

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

S.A. No. 156 (V) of 2016-17

(Arising out of the order of the learned DCST (Appeal), Bhubaneswar Range,
Bhubaneswar, in First Appeal Case No. AA-106221422000171,
disposed of on dtd.22.04.2016)

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. Prem Enterprises,
Forum Mart, Ground Floor,
Plot No.89, Kharvel Nagar,
Bhubaneswar.

... Respondent

S.A. No. 219 (V) of 2016-17

(Arising out of the order of the learned DCST (Appeal), Bhubaneswar Range,
Bhubaneswar, in First Appeal Case No. AA-106221422000171,
disposed of on dtd.22.04.2016)

M/s. Prem Enterprises,
Forum Mart, Ground Floor,
Plot No.89, Kharvel Nagar,
Bhubaneswar.

... Appellant

- V e r s u s -

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

... Respondent

For the Revenue : Mr. M.L. Agarwal, S.C.
For the Dealer : Mr. S.K. Mohapatra, Advocate

Date of Hearing: 01.05.2018 **** Date of Order: 10.08.2018

ORDER

As both the appeals bearing S.A. No. 156 (V) of 2016-17 and S.A. No. 219 (V) of 2016-17 arose out of the self-same order, both are disposed of by this common order.

2. S.A. No. 156 (V) of 2016-17 has been preferred by the Revenue whereas S.A. No. 219 (V) of 2016-17 has been preferred by the dealer-assessee against the order dtd.22.04.2016 passed by the learned Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (hereinafter referred to as, the learned DCST) in First Appeal Case No. AA-106221422000171, wherein and whereby he has allowed the first appeal in part by reducing the balance tax demand and penalty to Rs.1,81,629.00 from Rs.1,96,932.00 raised by the learned Sales Tax Officer, Bhubaneswar II Circle, Bhubaneswar (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, the OVAT Act) in respect of the dealer-assessee for the assessment period from 18.07.2009 to 30.09.2012.

3. The dealer-assessee M/s. Prem Enterprises bearing TIN-21472700123 is a trader of Timex brand of wrist watches and in course of business transaction it used to effect purchase and sale inside the State of Odisha. Basing upon an Audit Visit Report (in short, the AVR) the learned STO initiated a proceeding u/s.42 of the OVAT Act against the dealer-assessee for its assessment for the assessment period from 18.07.2009 to 30.09.2012 and issued a notice to appear and to produce the books of account and in response to the notice, the dealer-assessee appeared through an Advocate and produced the books of account which were duly been examined in the light of the allegation leveled in the AVR. As per the allegation of the AVR, there was stock discrepancy of 3 nos. of wrist watches during audit visit and the dealer-assessee has wrongly claimed ITC on the goods used by his staff of the showroom amounting to Rs.45,500.00. During assessment, though the dealer-assessee put forth its clarification that the

wrist watches are used by the staffs of the showroom on rotation basis for the purpose of advertisement and the same are being sold subsequently and as such it is entitled to avail ITC on those goods, the learned STO did not accept such clarification. Similarly, though the dealer-assessee denied the allegation of the stock discrepancy of 3 nos. of wrist watches and put forth its clarification that, those watches have been given by some of the customers for repair within the warranty period, the learned STO did not accept such clarification and proceeded to assess the dealer-assessee by accepting the allegations of the AVR as true and genuine and reversed the ITC in connection with the purchase of 11 nos. of wrist watches used by the staffs of the showroom and in connection with loss of one wrist watch. Similarly, as regard the stock discrepancy, on consideration of the value of 3 nos. of wrist watches, he determined the sale suppression to be Rs.12,000.00 and added the same to the GTO and TTO. Finally, on consideration of the entire transactions, the learned STO determined the GTO and TTO at Rs.92,51,992.98 and Rs.81,89,039.93 respectively and levied tax thereon at the appropriate rate which came to be Rs.10,64,573.04. After allowing the admissible ITC amounting to Rs.9,81,817.00 and after considering the payment of tax made earlier amounting to Rs.17,112.00, the learned STO raised the balance tax demand of Rs.65,644.04. Then, he also imposed a penalty of Rs.1,31,288.08, equal to twice of the balance tax demand u/s.42(5) of the OVAT Act and as such both the balance tax demand and penalty came to be Rs.1,96,932.00 in total, to be paid by the dealer-assessee.

4. After the assessment, being aggrieved with the order of the learned STO, the dealer-assessee preferred an appeal before the learned DCST bearing First Appeal Case No. AA-106221422000171. On hearing and on consideration of the materials available on record, though the learned DCST accepted the finding and order of the learned STO relating to the sale suppression and the reversal of ITC in connection with one wrist watch, did not accept his finding and order relating to the reversal of ITC in connection with the use of 11 nos. of wrist watches by the staffs of the showroom and

accordingly allowed the first appeal in part and the same resulted in reduction of the balance tax demand and penalty to Rs.1,81,629.00 from Rs.1,96,932.00 as raised earlier by the learned STO. But, thereafter, being aggrieved with the order of the learned DCST, the Revenue has preferred the second appeal bearing S.A. No.156(V) of 2016-17. Similarly, the dealer-assessee also preferred the second appeal bearing S.A. No.219(V) of 2016-17.

