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

S.A.No. 113(V)/2017-18

(From the order of the ld.JCST, Sambalpur Range, Sambalpur, in Appeal No. AA.134/SA-I/VAT/2013-14, dtd.20.04.2017, modifying the assessment order of the Assessing Officer)

Present: Sri S. Mohanty
2nd Judicial Member

M/s. Unifood India Pvt.Ltd.,
Nayapara, Dist. Sambalpur. ... Appellant

-Versus-

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

For the Appellant : Mr. N. Agrawal, Director
For the Respondent : Mr. S.K. Pradhan, ASC (CT)

(Assessment period : 01.04.2005 to 31.10.2006)

Date of Hearing: 01.08.2018 Date of Order: 01.08.2018

ORDER

Appeal against the order of assessment u/s.43 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act) when allowed in part but not in full as claimed by the dealer as appellant before the FAA, this second appeal is preferred by the dealer praying therein to set-aside the impugned order of the FAA and to delete the tax liability and penalty raised in the impugned order.

2. The facts in brief required for decision in this appeal are : the appellant-dealer M/s. Unifood India Pvt. Ltd., Nayapara, Sambalpur, a registered unit dealing with trading of peas, maize, sugar

and furniture etc., was subjected to assessment u/s.43 of the OVAT Act basing the escapement report submitted by AG Audit. It was reported that, the dealer had not reversed ITC against the loss of 367.50 quintals of peas as shown in the return and the dealer has not paid tax on sugar value of Rs.1,74,27,259/-. In course of re-assessment proceeding, the authority held that, the dealer was not entitled to claim ITC on the goods lost i.e. as per Sec.20(9) of the OVAT Act read with Sec.14(4) of the OVAT Rules and as such he was required to reverse the ITC to the tune of Rs.19,153/-. Besides, the AA has also held that, since the sugar was goods of special importance and exempted from levy of additional excuse duty, but as per Schedule-B Part-II in the list, it should have taxed @4% as suggested by the AG Audit and accordingly determined the tax at Rs.6,97,090/- on sale of sugar. Ultimately, the AA determined the total due i.e. the tax on sugar and ITC together which calculated at Rs.7,16,243/-. Twice of this amount was levied as penalty u/s.43(2) of the OVAT Act, thereby, the total demand of tax and penalty came to Rs.21,48,729/-.

3. This order of assessment was challenged by the dealer before the FAA, whereby and wherein the ld.DCST, Sambalpur as FAA deleted the tax liability as fixed against sale of sugar but confirmed the reversal of ITC. While confirming the reversal of ITC, he also sustained the order of penalty as levied u/s.43(2) of the OVAT Act and as such the total demand though reduced but calculated at Rs.57,459/-.

4. Feeling aggrieved further, the dealer has filed this second appeal with self-same contentions raised before the FAA. It is contended that, the proceeding u/s.43 is barred by limitation and the order of reversal of ITC is not sustainable, since there was assessment of tax liability u/s. 42 of the OVAT Act basing the same Audit report.

5. State has contested the appeal by filing cross objection. It is contended by the State that, when the re-assessment u/s.43 of the OVAT Act covers the period from 01.04.2005 to 31.10.2006, in that case, the order of assessment dtd.09.07.2013 is well within seven years period, which was expiring on 30.10.2013. Similarly it is also contended that, the reversal of ITC as ordered is valid since the question of ITC was not taken into consideration in the audit assessment while raising the VAT.

6. In consideration of the rival contentions and the prayer of the dealer-appellant, following questions are framed for decision in this appeal : (i) Whether the assessment u/s.43 of the OVAT Act is barred by limitation ? (ii) Whether the determination of reversal of ITC is not maintainable since it was considered and determined in the regular audit assessment u/s.42 of the OVAT Act in the case in hand ?

7. To substantiate his claim, the dealer in person present in the hearing has argued that, the fraud case report No.142 dtd.28.02.2006 was the basis of audit visit. As per Sec.43 of the OVAT Act, no order of assessment would have made after the expiry of 7 years from the end of the tax periods or tax period in respect of which, tax is assessable. Here in this case, the assessment was completed on 09.07.2013 i.e. beyond the period 7 years from the fraud case report dtd.28.02.2006. So, it should be treated as time barred and the proceeding is not maintainable.

