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

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

(From the order of the ld.Addl.CST (Appeal), Central Zone, Odisha, Cuttack, in Appeal No. AA/JCST/BLS(V)/128/14-15, dtd.30.11.2017, modifying the assessment order of the Assessing Officer)

Present: Sri S. Mohanty
2nd Judicial Member

M/s. Diana Foams Pvt.Ltd.,
Industrial Estate, Rairangpur,
Dist. Mayurbhanj. ... Appellant

-Versus-

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

For the Appellant : Mr. C.R. Das, Advocate
For the Respondent : Mr. S.K. Pradhan, ASC (CT)

(Assessment period : 01.08.2008 to 31.03.2012)

Date of Hearing: 21.08.2018 Date of Order: 27.08.2018

ORDER

This second appeal is preferred by the dealer challenging the computation of reversal of ITC on application of provision u/s.20(3)(d) of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act) to be wrong and not applicable to the case in hand.

2. The assessee-dealer was a manufacturer of PU foam. For the purpose of manufacturing, it used to purchase raw materials from inside as well as from outside the State dealers vis-à-vis it also engaged in selling of finished goods to purchaser inside and outside the State. As against the intra-state purchases, when the dealer availed ITC to the tune of Rs.52,45,655.68 without considering the

CST sale and by reducing the ITC in excess of CST payable as per the provision of Sec.20(3)(d) of the OVAT Act, the Audit team suggested for reversal of ITC. On the basis of such Audit report, proceeding u/s.42(4) of the OVAT Act was initiated taking the tax period from 01.08.2008 to 31.03.2012. In course of the assessment, the AA found the dealer had total purchase of Rs.18,69,33,688.00 (as per Assessment order) which includes 23.74% of his total intra-state purchases. On the other hand, the dealer had intra-state sale (within State) of finished products to the tune of Rs.9,05,76,588.16 i.e. 34.66% of the total sale of Rs.26,13,53,121.30. The dealer's contention was, the total purchase inside the State i.e. 23.74% is quite less than the total sale inside the State i.e. 34.66%. So, keeping in view the turnover of intra-state purchase and sale, the dealer was entitled to entire amount of ITC availed. The claim of the dealer was denied and the AA proceeded with the calculation of reversal ITC on application of Rule 20(3) proviso (d) of the OVAT Act i.e. against the amount of CST sale. As a result, the dealer was asked for reversal of ITC to the tune of Rs.26,76,433.30. In addition to that, the dealer was asked to pay penalty u/s.42(5) of the OVAT Act at two times of the tax due calculated at Rs.53,53,925.10. Thus, the total demand against the dealer was raised to Rs.80,30,888/-.

3. Being aggrieved, the dealer had preferred first appeal, whereby the ld.ACST (Appeal), Central Zone, Odisha, Cuttack as FAA accepted the dealer's books of account and the percentage of intra-state purchase and the percentage of intra-state sale i.e. 23.74% and 34.66% respectively. Then he re-determined the reversal of ITC on the basis of the ratio of the percentage-wise VAT sale and CST sale. As a result, ITC reversed became reduced to Rs.15,46,907/. However, he imposed penalty twice of it calculated at Rs.30,94,871.74. Thereby, the

total demand is re-determined at Rs.46,42,308/- instead of Rs.80,30,887.65 as determined by the AA.

4. Being further aggrieved, the dealer has preferred this appeal. It is contended that, the dealer had purchased maximum quantity of raw materials from outside the State. The raw materials like polyol and TDI consists more than 90% of the total raw materials used in the manufacturing and the balance 10% of raw materials are other kind of raw materials, which were purchased within the State. It is further contended that, the calculation of reversal of ITC by both the fora below has no sanction under law and the penalty as imposed is unwarranted.

5. In the cross objection, the Revenue has contended that, since the dealer could not produce the break up of the utilization of raw materials against the finished goods sold within the State or outside the State. The plea like raw materials purchased inside the State were sold within the State should not be accepted. So, reversal of ITC as determined is correct and in accordance to law.

