hon'ble Apex Court in the case of Indore Iron & Steel Mills Pvt. Ltd. ibid. It is further contended that there is no statutory obligation for the dealer assessee to ensure that the selling dealer does make the payment of entry tax collected from it before availing ITC which is also not contemplated in Section 20 of the Act. While contending so, an earlier order of the

Tribunal (FB) dated 15.09.2020 in S.A. No. 389 (VAT) of 2015-16 was cited, where ITC was disallowed, more or less, on a similar ground and it was set aside by allowing the cross-objection. The learned Standing Counsel (CT) for the State justified the demand by contending that unless actual payment of entry tax is shown, a dealer cannot be allowed to avail ITC and therefore, it is not a case where the Tribunal is to intervene and interfere with the impugned order dated 13.03.2018.

6. Section 20 of the Act deals with ITC. In fact, sub-section (3) thereof provides that 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 inside the State and under other contingencies stated therein. Sub-section (6) of Section 20 specifies that ITC shall not be claimed by a dealer for any tax period, until it receives tax invoice in original evidencing the amount of input tax. It is also provided in sub-Section (7) thereof that a dealer who intends to claim ITC shall, for the purpose of determining the amount of ITC, maintain accounts and such other records as may be prescribed in respect of the purchases and sales effected and stock held. The circumstances under which ITC shall not be claimed stand clearly enumerated in sub-Section (8) of Section 20 of the Act. From the above, it is clear and conspicuous that there is no any statutory obligation on the part of a buying dealer not to avail ITC unless the selling dealer deposited the entry tax in the Government exchequer. In fact, the Tribunal (FB) in its order dated 15.09.2020 supra, by referring to a decision of the

Hon'ble Delhi High Court in the case of Commissioner, Department of Trade and Taxes, Government of NCT Vs. S.K. Steel Traders reported in (2017) 101 VST 172 (Delhi) held that ITC cannot be disallowed or for that matter, rejected on the ground that the selling dealer had not deposited the entry tax. In said decision of the Hon'ble Delhi High Court, it has been held and observed that statutory authority granting ITC only to the extent of tax deposited by the selling dealer is an interpretation which is unsound and contrary to law and it is also iniquitous, since an onerous burden is placed on purchasing dealer to keep a vigil over the amounts deposited by the selling dealer, that too when, there is absence of any clear intendment in the statute. It is also held therein that in the event the selling dealer fails to deposit the tax after being collected from a purchasing dealer, the only remedy would be to proceed against the defaulter and not to reject ITC in favour of the purchasing dealer, who is otherwise entitled to it. In so far as Section 95 of the Act is concerned, no doubt burden always lies on the dealer, who claims ITC, which can be discharged on production of invoices for having purchases made. In other words, once invoices are produced by a dealer showing payment of entry tax, the burden of proof, as envisaged under Section 95 of the Act, stands satisfactorily discharged for the purpose of availing ITC which cannot, by any stretch of imagination, be disallowed for the selling dealer's default in depositing the tax. The learned Standing Counsel (CT) for the State contended that the AA referred to the decision of the Indore Iron & Steel Pvt. Ltd supra which required actual payment to

be established. In that case, the Hon'ble Supreme Court considered a notification issued under the M.P. General Sales Tax Act, 1958, which contained an expression that the goods 'had suffered entry tax' and while interpreting the same, it was held that only where the entry tax had been paid, exemption would arise. In fact, the aforesaid decision clarified that goods upon which entry tax had been paid to be eligible for exemption. As per the above ruling, exemption can only be claimed provided entry tax has been paid. It is not a ratio to hold that a selling dealer must have to deposit or a buying or a purchasing dealer shall have to ensure or prove that the tax collected by the selling dealer was deposited in order to avail the ITC. The payment of entry tax does mean, it had been paid by the purchasing dealer and for the purpose of availing ITC, it has no any obligation to prove and establish that the collected tax had really been deposited by the selling dealer. If a tax is paid by a dealer and again it is demanded on such a ground, as is put forth by the State, it would certain result in collection of tax twice, which is not at all comprehended in law and any such demand shall definitely be in flagrant violation of Article 265 of the Constitution of India, 1950. In the instant case, the dealer assessee said to have submitted the invoices with regard to the purchases made from the selling dealer and then, availed ITC and in the considered view of the Tribunal, the authorities below grossly erred in disallowing it on the plea that there was no evidence about the selling dealer to have been deposited the same. Having said that, the inevitable

conclusion of the Tribunal would be, additional demand of ₹44,470.00 as has been raised by the authorities below cannot at all be sustained in law.

7. Hence, it is ordered.

8. Thus, the appeal stands allowed. As a logical sequitur, the impugned order dated 13.03.2018 passed in Appeal No. 106221722000254 is hereby set aside. Resultantly, the order of assessment dated 15.11.2017 is quashed. The cross-objection is accordingly disposed of. The tax, if any, paid by the dealer assessee shall be refunded forthwith in accordance with law.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman