BEFORE THE DIVISION BENCH-II: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No.69 (V) of 2015-16

(From the order of the ld. JCST (Appeal), Cuttack II Range, Cuttack, in First Appeal Case No.AA/09/OVAT/CUII/2014-15, disposed of on 24.02.2015)

P r e s e n t : Shri S. Mohanty, 1st Judicial Member & Shri P.C. Pathy, Accounts Member-I

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

- V e r s u s -

M/s. Kailash Diesels, Jagatpur, Cuttack. ... Respondent

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

Date of hearing: 17.05.2019 ******** Date of order: 17.05.2019

O R D E R

Revenue being aggrieved with the order of the Joint Commissioner of Sales Tax (Appeal), Cuttack II Range, Cuttack, the first appellate authority, whereby and wherein, the assessment order u/s.42(4) of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) relating to the assessee-dealer-respondent is modified has preferred this appeal.

2. Bereft unnecessary details, the appellant's case may be summed up as follows. The dealer was assessed u/s.42(4) of the OVAT Act

for the tax period 01.04.2011 to 31.03.2013 on the basis of Audit Visit Report (in short, the AVR), the assessing authority has detected the dealer had received a sum of Rs.7,24,336.13 under the heads like BDS incentives, discount received, credit notes. It was also found that, the dealer has committed purchase suppression of Rs.3,155.00 and sale suppression of Rs.8,119.00. In absence of sufficient explanation from the dealer, the assessing authority accepted the suggestions by the audit team as established. Accordingly, he re-determined the tax liability of the dealer calculated at Rs.5,93,581.00 which includes tax due after adjustment of the ITC and admitted tax paid and added with penalty u/s.42(5) of the OVAT Act.

3. In appeal, at the instance of the dealer, the first appellate authority has excluded the incentives/discounts under four heads mentioned above to the tune of Rs.7,24,336.13 from out of the TTO treating the same as income of the dealer not exigible to sales tax. As a result, the appeal was partly allowed by the first appellate authority. However, the first appellate authority has directed the assessing authority for verification of the periodical return of the dealer and to raise demand of tax due as per law.

4. When the matter stood above, Revenue has challenged the order of the first appellate authority with the contentions like, the amount of Rs.7,24,336.13 received by the dealer as incentives/credit notes/misc. receipts for fulfilling annual target of the principal is part of sale transaction covered u/s.2(46)(e) of the OVAT Act.

The appeal is heard with cross objection from the side of the dealer.

5. A common question raises time to time before this Tribunal is raised once again for adjudication in this appeal is -: What should be the amount of sale price relatable to sale turnover, purchase price relatable to purchase turnover in the event trade discount/cash discount/commission incentives etc. received from manufacturer/ the selling dealer and its effect on the sale turnover of assessee- dealer on sale to consumer/customer.

6. To understand the disputed question and to appreciate the argument advanced by the sides it is pertinent to reproduce the relevant provisions under the statute as follows:-

Sec.2(46)OVAT act as it was before the amendment w.e.f. 01.06.2008 reads as follows:

> [(46) **"SALE PRICE"** means the amount of valuable consideration received or 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, and the expression 'purchase price' shall be construed accordingly.
> **Explanations.-**
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> xxx xxx xxx xxx

Post amendment of the provision reads as follows:-

> "(46) ***"SALE PRICE"*** means the amount of valuable consideration received or receivable by a dealer as consideration for the sale of any goods less any sum allowed as cash discount or trade discount at the time of delivery or before delivery of such goods 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 and the expression **'PURCHASE PRICE'** shall be construed accordingly;
>
> **Explanation.-**
> (a) Where any sum charged for freight, delivery, distribution, installation or insurance at the time of delivery or before delivery of such goods it shall be included in the sale price.
> (b) In case of sale by hire-purchase agreement, the prevailing market price of the goods on the date on which such goods are delivered to the purchaser under such agreement shall be deemed to be the sale price.
> (c) In relation to transfer of right to use any goods for any purpose (whether or not for a specified period) the consideration or the hire-charges received or receivable for such transfer shall be the sale price.
> (d) Any amount of duties, charges, taxes levied or leviable under any Act (other than tax levied or leviable under this Act) in respect of such goods shall be included in the sale price.

(e) Amount received or receivable by the seller by way of deposit, warranty (whether refundable or not) which has been received or is receivable whether by way of separate agreement or not, in connection with, or incidental or ancillary to, the sale of goods shall be deemed to be included in the sale price."