Per contra, learned Addl. Standing Counsel (C.T.), Mr. Pradhan vehemently argued that, the assessment comprised a period from 01.04.2005 to 31.10.2006. So, the period of 7 years starts from 31.10.2006 but not from the date of the fraud case report. Tax period as mentioned in the Sec.43(3) of the OVAT Act should be treated as

starting period for the purpose of 7 years. The assessment period as above were under consideration before the AA in the proceeding u/s.42 of the OVAT Act, which was decided on 07.06.2007. This tax period in consideration in that proceeding was not questioned by the dealer. So, the same period cannot be questioned here. So, the contentions of the dealer on this point has no force and is not sustainable. As such the proceeding is found to be maintainable.

8. Next plunk of argument of the dealer is, in the regular assessment u/s.42 of the OVAT Act, which was based on the fraud case report, the authority had taken into consideration of suppression to the tune of 738.52 quintals of peas worth of Rs.10,25,076/-. That suppression includes the quantity, which was shown by the dealer as damaged peas sold at Rs.2,32,277/- and according to the dealer, it was sold as cattle feed, which was tax free. As such, once that quantity was taken into account in the sale suppression in the assessment u/s.42 of the OVAT Act, then how the same could be reagitated here for the purpose of re-assessment u/s.43 of the OVAT Act. Perused the order of AA passed u/s.42 of the OVAT Act dtd.09.07.2013. The order as it revealed, the AA had determined the suppression of 738.52 quintals and that includes the damaged peas of 367.50 quitnals for Rs.2,32,277/- as claimed by the dealer. The AO rejected the claim of the dealer about sale as tax free goods and then determined the price of the entire 738.52 quintals at Rs.10,25,076/-. It has also determined the sale price of the peas purported to have sold as tax free goods at Rs.5,10,095/-. Now the question is, once that amount was treated as sale suppression and has taken into consideration in the earlier assessment u/s.42 of the OVAT Act, then whether re-assessment can be made on the question of reversal of ITC on that quantity. The

assessment order u/s.42 of the OVAT Act as it revealed, the authority had not considered the eligibility of ITC but has taken consideration of the goods shown as damaged or sold as tax free goods. The dealer argued that, the same fact cannot be considered twice. Conversely, learned Addl. Standing Counsel, Mr. Pradhan advanced the order passed in VAT appeal by the FAA dtd.11.09.2008 and argued that, the assessment u/s.42 was challenged before the FAA in First Appeal Case No.AA.297/SAI/VAT/07-08 and the assessment was deleted as it was done by Officer having no jurisdiction. Perused the order passed by the FAA. The order as it revealed, the FAA had dropped the proceeding u/s.42 of the OVAT Act for want of jurisdiction of the AO. Learned Addl. Standing Counsel argued that, it was an order not on merit. So, the consideration of the fact of goods to the tune of 367.50 quintals can be taken up in this appeal. It is apt to mention here that, it is the dealer himself has shown this quantity of goods sold as cattle feeds. So barring the fact of sale suppression as suggested in the Audit Visit Report, basing which the proceeding u/s.42 of the OVAT Act was initiated, it is admitted fact that, the dealer has shown the quantity of 367.50 quintals as damaged goods sold as cattle feeds worth of Rs.2,32,277/-. It was not found established that, there was any damage as claimed. So taking cue from the impugned order the value of 367.50 quintals of peas is calculated at Rs.5,10,095/-. Since it is treated as damage or sale suppression, the dealer is liable to reverse the ITC in application of the provision u/s.14(4)(i). The ITC is calculated as follows:

$$X = \frac{U \times V}{W}$$

$$= \frac{\text{Rs.}32765435 \times 510095}{1269964925} = \text{Rs.}13,160/-$$

Thus, as determined above it is held that, the dealer is liable to pay ITC of Rs.13,160/-.

9. Coming to the question of levy of penalty as per Sec.43(2) of the OVAT Act, perusal of the provision u/s.43 as it revealed, when the AO is satisfied that the escapement or under-assessment of tax on account of any reasons mentioned in sub section '1' of Sec.43 above is without any reasonable cause, he may direct the dealer to pay, by way of penalty, a sum equal to twice of the amount of tax additionally assessed under this section. Thus, as per the provision the cases fall under clause 'a' and 'b' of the provision u/s.43 attract penalty. If the dealer was allowed ITC wrongly to which he is not eligible can be assessed u/s.43 but for that reason Sec.43(2) is not attracted. Thus, it is held that, in the case in hand, even though, the dealer is liable to reverse the ITC as wrongly claimed or allowed but he is not liable to any penalty. In the result, it is hereby ordered.

The appeal by the dealer is allowed in part on contest. The dealer is only liable to reverse the ITC to the tune of Rs.13,160/-.

Dictated and Corrected by me,

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

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