5. No cross objection has been filed by the dealer-assessee in S.A. No.156(V) of 2016-17. But the Revenue has filed its cross objection in S.A. No.219(V) of 2016-17 in the line of its grounds of appeal mentioned in S.A. No.156(V) of 2016-17. In addition to that, the Revenue has taken a ground subsequently in its cross objection that the second appeal has been preferred by the dealer-assessee after the period of limitation.

6. Heard both the sides. The learned Standing Counsel appearing for the Revenue submitted that, as the dealer-assessee has received the first appeal order on 23.04.2016, the filing of the second appeal by it on 28.09.2016 can clearly be considered to be filed beyond the period of limitation of two months and only on this ground the appeal preferred by the dealer-assessee is liable to be dismissed. He also submitted that, even on merit, as the learned forums below have considered the matter properly relating to the issues raised by the dealer-assessee, the appeal preferred by it lacks merit. In support of the contention raised by the Revenue in S.A. No.156(V) of 2016-17, he further submitted that, the dealer-assessee is not entitled to avail ITC on the wrist watches used by its staffs in the showroom as the same is beyond the provisions of law. But, without considering the fact and law in its proper perspective, the learned DCST has allowed the ITC in this regard and as the order passed by him is totally erroneous, the same is liable to be set aside and the order passed by the learned STO being proper and justified is liable to be restored. On the other hand, the learned Counsel appearing for the dealer-assessee submitted that, the learned DCST has properly allowed ITC relating to the wrist watches used by the staffs in

the showroom on rotation basis as the same are being sold subsequently and as no wrong has been committed by the learned DCST in this regard, the appeal preferred by the Revenue is liable to be dismissed. In support of S.A. No.219(V) of 2016-17 he submitted that, the dealer-assessee had received 3 nos. of watches for the purpose of repair from some of the customers during the warranty period and without considering the contention of the dealer-assessee in this regard the learned forums below have considered the same to be stock discrepancy and as such the order passed by the learned forums below being erroneous, the appeal preferred by the dealer-assessee is liable to be allowed.

7. Perused the orders of both the learned forums below and the other materials on record. The Revenue has taken the plea by way of an additional ground that, the dealer-assessee has received the first appeal order within the period of two months rather ahs filed on 28.09.2016 and hence the appeal is liable to be dismissed being barred by limitation. In this regard, it is the plea of the dealer-assessee that, it has received the first appeal order on 30.07.2016 and as such the filing of the second appeal by it on 28.09.2016 is within the prescribed period of limitation. On perusal of the materials on record, it is seen that, some sort of evidence is available to show that, the first appeal order has been served upon the dealer-assessee on 23.07.2016. But on such evidence, a definite conclusion cannot be drawn that, the person received the order is the authorized person of the dealer-assessee and is competent to receive the order. Further, the principle is very much well settled that, a liberal approach should be taken while considering a question relating to the period of limitation. Therefore, as the Revenue has failed to prove that the order has been served upon the authorized person of the dealer-assessee on 23.04.2016 by adducing clear and convincing evidence, the plea taken by the dealer-assessee has to be accepted and a conclusion can be drawn that, this appeal has been preferred by it within the prescribed period of limitation.

8. Next, on perusal of the materials on record, it is seen that, on consideration of the available materials, the learned STO has reversed the ITC relating to the loss of one wrist watch and the same has further been confirmed by the learned DCST at the first appeal stage. As the reversal of ITC in this regard is clearly coming under the purview of the provisions of law, the order passed by the learned forums below needs no interference of this forum.

9. As regard the reversal of ITC relating to 11 nos. of wrist watches as ordered by the learned STO, on examination of the materials available on record, the learned DCST found out that, the same are being used by the staffs of the showroom on rotation basis from among the entire wrist watches to attract the customers and are being sold subsequently in due course and as such it is not coming under the conditions stipulated as a bar as mentioned in sub-section (8) and sub-section (9) of Sec.20 of the OVAT Act. Therefore, on consideration of the entire fact and law in its proper perspective, the learned DCST found out that, the order of the learned STO to be not sustainable in the eye of law and accordingly set aside the same and the order of the learned DCST being proper and justified needs no interference of this forum.

10. So far as the allegation of sale suppression is concerned, the same relates to availability of 3 nos. of wrist watches in the business premises of the dealer-assessee during the audit visit. Though the dealer-assessee has taken a plea that, those watches have been given by the customers for repair within the period of warrantee, it has failed to produce any documentary evidence in support of its plea. Therefore, considering the plea of the dealer-assessee to be baseless, the learned STO has determined the sale suppression to be Rs.12,000.00 on consideration of the value of the wrist watches and the same has further been confirmed by the learned DCST at the first appeal stage. As the dealer-assessee has only taken a bald plea without producing any sort of evidence, on consideration of the materials

available on record, it can clearly be said that, the learned forums below have considered the matter properly and have passed the order and the same also being proper and justified needs no interference of this forum.

11. In view of the above discussion, neither of the appeals has any merit and consequently both the appeals bearing S.A. No. 156 (V) of 2016-17 and S.A. No. 219 (V) of 2016-17 are dismissed. The cross objection filed by the Revenue is disposed of accordingly.

Dictated & corrected by me,

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

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