Taxable turnover of purchase as per Sec.2(56) reads as follows:

"(56) ***"TAXABLE TURNOVER"*** means the turnover on which a dealer is liable to pay tax as determined after making such deduction from his gross turnover and in such manner as may be prescribed."

Turnover of purchase as per Sec.2(59) reads as follows:-

"(59) ***"TURNOVER OF PURCHASES"*** means the aggregate of the amounts of purchase price paid and payable by a dealer in respect of the purchase or receipt of goods liable to tax under Section 12 during a given period;"

Turnover of sale as per Sec.2(60) reads as follows:

"(60) ***"TURNOVER OF SALES"*** means the aggregate of the amounts of sale price received or receivable by a dealer in respect of sale or supply of goods effected or made during a given period;"

'Rule 6' of the OVAT Rules speaks the method of determining the taxable turnover. Similarly, the provision u/s 22 and 23 of the OVAT Act contemplates the entitlement and adjustment of ITC, credit notes and debit notes with specific time limit within which these can be entertained.

If we look at the provision under section 2 (46) of the OVAT Act, the definition of sale price as amended w.e.f. 01.06.2008 it excludes the cash discount or trade discount etc up to the time of delivery or before delivery of such goods. This provision as per the statute of different states is found not exact to the statute under OVAT Act of our State. However, the principle is now well settled by the different authorities including the Hon'ble Apex Court that, the sale price cannot be treated as an amount more than the amount what was actually, directly or indirectly, payable to the dealer.

In **Southern Motors v State of Karnataka (2017) 3 SCC 467**, the Court expressed that,

> "if taxable turnover is to be comprised of sale/purchase price, it is beyond one's comprehension as to why the trade discount should be disallowed, subject to the proof thereof, only because it was effectuated subsequent to the original sale but evidenced by contemporaneous documents and reflected in the relevant accounts. It was also observed therein that to insist on the quantification of trade discount for deduction at the time of sale itself, by incorporating the same in the tax invoice/bill of sale, would be to demand the impossible for all practical purposes and thus would be illogical, irrational and absurd."

7. In the case in hand, the assessee-dealer is engaged in trading of automobile spare parts and lubricants. It purchases goods from interstate and intrastate dealers and affects sale to intrastate and interstate purchasers as well. On purchase he has got BDS incentives calls, credit notes etc. from his selling dealers. Now the question is, whether such incentives/discounts if affects the assessee-dealer's sale price? The answer is No. On the point of purchase, the assessee-dealer has paid the price to his selling dealers. Later his selling dealer has given incentives/discounts to him. These discounts or incentives affects the selling dealer's sale price and the present dealer's purchase price only. It has no relationship or nexus with the present assessee-dealer's sale price. At the point of sale, the present assessee-dealer has not given any incentives or trade discount to his purchasers. A careful reading of the provision u/s.2(46) of the OVAT Act above speaks of the effect of trade discounts or incentives etc. is given by the selling dealers to his purchasers on or before delivery of goods to the purchaser. In the case in hand, the fact remains, the selling dealer of the present assessee-dealer has given some discounts. So, the taxing authority should have taken care of the selling dealer's return and the sale price shown by the selling dealer to the present assessee-dealer in case it is an intrastate purchase. But, it is found that, the assessing authority has totally misdirected his enquiry by taking account of the incentives given by the selling dealer at the time of purchase by the instant dealer. Yes, it is a fact that, if the present assessee-dealer has availed ITC in accordance to the

purchase price paid by him but, in a later period after getting incentives/discounts has not reversed the ITC proportionately then, it amounts to unjust enrichment by the present assessee-dealer. However, neither it is the case before us in this appeal nor it can arise because discounts goes against inter-state purchase

8. The appeal is solely based on the determination of sale price of the assessee-dealer. The assessee-dealer has sold the goods and at no point of time it has given any kind of discounts or incentives to his purchasers. So, there is no question of any effect on sale price of the present assessee-dealer and it is not affected in any way by the incentives/discounts availed by the present dealer. The incentives or trade discounts availed by the present assessee-dealer will not affect his sale price.

9. Be that as it may, it can be said that, even though the analysis of the question of fact relating to the provisions under law in the case in hand by the authority below is not in the direction as discussed above but, the fact remains result of the appeal will no way be affected as the incentives/discounts availed by the present assessee-dealer is no way related to the present assessee-dealer's sale price collected from his purchasers. Accordingly, it is held that, the impugned order calls for no interference, hence confirmed. It is ordered.

10. The appeal be and same is dismissed on contest as of no merit.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

Sd/-
(S. Mohanty)
1st Judicial Member

I agree

Sd/-
(P.C. Pathy)
Accounts Member-I