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. 299 (V) of 2017-18

(Arising out of the order of the learned Addl. CST (Appeal), Central Zone, Odisha, Cuttack, in Appeal Case No.CU-II-AA-16/2006-07, disposed of on dtd.22.09.2017)

M/s. Saralia Foods Pvt. Ltd.,
At/P.O.:- Benagadia,
Dist.- Angul. ... Appellant

- V e r s u s -

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

S.A. No. 311 (V) of 2017-18

(Arising out of the order of the learned Addl. CST (Appeal), Central Zone, Odisha, Cuttack, in Appeal Case No.CU-II-AA-16/2006-07, disposed of on dtd.22.09.2017)

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

- V e r s u s -

M/s. Saralia Foods Pvt. Ltd.,
At/P.O.:- Benagadia,
Dist.- Angul. ... Respondent

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

Date of hearing: 18.12.2019 **** Date of order: 04.01.2020

O R D E R

Both the appeals bearing S.A. No.299(V) of 2017-18 and S.A. No.311(V) of 2017-18 arose out of the self-same order passed by the learned Addl. Commissioner of Sales Tax (Appeal), Central Zone, Odisha, Cuttack in Appeal Case No.CU-II-AA-16/2006-07. Hence, both the appeals are disposed of by this common order.

S.A. No.299(V) of 2017-18 has been preferred by the dealer-assessee, whereas S.A. No.311(V) of 2017-18 has been preferred by the Revenue challenging the order dtd.22.09.2017 passed by the learned Addl. Commissioner of Sales Tax (Appeal), Central Zone, Odisha, Cuttack (hereinafter referred to as, the learned ACST) in Appeal Case No.CU-II-AA-16/2006-07, wherein and whereby he had allowed the first appeal in part by reducing the assessment after deleing the enhancement. The total tax and penalty payable by the dealer was reduced to Rs.3,21,544.00 from Rs.4,88,709.00 raised by the Asst. Commissioner of Sales Tax (LTU), Cuttack II Range, Cuttack (hereinafter referred to as, the LAO) in an assessment u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OST Act) in respect of the dealer-assessee for the assessment period 01.04.2005 to 31.10.2005.

2. The brief facts of the case are that, the dealer-assessee owns a rice mill, wherein he processes and sales rice, broken rice and rice bran. He purchases paddy locally and processes the same into rice by maintaining the purchase, sale and stock account relating to his business. On the basis of an audit visit report, the assessment was completed. In course of the audit the stock of paddy, rice and rice bran was noted down and cross verified with respect to the stock account maintained on the date of the visit i.e. on 15.12.2005. As per the audit report, there was stock discrepancy of Q. 2.62 of paddy, Q. 5.22 of boiled and raw rice and Q. 0.14 of rice bran. The allegation of

suppression of Rs.5,673.00 was brought on the basis of such stock discrepancy. The LAO completed the assessment by enhancing the turnover of the dealer-assessee by Rs.1,13,460.00.

3. Both the dealer as well as the Revenue have filed cross objections in S.A. No.299(V) of 2017-18 and S.A. No.311(V) of 2017-18 respectively.

4. In the appeal filed by the dealer in S.A. No.299(V) of 2017-18 he has come up with the following grounds:-

(i) In the facts and circumstances of the case the order passed by the learned Additional Commissioner of Sales Tax (Appeal), Central Zone, Cuttack is improper, erroneous and unjustified.

(ii) Without considering the case properly the appellate authority has enhanced the tax which is illegal.

(iii) The learned appellate authority has erroneously failed to allow credit of input tax on the opening stock held as on 01.04.2005 even though the goods those were in stock were either the raw materials or the finished products and the law provides to take credit of input tax at a time on such materials.

(iv) The observation made in the order on disallowance of ITC for Rs.43,136.79 is bad in law and it contravenes the provision of ITC under the Act.

In the appeal filed by the Revenue in S.A. No.311(V) of 2017-18, it has come up with the following grounds:-

(i) The order of the 1st appellate authority appears to be unjust and improper.

(ii) The 1st appellate authority upheld the disallowance of ITC amounting to Rs.43,136.79 as the dealer did not incorporate the ITC in its original return and filed the revised return after the audit visit was conducted

contravening the provision made U/s.33(5) of the OVAT Act whereas he has deleted the penalty considering that it was not justified on the part of the LAO to impose penalty of two times U/s.42(5) of the OVAT Act.

(iii) The 1st appellate authority has tried to justify the same by way of stating that the tax assessed should have been arrived at after allowing adjustment of the claim of ITC and payment of admitted tax, if any, ignoring the provision U/s.42(5) which speaks "without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under sub-section (3) or sub-section (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-section". Since imposition of penalty is mandatory in nature no such discretion lies with the 1st appellate authority to interpret the same.

