BEFORE THE FULL BENCH : ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 157 (VAT) of 2014-15
&
S.A. No. 178 (VAT) of 2014-15

(Arising out of order of the learned JCST, Sambalpur Range, Sambalpur in First Appeal Case No. AA- 4/BGH/VAT/2012-13, disposed of on dt. 31.03.2014)

Present : **Smt. Suchismita Misra**, **Chairman**
Shri Subrat Mohanty, 2nd Judicial Member
&
Shri Prabhat Ch. Pathy, Accounts Member-I

S.A. No. 157 (VAT) of 2014-15

M/s. Balgopal Food Products Pvt. Ltd.,
At/PO- Chakarkend, Dist. Bargarh. . . . Dealer

- V e r s u s –

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

S.A. No. 178 (VAT) of 2014-15

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

- V e r s u s –

M/s. Balgopal Food Products Pvt. Ltd.,
At/PO- Chakarkend, Dist. Bargarh. . . . Dealer

For the Dealer … Mr. B.N. Agrawal, Advocate
For the State … Mr. M.S. Raman, Addl. S.C. (CT)

Date of hearing: 27.02.2019 **** Date of order: 25.03.2019

O R D E R

The S.A. No. 157 (VAT) of 2014-15 preferred by the dealer-assessee and the S.A. No. 178 (VAT) of 2014-15 preferred by the State are directed against the order dated 31.03.2014 passed by the Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, "first appellate authority") in First Appeal Case No. AA- 4/BGH/ VAT/2012-13 wherein he allowed the appeal preferred by the dealer-assessee in part and reduced the assessment made by the Asst. Commissioner of Sales Tax, Bargarh Circle, Bargarh (in short, 'assessing officer') in respect of the business concern of the dealer-assessee u/S. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') pertaining to the tax period 01.12.2008 to 30.09.2010. As both the appeals are directed against the same order of the first appellate authority, they are taken up together for disposal in this order for the sake of convenience.

2. As would reveal from the case record the dealer-assessee named and styled as "M/s. Balgopal Food Products Pvt. Ltd." situated at Chakarkend in the district of Bargarh is a manufacturer and trader of rice bran oil. He purchases the raw material i.e. rice bran from the registered as well as unregistered sources situated in the same locality and by using the same he produces rice bran oil, refined rice bran oil, de-oiled rice bran, wax, acid oil, gum etc. and sells all those

goods both inside and outside the State of Odisha. His business activities pertaining to the relevant period was audited by a team of departmental officers in terms of provision u/S. 41 of the OVAT Act and then after receipt of the Audit Visit Report (AVR) a notice was sent to the dealer to appear before the assessing officer with his books of account. Thereafter the books of account were verified by the assessing officer. After examining all the transactions made by the dealer-assessee relating to the aforesaid assessment period and the AVR the assessing officer reversed the ITC claimed by the dealer-assessee to the tune of `69,91,677.00 and allowed the ITC amounting to `1,16,88,112.41 and thereafter calculated his tax due at `69,91,677.00. He imposed penalty of `1,39,83,354.00 u/S. 42(5) of the OVAT Act on the dealer on the ground that the dealer had filed the returns without reversing the ITC as provided in clause (d) of the proviso to sub-section (3) of Section 20 of the OVAT Act deliberately. Thus, the assessing officer issued a notice demanding `2,09,75,031.00 to be paid by the dealer towards his tax liability.

3. Being aggrieved with this order the dealer-assessee preferred an appeal before the first appellate authority asserting that the order of assessment was passed on 25.01.2012 instead of 06.01.2012 i.e. after the period of limitation which expired on 21.01.2012 which is in contravention of the provision as envisaged in

Sec. 42(6) of the OVAT Act. In order to substantiate his contention the dealer-assessee had urged before the first appellate authority to refer the CST appeal record for the same tax period which was filed on 23.01.2012 challenging the order of audit assessment made by the same assessing officer on the same day i.e. 06.01.2012. At that time the dealer-assessee filed some 'C' forms out of which two numbers of 'C' forms were issued on 17.01.2012 by the purchasing dealer and those 'C' forms were filed before the assessing officer on 23.1.2012. Thereafter the assessing officer passed the assessment order under the OVAT Act, OET Act and CST Act which were issued to the dealer-assessee vide Memo Nos. 182, 183 and 184 respectively on 25.01.2012. The dealer-assessee further asserted that filing of 'C' forms by him on 23.01.2012 could be ascertained from the CST assessment record and this circumstance would clearly establish that the order passed by the assessing officer under the OVAT Act was simply antedated and as such to be held as null and void. The dealer-assessee further asserted that the method of calculation for reversal of ITC adopted by the assessing officer was not in accordance with Rule 11(3) of the OVAT Rules. While considering the grounds advanced by the dealer-assessee and the relevant records the first appellate authority discarded the dealer-assessee's contention regarding antedated order of the assessing officer in order to bring the same within the period of limitation. The first

