BEFORE THE JUDICIAL MEMBER-I:
ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 82(V) of 2018
(Arising out of the order of the learned JCST, Bhubaneswar Range, Bhubaneswar, in First Appeal Case No. 106221722000160, disposed of on dtd.30.12.2017)

P r e s e n t: Shri A.K. Dalbehera, O.S.J.S.
M.A., LL.M.
1st Judicial Member

M/s. Lafarge Aggregates &
Concrete India Pvt. Ltd.,
Now- Nuvoco Vistas Corp. Ltd.,
Flat No.2A, Sector-A, Zone-B,
Mancheswar Industrial Estate, Rasulgarh,
Bhubaneswar. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. R.C. Das, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 10.03.2021 *** Date of order: 26.03.2021

O R D E R

This appeal is directed against the order dtd.30.12.2017 passed by the learned Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar (hereinafter referred to as, the learned JCST) in First Appeal Case No. 106221722000160, wherein he reduced the demand to Rs.72,10,284.00 from Rs.76,50,051.00 made by the learned

Deputy Commissioner of Sales Tax, Bhubaneswar III Circle, Bhubaneswar (hereinafter referred to as, the learned DCST) for the assessment period 01.04.2013 to 31.03.2015 u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act).

2. The brief facts of the case are that, the appellant-dealer is engaged in the business of manufacture and sale of ready-mix concrete of Lafarge bran at Bhubaneswar. Consequent upon tax audit of the business of the appellant-dealer for the tax period from 01.04.2013 to 31.03.2015 which resulted in detection of irregular claim of ITC affecting its tax liability, the learned DCST initiated assessment proceeding u/s.42 of the OVAT Act and upon hearing the dealer and considering the objections filed by him completed the assessment raising the demand. In the assessment the learned DCST disallowed the claim of ITC amounting to Rs.26,63,082.30 on the ground that the selling dealers had either not filed returns or had shown less tax collected or not shown any output tax at all. The reversal of ITC has been effected on the point of mismatch of the particulars of sale details of the selling dealers with that of the purchase details of the appellant-dealer furnished at Col. 57 of the return in form VAT-201 and this was effected on verification with the website (VATIS) of the department. Besides disallowing ITC of Rs.26,63,082.30 the learned DCST had disallowed ITC amounting to Rs.2,293.00 on the ground that the inputs corresponding to such ITC had been used for self consumption. The appellant-dealer was assessed to tax amounting to Rs.4,46,59,024.00 and after adjustment of

creditable ITC amounting to Rs.1,67,01,635.70 and tax paid with returns amounting to Rs.2,54,07,371.00, the balance tax payable was determined at Rs.25,50,017.00. The learned DCST imposed penalty amounting to Rs.51,00,034.00 u/s.42(5) of the OVAT Act, 2004. Thus the appellant-dealer was made liable to pay tax and penalty amounting to Rs.76,50,051.00.

3. Being aggrieved by the order of the learned DCST, the appellant-dealer preferred an appeal before the learned JCST who reduced the demand to Rs.72,10,284.00. Being further aggrieved by the order of the learned JCST, the appellant-dealer has preferred the second appeal.

Cross objection has been filed by the respondent-Revenue by supporting the impugned order.

4. Heard the learned Counsel for the appellant-dealer and the learned Addl. Standing Counsel appearing for the Revenue. Perused the materials available on record and the orders passed by both the fora below. I also perused the grounds of appeal and the plea taken in the cross objection. From the submission of the learned Counsel of the appellant-dealer and from the grounds taken in the appeal it is evident that the appellant-dealer has challenged the disallowance of ITC amounting to Rs.25,18,786.22 which is not maintainable in the eye of law; that the learned DCST did not hold any inquiry nor called for the information from the concerned dealer for verification of their accounts before treating it as mismatch of ITC which is against the principle of VAT law; that no proper enquiry was conducted by the learned DCST before completion of assessment; that the appellant-dealer

had taken utmost care to obtain sales ledger copy from the selling dealer and the learned DCST should have allowed further opportunity to obtain certificates from the other dealers; that due to insufficient opportunity the appellant-dealer could not place the ledgers of other dealers for which the demand on ITC mismatch was found and by not allowing sufficient opportunity the learned DCST had not followed the principles of natural justice; that there is only demand on ITC mismatch for which imposition of 200% penalty is prima facie wrong and not maintainable in the eye of law; that the learned JCST concluded the appeal in a routine manner which is against the principle of natural justice and hence the impugned order is liable to be set aside.

5. I have meticulously gone through the impugned order. From the impugned order it is seen that evidence of purchase from M/s. The Sanchar involving ITC amounting to Rs.92,147.00 was not produced by the appellant-dealer. M/s. Prabasini Mohanty had filed returns disclosing no purchase no sale for which the learned JCST held that the appellant-dealer cannot avail ITC when the selling dealer had not reported the transactions and not paid the tax. The ITC claimed against purchases made from M/s. The Structural Water Proofing Co. Pvt. Ltd. do not match completely with the transactions reported by the seller and the dealer had not taken any step to reconcile the mismatch with the seller. It is also found by the learned JCST that the appellant-dealer had not taken any step to reconcile the mismatch with the seller relating to M/s. India Cement Ltd. The appellant-dealer had also not taken any step to reconcile the mismatch with the

selling dealer M/s. Garuda Aggregate Pvt. Ltd. who had not reported its sale details in the returns for the relevant period.

