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

S.A. No. 328(V) of 2017-18

(Arising out of the order of the learned JCST, Jajpur Range, Jajpur Road, in First Appeal Case No. AA 707 KJ 16-17 (OVAT), disposed of on dtd.31.07.2017)

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

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

- V e r s u s -

M/s. Jai Sriram Engineering Works, Keonjhar. ... Respondent

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

Date of hearing: 08.11.2019 ******** Date of order: 25.11.2019

O R D E R

This appeal is directed against the order dtd.31.07.2017 passed by the learned Joint Commissioner of Sales Tax, Jajpur Range, Jajpur Road (hereinafter referred to as, the learned JCST) in First Appeal Case No. AA 707 KJ 16-17 (OVAT), wherein he has set aside the first appeal by remanding the matter to the learned Sales Tax Officer, Keonjhar Circle, Keonjhar (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) for reconsideration of the claim of ITC of the respondent-dealer taking into account the transactions made by him as per the tax evasion report for the assessment period from 01.04.2013 to 31.03.2015.

2. The respondent-dealer was granted the certificate of registration under OVAT, CST and OET Act w.e.f. 25.10.2010 to deal in power tiller (Rhino model), auto (three wheelers of TVS company), tractor (Indo Farm Model) and spare parts of three wheelers only. Thus, the respondent-dealer was carrying on business in resale of power tiller, tractor, three wheelers and spare parts of three wheelers. The respondent-dealer preferred first appeal against the order passed by the learned STO u/s.42 of the OVAT Act relating to the period from 01.04.2013 to 31.03.2015 who had raised an extra demand of Rs.18,75,926.00 (including penalty of Rs.9,37,963.00) u/s.42(5) of the OVAT Act. On dtd.31.12.2015, the audit team of Keonjhar Circle, Keonjhar had visited the place of business of the respondent-dealer situated at Harshapur, Raisuan, Keonjhar in connection with the tax audit for the years 2013-14 and 2014-15 after issuing notice. As per the Audit Visit Report (in short, the AVR) all the interstate purchases were effected through proper way bill and use of Form 'C'. Similarly, all the sales were effected within the State of Odisha to the consumers through retail invoices. The firm had one additional place used as a godown. The respondent-dealer claimed ITC on the purchases effected from the registered dealer on the strength of tax invoices and adjusted the same against the output tax while calculating the net tax payable. During the visit of the audit team, the proprietor of the firm who was looking after the business produced the books of account on demand such as purchase register, sale register, purchase invoices and sale invoices. The purchase registers and sale registers were maintained manually but no stock register was maintained. The audit team noted down the total physical stock of the goods in trade in separate sheets both at the place of business and at the godown. The audit team had submitted the report with the following allegations –

(i) The dealer had reflected less sales turnover of Rs.2,46,625.00 under tax category of 5% in the return as

compared with that in the sales register and paid less tax of Rs.12,369.00 during the period under assessment.

(ii) The dealer had entered wrong values of the invoices in the sale register. In this way he had not entered turnover of Rs.19,047.00 in the sales register. The audit team recommended for levy of tax @ 5% on the same.

(iii) The audit team verified and recommended to disallow ITC to the tune of Rs.13,45,552.00 as per Section 20(3-a) of the OVAT Act.

(iv) The audit team found that there was a stock discrepancy of Rs.1,81,848.00 as on 31.03.2015 and recommended to tax the same under 5% tax category and under 13.5% tax category @ 98:1.3 proportionately.

As per the assessment order of the learned STO, after adjustment of ITC against the output tax on TTO, the dealer had to pay the amount of Rs.9,65,941.00 but he had paid the tax of Rs.27,978.00 only during the period under assessment. So, the dealer had to pay the rest amount of Rs.9,37,963.00 and the same amount was also imposed as penalty u/s.42(5) of the OVAT Act. Hence, the dealer had to pay the balance tax and penalty amounting to Rs.18,75,926.00 as per the terms and conditions of the demand notice in Form VAT-313 enclosed along with the assessment order.

3. After the assessment, being aggrieved by the entire order of the learned STO, the respondent-dealer preferred an appeal before the learned JCST bearing First Appeal Case No. AA 707 KJ 16-17 (OVAT). On hearing and on consideration of the materials available on record, the learned JCST accepted the contentions of the respondent-dealer and set aside the order of the learned STO. Thus, being aggrieved by the order of the learned JCST, the respondent-dealer has preferred this second appeal.