appellate authority, however, considered the question regarding determination of reversible amount of ITC in excess of CST payable on account of sale of de-oiled cake, tax exempted goods in course of inter-State trade and commerce and then concluded that calculation of reversal ITC by the assessing officer on account of sale of de-oiled cake was not correct. However, at the same time the first appellate authority held that the dealer was required to reverse the ITC in excess of CST payable in respect of sale of taxable goods in course of inter-State trade and commerce which the dealer had failed to do so. He (the first appellate authority) thereafter made a chart giving the description of taxable goods which were sold in course of inter-State trade and commerce; determined the reversible amount of ITC in respect of those transactions as prescribed under sub-section (10) of Section 20 of the OVAT Act and then came to a conclusion that the ITC amounting to `11,17,670.00 which was found to have been availed by the dealer-assessee in excess of CST payable by him was supposed to have been reversed in course of filing of returns. As the dealer-assessee was found to have failed to do so in violation of the relevant statutory provision and further as such failure on his part did not appear to be a bonafide omission, the first appellate authority determined the tax dues of the dealer at `11,17,670.00 and imposed penalty twice this amount of tax due which came to `22,35,340.00. He (the first appellate authority)

thus, required the dealer-assessee to pay a sum of `33,53,010.00 towards his tax liability for that relevant period.

4. Being aggrieved by this order the dealer-assessee preferred an appeal i.e. S.A. No. 157 (VAT) of 2014-15 as well as cross-objection in S.A. No. 178 (VAT) of 2014-15 assigning the grounds that the order of assessment done by the assessing officer and the order of the first appellate authority are bad in law as well as in facts. The first appellate authority is not justified in overruling the dealer's contention on the issue of limitation on the ground that there was no supporting evidence except the verbal assertions of the Advocate appeared on behalf of the dealer in that respect. The first appellate authority should have called for an explanation from the assessing officer as to why there was a delay of 19 days in issuance of the impugned assessment order dated 06.01.2012 in which he had made a demand of `1.10 crore but kept the order in his file till 25.01.2012. He further contended that certain facts absolutely indicate that the assessing officer passed the assessment orders under the OVAT Act, CST Act and OET Act for the same tax periods simultaneously on the same day but he showed that the order of assessment under the OVAT Act was passed by him on 06.01.2012 which is not at all correct. The dealer-assesse further contended that law relating to ITC provides that the said ITC is applicable in the case of trading goods purchased and sold as such but

not in case of purchase of raw materials and inter-State sale of goods manufactured therefrom. Thus the first appellate authority by applying the law in a very incorrect manner had computed the amount of reversible ITC and held the same being excess of CST payable by him determined his tax dues and imposed penalty thereon. For the above reasons the order passed by the first appellate authority is found to be absolutely unjustified and as such liable to be set aside with annulment of order of assessment as well.

5. The State has also preferred an appeal i.e. S.A. No. 178 (VAT) of 2014-15 as well as cross-objection in S.A. No. 157 (VAT) of 2014-15 challenging the very same order of the first appellate authority with the following grounds :-

The order of first appellate authority is unjust and illegal. The dealer-assessee in the instant case is a manufacturer and trader of rice bran oil, de-oiled cake etc. and being a manufacturer he sold both taxable and tax exempted goods. The first appellate authority devised his method of calculation for determination of reversible ITC following some judgments which are not applicable to this case. He committed gross error in calculating and determining the ITC due of the dealer and as such came to a wrong valuation for which the same is to be rejected and the matter is to be remanded back for fresh assessment.