6. The claim of ITC can only be set off from the output tax under the OVAT Act and no set off can be allowed otherwise. The allowance of set of ITC is conditional in nature as per the provisions of the Act. The amount of set off of ITC is only from the output tax under the Act and there is no independent right to a set off. The entitlement to a set off is created by the taxing statute and the terms on which a set off is granted by the legislation must be strictly observed. In view of such discussion I rely on the decision of our own Hon'ble High Court as reported in **(2012) 56 VST 68 (Orissa) in the case of National Aluminium Company Ltd. v. Dy. Commissioner of Commercial Taxes, Bhubaneswar III Circle, Khurda**, where the Hon'ble Court have highlighted about the set off as follows-

> "Input" has been defined in Section 2(25) to mean that any goods purchased by a dealer in the course of his business for resale or for use in the execution of works contract, in processing or manufacturing, where such goods directly goes into composition of finished products or packing of goods for sale, and includes consumables directly used in such processing or manufacturing. Section 2(26) defines "input tax" to mean tax collected and payable under this Act in respect of sale to a registered dealer of any taxable goods for use in the course of his business, but does not include tax collected on the sale of goods made to a

commission agent purchasing such goods on behalf of such dealer. "Input-tax credit" as defined under Section 2(27) of the OVAT Act means the setting off of the amount of input tax or part thereof under Section 20 against the output tax, by a registered dealer other than a registered dealer paying turnover tax under Section 16.

On a conjoint reading of Section 2(25), Section 2(26) and Section 2(27) of the OVAT Act, it is amply clear that a registered dealer under the OVAT Act shall be entitled to set off the tax paid on the purchase of goods effected by such dealer either for resale or for use in execution of works contract or for manufacture and processing against the output tax, that is the tax payable on sale of any taxable goods."

7. It is the settled principle of law that no ITC can be allowed on billing, bogus transactions and when genuineness of the transactions are doubtful. The onus for claim of ITC is on the dealer-purchaser to be proved beyond reasonable doubt. In **Commissioner of Customs (Import), Mumbai v. M/s. Dilip Kumar and Co. (2018) 9 SCC 1** the Hon'ble Apex Court held that exemption has to be strictly construed and to be proved by the person who claims the same to avail the benefit.

A bonafide purchasing dealer cannot be denied his claim because of the intentional default of the selling dealer over whom the purchasing dealer has no control. The taxing authority may also as per law collect tax from the defaulting

dealer and punish him, but it is to be seen whether the selling dealer is a registered dealer or not. If the purchasing dealer has shown that he has complied with the requirements he cannot be denied ITC only because the selling dealer fails to discharge his obligation under the Act by not depositing the tax collected under the law.

8. It is held that mismatch of ITC can never be a ground to disallow ITC to a bonafide purchasing dealer who has acted in good faith. But in the event it is found that the selling dealer is a fake dealer where there is no question of collection and payment of output tax, in that event it is nothing but a commission of fraud and the question of ITC shall not arise. Hence this is a fit case where the matter should be remitted back for a limited purpose of enquiry into the identity of the selling dealer and to determine the legitimacy of the claim of ITC. As regards the question of imposition of penalty it is the mandate of the provision u/s.42 of the OVAT Act that in case of wrong claim of ITC or erroneous claim of ITC, the dealer can be assessed u/s.42(3) or 42(4) of the OVAT Act. Further, Sec.42(5) of the OVAT Act speaks of penalty as a mandatory consequence in case the dealer is found liable to pay tax in an assessment u/s.42(3) or 42(4) of the OVAT Act. Thus when there is an assessment u/s.42 of the OVAT Act and there is a wrong claim of ITC, then penalty can be imposed in that case. However, in the case in hand, the question of penalty will arise only when it is found that the claim of the dealer for the admissible ITC is found wrong. In view of such analysis, I hold that the matter

is to be remitted back to the learned DCST for fresh assessment.

9. Thus I am of the opinion that the arguments advanced by the learned Counsel for the appellant-dealer appears to be genuine and this is a fit case where the matter should be remanded to the learned DCST for fresh assessment. Similar view has been taken by this Tribunal in case of the same dealer vide S.A. No.128(V) of 2018, disposed of on dtd.28.02.2020. The principle of natural justice should be strictly adhered to by verifying the relevant documents to be produced by the appellant-dealer. Hence, it is ordered.

10. The appeal is allowed on contest and the impugned order is hereby set aside. The matter is remanded to the learned DCST to ascertain the genuineness of the claim of the appellant-dealer and to conduct fresh assessment in view of the entire observations made in the foregoing paragraphs after giving the appellant-dealer a reasonable opportunity of being heard within a period of three months from the date of receipt of this order. The cross objection is accordingly disposed of.

Dictated & corrected by me,

Sd/-
(A.K. Dalbehera)
1st Judicial Member

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