

**BEFORE THE JUDICIAL MEMBER: ODISHA SALES TAX TRIBUNAL:
CUTTACK.**

S.A. No. 141 (V) of 2016-17

(Arising out of the order of the learned DCST (Appeal), Balasore Range,
Balasore, in First Appeal Case No.AA-53/BA-2011-2012 (VAT),
disposed of on dtd.28.04.2016)

P r e s e n t :

Shri A.K. Panda,
1st Judicial Member

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

... Appellant

- V e r s u s -

M/s. Mohanty Distributors,
At/P.O.- Januganj Golei,
Balasore.

... Respondent

For the Appellant ... Mr. M.L. Agarwal, S.C.
For the Respondent ... Mr. S. Panigrahi, Advocate

Date of hearing: 20.08.2018

Date of order: 29.08.2018

ORDER

This appeal is directed against the order dtd.28.04.2016 passed by the learned Deputy Commissioner of Sales Tax (Appeal), Balasore Range, Balasore (hereinafter referred to as, the learned DCST) in First Appeal Case No. AA-53/BA-2011-2012 (VAT), wherein and whereby, he has allowed the first appeal in part by reducing the balance tax demand and penalty to Rs.11,100.00 from Rs.1,13,895.00 raised by the learned Sales Tax Officer, Balasore Circle, Balasore (hereinafter referred to as, the learned STO) in an assessment u/s.43 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) in respect of the respondent-dealer for the assessment period from 01.04.2010 to 31.07.2010.

2. The respondent-dealer is a retailer of cement and iron & steels. Basing upon a tax evasion report submitted by the Vigilance Wing, Balasore Division, Balasore, the learned STO initiated a proceeding u/s.43 of the OVAT Act against the respondent-dealer for its assessment for the period from 01.04.2010 to 31.07.2010 and issued a notice to appear and to produce the books of account and in response to the notice, the authorized representative of the respondent-dealer appeared and produced the books of account, which were duly been examined. During assessment, when the authorized representative of the respondent-dealer failed to offer any explanation relating to the allegation of sale suppression leveled in the tax evasion report, the learned STO accepted such allegation as true and genuine and proceeded to assess the respondent-dealer to the best of his judgment by examining the available materials on record including the books of account and the tax evasion report and determined the total sale suppression to be Rs.3,03,718.00 and levied tax thereon at the appropriate rate of 12.5% which came to be Rs.37,965.00. Then, the learned STO also imposed a penalty of Rs.75,930.00, equal to twice of the tax demand u/s.43(2) of the OVAT Act and as such both the tax demand and penalty came to be Rs.1,13,895.00 in total, to be paid by the respondent-dealer.

3. After the assessment, being aggrieved with the order of the learned STO, the respondent-dealer preferred an appeal before the learned DCST bearing First Appeal Case No. AA-53/BA-2011-2012 (VAT). On hearing and on consideration of the materials available on record, the learned DCST found out that, stock discrepancy of 31 bags of cement has occurred due to damage of the same and the insurance company has already accepted the claim of the respondent-dealer in this regard and as such on consideration of the same, he re-determined the sale suppression to be Rs.2,95,968.00 and after deducting the profit margin @ 10%, determined the purchase suppression to be Rs.2,66,371.00 and levied tax thereon at the appropriate rate, which came to be Rs.36,996.00. Then, after allowing ITC to the tune of Rs.33,296.37, he raised the tax demand of Rs.3,700.00 and also imposed a penalty of Rs.7,400.00, equal to twice of the tax demand u/s.43(2)

of the OVAT Act and as such both the tax demand and penalty came to be Rs.11,100.00 in total, to be paid by the respondent-dealer. But, thereafter being aggrieved with the order of the learned DCST, the Revenue as appellant has preferred this second appeal.

4. Cross objection has been filed by the respondent-dealer supporting the order of the learned DCST.

5. Heard both the sides. The learned Standing Counsel appearing for the appellant-Revenue submitted that, the learned DCST has not considered the fact and law in its proper perspective and has allowed ITC to the tune of Rs.33,296.37 which clearly contravenes the provisions mentioned in Sec.20(3) of the OVAT Act. Similarly, though there is no convincing evidence relating to the damage of 31 bags of cement, the learned DCST has accepted the plea of the respondent-dealer in this regard and has re-determined the stock discrepancy by deducting the cost of 31 bags of cement and as the finding and order arrived at by the learned DCST is erroneous in both the count, the same is liable to be rectified by this Hon'ble forum and the appeal preferred by the appellant-Revenue is liable to be allowed. On the other hand, the learned Counsel appearing for the respondent-dealer supported the order of the learned DCST and urged for dismissal of the appeal.

6. Perused the orders of both the learned forums below and the other materials on record. On perusal of the materials available on record and the orders of the learned forums below, it is seen that, at the first appeal stage, the respondent-dealer produced some documentary evidence showing its claim of insurance towards damage of 31 bags of cement and on being convinced, the learned DCST has re-determined the stock discrepancy by deducting the same. As the respondent-dealer has produced some sort of documentary evidence to the satisfaction of the learned DCST relating to the damage of 31 bags of cement, the order passed by the learned DCST in determining the stock discrepancy by deducting the damage goods can never be considered to be wrong and as such the same needs no interference of this forum.

7. But, so far as the allowance of ITC is concerned, from the materials on record, it is seen that, the learned forums below have determined the sale suppression and the purchase suppression to be Rs.2,95,968.00 and Rs.2,66,371.00 respectively basing upon the tax evasion report and the other available materials. As the same has clearly been held to be out of account sale and out of account purchase, no ITC can be allowed to the respondent-dealer under the provisions of the OVAT Act. But, without considering the fact and law properly, the learned DCST has allowed ITC to the tune of Rs.33,296.37 and the same can clearly be held to be illegal. As the respondent-dealer is not entitled to get ITC in the present case, it is liable to pay the entire tax amounting to Rs.36,996.00 as determined by the learned DCST. Similarly, as the tax demand has been raised against the respondent-dealer on determination of sale suppression and purchase suppression, it is also liable to pay penalty amounting to Rs.73,992.00, equal to twice of the tax demand u/s.43(2) of the OVAT Act and as such both the tax demand and penalty came to be Rs.1,10,988.00, to be paid by the respondent-dealer.

8. In the result, the appeal is allowed in part. The cross objection is disposed of accordingly. The respondent-dealer is liable to pay the tax demand and penalty amounting to Rs.1,10,988.00. The demand notice be issued accordingly.

Dictated & corrected by me,

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

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