6. In course of hearing these appeals learned Counsel appearing on behalf of the parties respectively putforth their points which they have already mentioned as grounds of their appeals and urged before this forum for setting aside the order passed by the first appellate authority. Learned Counsel appearing on behalf of the dealer-assessee submitted that the order of assessment has to be discarded and declared as null and void on the ground of limitation only. He urged before the Bench that in the instant case the AVR in respect of business concern of the dealer-assessee pertaining to the period from 01.12.2008 to 30.09.2010 was submitted on 30.03.2011. Therefore, as per provision of Sec. 42(6) of the OVAT Act the assessment u/S. 42 had to be completed within a period of six months from the date of service of notice issued under sub-section (1) of Sec. 42 alongwith the AVR. Section 42(2) of the OVAT Act provides as under :-

Quote : "Where a notice is issued to a dealer under sub-section (1), he shall be allowed time for a period of not less than thirty days for production of relevant books of account and documents." Unquote.

In the instant case the dealer claims that the notice u/S. 42 of the OVAT Act was issued to him on 18.07.2011 and pursuant to that notice he was required to appear before the assessing authority on 19.08.2011. The A.D. relating to this notice is available on record

which reveals receipt of notice by the dealer-assessee but without a date. However, from the seal found in the A.D. it appears that the same was received back in the office of the Asst. Commissioner of Sales Tax on 23.07.2011. In such state of affairs regarding issuance of notice it cannot be said that the dealer was not allowed time for a period of not less than 30 days for production of relevant books of account and documents.

7. Now the question comes whether the assessment u/S. 42 of the OVAT Act was not completed within a period of six months from the date of service of notice issued under sub-section (1) alongwith the AVR. In this regard it is found from the case record that the assessment order was passed on 06.01.2012 and the same was sent to the dealer-assessee on 25.01.2012. Learned Counsel appearing on behalf of the dealer-assessee contended that a CST assessment was also done in respect of his business concern for the same period and in the CST assessment he had furnished some 'C' forms on 23.01.2012 which were accepted by the assessing officer in the CST assessment order and concessional rate of CST was allowed. This indicates that the OVAT assessment which was also related to the CST assessment could not have been done prior to 23.01.2012 and as such the assessing officer had prepared the assessment order only after 23.01.2012 alongwith the CST assessment order and antedated the OVAT order to

bring the same within the period of limitation. However, on perusal of the OVAT assessment order it could not be gathered that the assessing officer had considered any such 'C' forms stated to have been submitted by the dealer-assessee before him for assessment under the CST Act. That apart, the dealer-assessee has neither filed any document nor produced any evidence from which it could be gathered that the order of assessment u/S. 42 of the OVAT Act was passed by the assessing officer beyond the period of limitation. In the circumstance the finding of the first appellate authority with regard to the period of limitation needs no interference.

8. Now the question comes as to what should be the quantum of ITC to be reversed. As noticed from the order of assessment as well as the order of first appellate authority, both the authorities below have nowhere mentioned about the dealer not keeping separate account of purchase of goods during that relevant period. They rather had given the chart reflecting the total inter-State sale, total sale, purchase value and sale of CST transaction etc. including CST payable by the dealer. Under such circumstance it is felt that the formula to be applied for determining reverse tax credit as envisaged u/R. 14(4) of the OVAT Rules is not required to be applied in this case. It is rather seen that the assessing officer did not specify the transactions from where he could gather total inter-State sale, total sale, total purchase

value of goods from the registered dealers, sale of CST transaction etc. but the first appellate authority has categorically reflected in a tabular form as to the description of goods, quantity sold in quintal, sale value, tax rate, tax amount (CST) and thus determined the total sale value which came to `3,89,61,349.00. Similarly, he has also given in a tabular form the description of goods, quantity in quintal, purchase value, tax rate and input tax to be availed by the dealer in his order now under challenge. From his appreciation on this issue as revealed from the impugned order he appears to be more accurate than the calculation done by the assessing officer to find out as to what should be the ITC to be reversed. The first appellate authority has categorically described in pages- 9, 10 and 11 of the impugned order as to why he came to a conclusion that the ITC to be reversed in this case comes to `11,17,670.00 which was availed by the dealer-assessee in excess of CST payable by him. Thus, he determined the tax amount to be paid by the dealer-assessee at `11,17,670.00. As he did not find any reason that this omission on the part of the dealer-assessee could be a genuine one, he imposed penalty of `22,35,340.00 which is twice the amount of tax to be levied from the dealer-assessee.

9. Therefore, the as per the discussion made in the foregoing paragraphs it is found that the order passed by the first

appellate authority does not suffer from any sort of infirmity which needs to be interfered with by this forum.

10. In the result, both the appeals preferred by the dealer-assessee as well as the State respectively are dismissed. Cross-objections are disposed of accordingly.

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

Sd/-
(Subrat Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Prabhat Ch. Pathy)
Accounts Member-I