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

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

S.A. No. 148(V) of 2017-18
(Arising out of the order of the learned JCST (Appeal), Cuttack II Range, Cuttack, in First Appeal Case No. AA/80/OVAT/CUII/2016-17/106131713000034, disposed of on dtd.26.05.2017)

M/s. Mahima Alekha Coal Traders,
Plot No.-304, Nelia, Manguli Chhak,
P.O.- Choudwar, Dist.- Cuttack. ... Appellant

- V e r s u s -

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

S.A. No. 158(V) of 2017-18
(Arising out of the order of the learned JCST (Appeal), Cuttack II Range, Cuttack, in First Appeal Case No. AA/80/OVAT/CUII/2016-17/106131713000034, disposed of on dtd.26.05.2017)

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M/s. Mahima Alekha Coal Traders,
Plot No.-304, Nelia, Manguli Chhak,
P.O.- Choudwar, Dist.- Cuttack. ... Respondent

For the Dealer : Mr. B.B. Panda, Advocate
For the Revenue : Mr. M.S. Raman, A.S.C.

Date of hearing: 15.01.2021 *** Date of order: 04.02.2021

O R D E R

As both the appeals bearing S.A. No. 148(V) of 2017-18 and S.A. No. 158(V) of 2017-18 arose out of the self-same order, both are disposed of by this common order.

2. S.A. No.148(V) of 2017-18 has been preferred by the dealer whereas S.A. No. 158(V) of 2017-18 has been preferred by the Revenue against the order dtd.26.05.2017 passed by the learned Joint Commissioner of Sales Tax (Appeal), Cuttack II Range, Cuttack (hereinafter referred to as, the learned JCST) in First Appeal Case No. AA/80/OVAT/CUII/2016-17/106131713000034, wherein and whereby he reduced the tax demand to Rs.20,18,565.00 from Rs.2,01,850.00 as raised by the learned Sales Tax Officer, Cuttack II Circle, Cuttack (hereinafter referred to as, the learned STO) in an assessment u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, OVAT Act) for the assessment period 01.04.2013 to 31.03.2015.

3. The brief facts of the case are that, the dealer carries on business in trading of coal on wholesale-cum-retail basis. During the material period the dealer had purchased coal both from registered and unregistered dealers inside the State of Odisha and effected sale within the State. The dealer also effected stock transfer of goods to its own branch located at Medinpur, West Bengal. The dealer had maintained purchase and sale accounts manually. On examination of

books of account, it was found that the dealer had made inside State purchase of taxable items such as coal for an amount of Rs.6,32,44,460.00 by availing input tax of Rs.31,53,373.00 but the dealer had purchased coal of 100MT from unregistered sources to the tune of Rs.1,77,000.00 during the year 2014-15. As against the aforementioned transaction the dealer had disclosed the gross sale/transfer to the tune of Rs.6,65,98,154.00 against which it had shown output tax amounting to Rs.22,10,073.00. But as per Audit Visit Report there was stock discrepancy, ITC reversal issue and ITC mismatch of dealer against the selling dealer for the period 2013-14 and 2014-15. Accordingly, the learned STO determined the GTO of the dealer at Rs.4,64,11,548.00 and TTO at Rs.4,42,01,475.00 and calculated the tax demand at Rs.20,18,565.00 including penalty of Rs.13,45,710.00.

4. Being aggrieved by the order of the learned STO, the dealer preferred an appeal before the learned JCST who reduced the demand to Rs.2,01,850.00 including penalty and also passed order that the excess tax paid, if any, be refunded to the dealer as per the provisions of law. Being aggrieved by the order of the learned JCST both the dealer and the Revenue have filed second appeals. In the appeal filed by the dealer vide S.A. No.148(V) of 2017-18 the Revenue has filed cross objection whereas in the appeal filed by the Revenue vide S.A. No.158(V) of 2017-18 the dealer has not filed any cross objection.

5. In the appeal filed by the dealer in S.A. No.148(V) of 2017-18, it has come up with the following grounds:-

(i) Without assigning any reason the learned JCST has disallowed ITC of Rs.88,621.00, which is not in accordance with the provisions of law, where it is a settled principle of law if the tax has been paid on the strength of invoice the assessing officer shall have power to appreciate any other documents and evidence to ascertain the facts that the appellant has paid tax on goods at the time of purchase and in spite of tax invoice the same may be taken into account.

(ii) The learned STO as well as the learned JCST have failed to consider the confirmation letter issued by the selling dealer with a certificate that the purchase turnover of the dealer has been disclosed by them in their periodic return as sales turnover for the above tax periods, therefore the second time tax on the same turnover shall amount to reassessment of assessed turnover. The above principle is not permissible under the four corners of the statute.

(iii) Without rejecting the books of account, invoices and confirmation letters of the selling dealer the disallowance of ITC is not permissible under the law.