6. The fact in dispute giving rise to the substantial question to be determined in this case are; Whether the dealer is entitled to avail entire amount of ITC as claimed or whether the reversal of ITC in application of the provision u/s.20(3) proviso (d) of the OVAT Act is appropriately applied in the case in hand ?

7. The admitted facts in this case are : the dealer has made purchases from intra-state as well as inter-state dealers. The dealer had also sold finished products after manufacturing to intra-state and inter-state purchasers. The books of account produced by the dealer was accepted by the authority. The percentage of raw materials i.e. 23.74% as shown by the dealer towards purchases inside the State was also not disputed. Similarly the percentage of intra-state sale i.e.

34.66% was almost not disputed. The AA has only taken into consideration of the amount of CST sale and then applied the provision u/s.20(3) proviso (d), which reads as follows :

> "(d) the input tax credit on purchase when sold in course of inter-State trade or commerce shall be allowed only to the extent of the Central sales tax payable under the Central Sales Tax Act, 1956 (74 of 1956)."

The provision u/s.20 or Rule 11 or 14 does not specify any method for calculation of ITC when there is intra-state as well as inter-state sale. In this case, the dealer took an inconsistent stand such as, at one point, the dealer claimed whatever he has purchased inside the State i.e. sold inside the State only. In the appeal memo, dealer has stated 90% of the products are purchased from outside the State. However, on perusal of the LCR and orders from both the fora below, it is evident that, the dealer has purchased raw materials within the State and outside State. It is not known what amount of raw materials purchased inside the State is utilized in the finished products covered under CST sale. It is also not known whether any amount of intra-state purchase should be covered under CST sale. The dealer's books of account does not reflect such details and morefully it can safely be said that it is not possible for any dealer to make such calculation relating to the raw materials used in finished products after manufacturing with respect to the inter-state or intra-state purchase/sale. On careful perusal of the order of AA, it is found that, the AA has not taken into consideration of the intra-state sale. So, there is no hesitation to hold that, the calculation of reversal of ITC by the AA is erroneous and not sustainable. When it comes to the impugned order, it is found that, the FAA has held that, in accordance to the percentage of inter-state and intra-state sale, the total ITC

claimed by the dealer should have been divided. He has discarded the plea of the dealer that, the intra-state purchase were only used in intra-state sale of finished goods so as to enable the dealer to avail entire amount of ITC to the tune of Rs.52,45,655.68.

To appreciate the question of dispute involved here in this appeal, it will be beneficial to read and produce the provisions relevant to the calculation of ITC and reversal of ITC. The instant dealer effects intra-state and inter-state sale. Both the fora below have gone by the provision u/s.20(3)(d) read with Rule 11(3)(a) of the OVAT Act. Both the provisions reads as follows :

Sec.20(3) :

(d) "[(the input tax credit on purchase when sold in course of inter-State trade or commerce shall be allowed only to the extent of the Central Sales Tax payable under the Central Sales Tax Act, 1956 (74 of 1956)"

Rule 11(3) :

(a) "Where a dealer effect sale of goods in the course of inter-State trade and commerce, the creditable input tax shall be calculated limiting the same to the extent of CST payable under the CST Act 1956 as provided in clause (d) of the proviso to sub-section (3) of Section 20 of the Act".

Both the provisions above do not speak of the contingencies where there is inter-state sale and intra-state sale as well by the dealer. Both the provisions only give a limit i.e. to the extent the dealer is entitled to avail ITC in case of CST sale. But that does not mean or imply that the dealer's entitlement of ITC beyond the CST sale will be lost not withstanding the fact that, the dealer has also effected intra-state sale and collected VAT/output tax. Either it is the CST sale or VAT sale, in both the cases, the output tax so collected goes to state exchequer. Here it is apt to mention the provision u/s.21 of the OVAT Act which reads as follows :

"**21. Input tax credit exceeding tax liability.-**

(1) If the input tax credit of a registered dealer other than an exporter selling goods outside the territory of India determined under Section 20 for any tax period exceeds the tax liability for that period, the excess input tax credit shall be set off against the tax payable under the provisions of the Central Sales Tax Act, 1956 (74 of 1956) for that period at the first instance and if any balance input tax credit is still available, the same shall be carried forward for being set off against the tax payable for subsequent tax period or periods by that dealer.]