4. The State as appellant has filed its grounds of appeal as follows:-

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

(ii) The ld. STO has rightly disallowed the same as it is a cardinal principle that burden of proof lies with the assessee for filing return and availing ITC and ensure that the tax collected from it is remitted as observed by the Hon'ble Court in the case of M/s. Packwell Industries.

(iii) In the case of M/s. Mahalaxmi Cotton Ginning vrs. State of Maharastra, the Hon'ble Court held that "set off" of ITC is to be allowed only if tax is actually paid by selling dealer to the Govt. Treasury. So in this case the inference drawn by the 1st appellate authority is fallacious in nature.

(iv) The order of 1st appellate authority may be set-a-aside and that of the STO may be restored.

5. The respondent-dealer has not filed its cross objection in support of its stand.

6. Heard both the sides. The learned Standing Counsel appearing for the appellant-Revenue supported the order of assessment. Being aggrieved by the order of the first appellate authority who remanded the matter to the learned assessing authority with a direction to reconsider the claim of ITC, the learned Standing Counsel submitted that levy of penalty was legal and was in accordance with law for which it is a fit case for restoration of penalty as per the provisions of law. He further submitted that the ingredients of Sec.42(1) of the OVAT Act is squarely attracted in the present case. The learned Counsel appearing for the respondent-dealer submitted that, the learned JCST has allowed the appeal in part on exparte hearing on the basis of the information and materials available with

him and has not allowed the appeal in respect of other grounds without assigning any reason and imposition of penalty on admitted turnover is not tenable in law. Accordingly, the learned Counsel for the respondent-dealer submitted that the order of the first appellate authority should be modified with a direction to consider all the grounds taken by the respondent-dealer by allowing an opportunity of being heard.

7. Perused the orders of both the learned forums below and the other materials on record. In first appeal the learned JCST upheld the charge of stock discrepancy of Rs.1,81,848.00 treating it as suppression as the respondent-dealer failed to produce documentary evidence in support of its rebuttal. With regard to mismatch of ITC, the learned JCST remanded the matter to the LAO with a direction to reconsider the claim of ITC. As per the provisions of the Act, a dealer on sale or purchase of goods has to file a monthly/quarterly returns in Form VAT-201. In the said Form VAT-201, two annexures are appended in Col.57 in which a selling dealer is obliged to mention the details of sales effected to register dealers (such as name & address of purchase dealer, TIN, value of goods, VAT paid). If such sales are reflected in the returns and the consequential tax has been paid only then the purchasing dealer can claim and avail the consequential tax paid by the selling dealer as its Input Tax Credit in accordance with Sec. 20(3) read with Sec.95 of the OVAT Act. Hence, the remand order of assessment on the facts and circumstances of the case is not in accordance with law. The learned STO has rightly disallowed the ITC applying the provisions of the Act and Rules. Grant of ITC is subject to conditions and restrictions. In the present case, the selling dealer has not disclosed the sales to the dealer by showing the transactions in Annexure appended to Sl. No.57 in Form VAT-201 and has not paid the tax. Therefore, ITC cannot be availed by the dealer. Thus, the

dealer has failed to discharge the burden of proof as per sec.95(h) & (i) of the OVAT Act.

8. 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."

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. The Legislature in its wisdom has inserted Sec.20(3-a) on 01.10.2015 which is clarificatory in nature and has retrospective application. In absence of payment of tax by the selling dealer the grant of ITC cannot be granted to the Revenue as it amounts to unjust enrichment on the part of the Revenue and unreasonableness in application of law. The ingredients of Sec.42(1) are squarely attracted in the present case as the respondent-dealer has claimed erroneous deduction thereby affecting tax liability. Therefore, levy of penalty is legal and is in accordance with law. Thus, it is fit case for restoration of penalty as per the provisions of law.

9. 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 on the limited point of mismatch/claim of ITC. The respondent-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.

The appeal is allowed in part on contest. The first appeal is modified to the extent of mismatch/claim of ITC and the matter is remitted back to the learned Assessing Authority for determination of the ITC entitlement/claim of the respondent-dealer as per the observation made above within three months from the date of receipt of this order.

Dictated & corrected by me,

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

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