(iv) The statute mandates penalty which is to be imposed without any discretion as observed by the Hon'ble Apex Court in the case reported in 18 VST 180 SC as well as the Hon'ble High Court of Orissa in 54 VST 1. As per the judgments of the Hon'ble Apex Court and the Hon'ble High Court when the statue is penal in nature/character it must be strictly construed and followed.

(v) The order of 1st appellate authority may be modified accordingly.

5. Heard both the sides. On perusal of the documents available in the record and after hearing the arguments from the learned Counsels from both the sides, I find that the learned STO, Angul Circle had issued form VAT-608 along with ITC of Rs.12,24,611.00 on opening stock of paddy and rice. But the LAO

raised extra demand by disallowing the ITC to the tune of Rs.1,56,431.00 allowed by the learned STO, Angul Circle in form VAT-608 relating to the closing stock of rice of Q. 4,942.99 as on 01.04.2005 on the ground that the dealer could not submit the bill incorporating the value of paddy purchase within twelve months. Such act of the LAO is illegal in the sense that he has no authority to disallow ITC which can only be done by the competent higher authority. The learned ACST has rightly decided this issue by holding that it is not proper for the LAO to disallow part of the ITC allowed on the opening stock as on 01.04.2005 by the learned STO, Angul Circle on the basis of doubt. Hence, the dealer-assessee is entitled to avail ITC of Rs.12,24,611.00. The learned ACST also rightly held that the enhancement of the GTO by the LAO by Rs.1,13,460.00 was not justified.

However, the findings arrived at by the learned ACST about the forfeiting of liability of Rs.8,99,331.00 in the appeal order is without any basis because the amount cannot be forfeited and has to be carried forward for the next period as per return form VAT-201. So, disallowance made by learned ACST is deleted. The claim of ITC by final revised return of Rs.43,136.79 on packing materials has rightly been disallowed by both the forums below as because the revised return cannot be accepted in view of the decision of our own Hon'ble High Court of Orissa in the case of G.E.T. Power v. State of Odisha (2012) 50 VST 363 (Orissa) who have observed as follows:-

> "20. There is no provision under the OVAT Act to enable an assessee to revise its claim made in the returns in any manner other than by way of filing revised return within statutory period as provided u/s.33(4) of the OVAT Act.
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> 21. The Hon'ble Supreme Court in the case of Goetze (India) Limited vs. Employees State Insurance Corporation, held that the assessing officer has no power to entertain fresh claim made by the assessee after filing of the original return other than by filing of revised return.

> 22. This Court in the case of Orissa Rural Housing Development Corporation Ltd. v. Assistant Commissioner of Income Tax [2012] 343 ITR 316 (Orissa) (W.P.(C) No.4554 of 2011) disposed of on December 15, 2011 held that the learned Assessing officer is fully justified in completing the assessment u/s.143(3) of the Income Tax Act on the basis of the original return filed u/s.391(1) without taking into consideration the revised statement filed on December 8, 2008 in absence of revised return as contemplated u/s.139(5) of the Income Tax Act and the CIT is also justified in confirming the view of the learned Assessing officer.
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> 23. Law is well-settled that when the statute requires to do certain thing in certain way, the thing must be done in that way or not at all. Other methods or modes of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressio unius est exclusion alteris" meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following of other course is not permissible. Taylor v. Taylor [1876] 1 Ch. D. 426, AIR 1936 253 (Privy Council), Ram Phal Kundu Vs. Kamal Sharma and Indian Bank's Association, Bombay and Others Vs. Devkala Consultancy Service and Others."

6. Both the forums below have lost sight in deducting the carry forward ITC of the period OCT, 2005 to the subsequent tax period i.e. Nov, 2005 while computing the tax liability, even though the LAO in its order (at page 2) mentioned that there is a carry forward ITC, but has failed to take the same into account while computing the figures. The appellant in course of hearing has filed revised return for the tax period Nov, 2005 showing C/F ITC at Rs.2,47,137.41 in Col. 5 of the return form VAT-201. Therefore, the same needs to be rectified and recomputed taking into account the actual carry forwarded ITC. The carry forward ITC for the next tax period has to be deducted from the admissible ITC which has not been taken into consideration by the forums below. So, the matter needs to be remanded to the LAO for fresh computation in view of the aforesaid findings and analysis. However, the dealer-assessee shall be

liable for penalty u/s.42(5) of the OVAT Act on the tax assessed which is automatic which may be decided only after computation and if the dealer-assessee has paid excess tax, he will be entitled for the said amount as per the provisions of law.

7. In the result, both the appeals are allowed in part as per the aforesaid observation and findings. The order of the learned ACST is modified accordingly and the matter is remitted back to the LAO for fresh computation as per law within a period of three months from the date of receipt of this order. Cross objections are disposed of accordingly.

Dictated & corrected by me,

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

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