(2) The excess input tax credit after adjustment under sub-section (1), shall be carried forward as an input tax credit, to the subsequent tax period or periods, till it is fully adjusted.

Provided that no excess input tax credit for a tax period shall be carried forward exceeding a period of twenty-four months from the close of the year to which that tax period relates.

(3) Where input tax credit is so carried forward, a quarterly credit statement shall be forwarded to the concerned dealer and the claims reconciled accordingly".

Rule 7(3)(C) of the CST Rules is also very much pertinent on this issue and the provision reads as follows :

7. Returns

Xxx xxx xxx xxx

(c) Where, in case of a dealer registered under this Act and the Orissa Value Added Tax Act, 2004, the input tax credit under the Orissa Value Added Tax Act, 2004 in respect of a month or quarter, as the case may be, exceeds his tax liability under the said Act for that period, the excess input tax credit shall be set off against the tax payable under this Act and these rules in the return for the same month or quarter, as the case may be.]

[***Provided that*** in cases where the registered dealers have, while filing return under the Act and these Rules for the tax periods commencing from 1st July 2005, adjusted the excess input tax under the Orissa Value Added Tax Act, 2004 towards the tax payable under the Act and these rules shall be deemed to have claimed such set off under sub-rule (3)]"

Provision u/s.21 of the OVAT Act went through amendment w.e.f.01.06.2008 and the same specifically relates to calculation of ITC and it is needless to mention here that, the provision of ITC is introduced by the VAT Act itself. In that view of the matter, any ambiguity or inconsistencies in between Rule 7 of the CST Rule and Sec.21 of the OVAT Act as amended on 01.06.2008, the interpretation attributed to Sec.21 of the OVAT Act will be the guiding principle in the matter of calculation of ITC. A harmonious reading of both the provisions clearly indicates. Once there is entitlement of ITC under OVAT Act exceeds the tax liability of that period, then the excess ITC shall be set off against the tax payable under the provision of the CST for that period at the first instance and if any balance ITC is still available, the same shall be carried forward for being set off against the tax payable for subsequent tax period or period by the dealer. The provision u/s.21 of the OVAT Act above is in consonance to Rule 7(3)(C) of the CST (O) Rules. The conjoint study of the Sections leads to a definite conclusion that, the ITC accrued/available to the dealer should be adjusted from the output tax collected by both the sales like CST sale (inter-state sale) and VAT sale (intra-state sale).

The impugned order as it revealed, the FAA has taken consideration of Rule 20(3)(d) of the OVAT Act and Rule 11 of the OVAT Rules. But the authority has not taken consideration of the Rule 7(3)(C) of the CST(O) Rules and Sec.21 of the OVAT Act. In application of both the provisions, it can safely be said that, the dealer is entitled to the entire amount of ITC as available from the output CST sale and VAT sale. Keeping in view the decision above, adverting to the case in hand, it is held that, the mode of calculation by the fora below and the mode of calculation by the dealer, both are not in accordance to law.

Resultantly, it is held that, the calculation of ITC and direction for reversal of ITC in the case in hand is not sustainable in the eye of law. Hence, in ultimate analysis, it is held that, the dealer is not liable to reverse any ITC since his entitlement is not exhausted by application of Sec.20(3)(d) of the OVAT Act, particularly when, he had collected VAT in intra-state sale entitling him to avail ITC. Noteworthy to mention here that, once the dealer is found to not liable to reverse any ITC in that case question of penalty does not arise.

In the wake of above it is ordered.

The appeal is allowed on contest. The impugned order is set-aside. The dealer is not liable to reverse ITC as determined by both the fora below.

Dictated and Corrected by me,

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

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