In the appeal filed by the Revenue in S.A. No.158(V) of 2017-18 it has come up with the following grounds:-

(i) The order of the first appellate authority appears to be unjust and improper.

(ii) The case cited by the first appellate authority before allowing trade discount is distinguishable from this case, because here the statute has clearly determined the term “sale price” which means the amount of valuable consideration received or of receivable by a dealer as consideration for the sale of any goods less any sum allowed as cash discount or trade discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof. Normally the VAT is leviable on the sale price under present statute. So sale value itself includes the trade discount. Anything paid afterward is either the sales return price in for of credit note or it is an incentive. Besides these discount availed by the dealer in any name & form will reduce the sale price thereby reducing ITC availed by the dealer, which leads to reversal of ITC on the hand of purchaser. So it appears that the STO has rightly disallowed the same. The discount that has been allowed by the first appellate authority has not been properly identified by its nature and he has not clearly narrated whether reversal of ITC is applicable in this case or not? Simply using straight jacket method nothing can be inferred. So the order of the first appellate authority is to be set aside.

(iii) The order of first appellate authority may be set aside and that of the STO may be restored.

6. The Revenue in the S.A. No.148(V) of 2017-18 has filed cross objection as follows:-

(i) There is no reasonable merit in the second appeal filed by the dealer, which is not sustainable in the eyes of law.

(ii) The assessing authority has rightly completed assessment based on the statutory provisions under the Act and Rules with regard to the points raised by the dealer.

(iii) The admissibility of ITC is well defined u/s.20 of the OVAT Act for which the grounds of the dealer are not maintainable in the eyes of law. It is well settled in law that "set off of ITC is to be allowed only if tax is actually paid by the selling dealer to the Government treasury".

(iv) The order of assessing authority is crystal clear with respect to other points raised by the dealer who has dealt each and every item which is self-explanatory and requires no further interference.

7. Heard both the sides. Perused the materials available on record so also the orders of both the fora below. I also perused the written submissions submitted by both the dealer as well as the Revenue. I have meticulously gone through the grounds of appeal and the plea taken in the cross objection.

8. As per the impugned order the learned JCST has confirmed the disallowance of ITC of Rs.88,681.20. It is urged by the dealer that as per the settled principles of law if the tax has been paid on the strength of invoice, the assessing

authority shall have to appreciate other documents and evidence to ascertain that the dealer has paid tax on the goods at the time of purchase and in respect of tax invoice the same may be taken into account. It was also submitted by the learned Counsel for the dealer that learned STO and the learned JCST have failed to consider the confirmation letter issued by the selling dealer with a certificate that the purchase turnover of the dealer has been disclosed by them in their periodic return as sales turnover for the tax period and therefore the second time tax on the same turnover shall amount to reassessment of assessed turnover. It seems that the learned JCST has not given any reasoned finding on this aspect. Needless to say that due to the fault of the selling dealer, the assessee-dealer should not suffer. The authority has also to rely upon the documents produced before him in support of the claim that the assessee-dealer has paid tax to the selling dealer (if any) if the documents are found genuine.

9. 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."

10. 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.

11. 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.

12. The Revenue has come up with the second appeal vide S.A. No.158(V) of 2017-18 mainly assailing the order as regards allowing trade discount. To that effect the learned Addl. Standing Counsel relied upon some decisions but did not file any copy of such decisions. In this connection, the learned Counsel for the dealer relied upon and filed a decision of our own Hon'ble High Court in the case of **Orient Paper Mills Ltd. Vs. State of Orissa** as reported in **(1975) 35 STC 84 (Orissa)** and two orders of the Division Bench of this Tribunal vide S.A. No.282(V) of 2016-17, disposed of on 15.12.2017 and S.A. No.2489 of 1996-97, disposed of on 23.12.2019. On going through the aforesaid decision and the orders of the Tribunal I come to the finding that there is no infirmity in the order of the learned JCST as regards the trade discount.

13. In view of my aforesaid analysis, I hold that the matter is to be remitted back to the learned STO by modifying the order of the learned first appellate authority to the extent of the limited point on mismatch/claim of ITC. The dealer has to prove the genuineness of his purchase according to Sec.20 r/w. Sec.95 of the OVAT Act for claim of ITC in the light of the analysis made in the foregoing paragraphs. Accordingly, it is ordered.

14. The appeal vide S.A. No.148(V) of 2017-18 is allowed on contest and the appeal vide S.A. No.158(V) of 2017-18 is dismissed being devoid of any merit. The first appeal order is modified to the extent of mismatch/claim of ITC and the matter is remitted back to the learned STO for determination of the ITC entitlement/claim of the dealer as per the observation made above within three months from the date of receipt of this order. The cross-objection is disposed of accordingly.

Dictated & corrected by me,

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

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