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

S.A. No. 45(V) of 2017-18

(Arising out of the order of the learned DCST (Appeal), Balangir Range, Balangir, in First Appeal Case No. AA-04 (NUA) of 2016-17, disposed of on dtd.28.02.2017)

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

M/s. Gupta Trading Co.,
At:- Nuapada,
Dist.- Nuapada. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. D. Pati, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 21.12.2019 ******** Date of order: 18.01.2020

O R D E R

This appeal is directed against the order dtd.28.02.2017 passed by the learned Deputy Commissioner of Sales Taxes (Appeal), Balangir Range, Balangir (hereinafter referred to as, the learned DCST) in First Appeal Case No. AA-04 (NUA) of 2016-17, wherein he set aside the order of assessment made by the learned Sales Tax Officer, Nuapada Circle, Nuapada (hereinafter referred to as, the learned STO) for the assessment period 01.04.2013 to 31.03.2015 u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act).

2. The brief facts of the case are that, the appellant-dealer firm is a proprietorship concern engaged in trading of cement, M.S.

Rod, M.S. angle, M.S. sheet, bitumen and coal tar on retail sale basis. An audit visit report (in short, the AVR) was conducted u/s.41 of the OVAT Act in form VAT-303. A statutory notice was issued in form VAT-306 for which the authorized person of the firm appeared and produced the books of account. On verification of the books of account, it was found that the dealer had disclosed total purchase of goods worth Rs.2,04,45,915.00 which included taxable goods @ 5% of Rs.1,26,44,337.00 and @ 13.5% taxable goods worth Rs.78,01,578.00 for the tax period under assessment. The dealer had not claimed ITC of Rs.16,85,481.00 for the tax period under assessment. The dealer was disallowed the ITC of Rs.27,251.00 for non-submission of tax invoices and ITC of Rs.32,014.00 towards carried forward in the last tax period. Hence ITC of Rs.16,26,216.00 was allowed. The dealer had returned total sales of taxable goods of Rs.2,14,85,398.00 @ 5% taxable goods for Rs.1,43,81,476.00 and @ 13% taxable goods worth Rs.71,03,922.00 and collected output tax of Rs.16,78,104.00. The GTO was determined at Rs.2,31,63,502.00. After allowing deduction of Rs.16,78,104.00 towards collection of output tax, the TTO was determined at Rs.2,14,85,398.00. The total output tax came to Rs.16,78,103.00. After adjustment of ITC of Rs.16,26,216.00 and VAT paid of Rs.30,000.00, the dealer was required to pay Rs.21,887.00. Thus, the total amount of tax together with penalty amounting to Rs.43,774.00 was required to be paid by the appellant-dealer as per the demand notice.

3. Being aggrieved by the order of the learned STO, the appellant-dealer had preferred an appeal before the learned DCST. The learned DCST after verifying the assessment order set aside the order of the learned STO by giving a reasonable opportunity to the appellant-dealer for re-verifying the related invoices by issuing summons.

4. Being dissatisfied with the order of the learned DCST, the appellant-dealer has come up with this second appeal before this forum with a prayer to quash the impugned order. The grounds taken by the appellant in the second appeal are as follows:-

(i) The order of assessment passed by the LAO so also the order of first appellate officer in remanding the case to the assessing officer is illegal, arbitrary and is based on misconception of law and facts.

(ii) The assessment was completed u/s.42 of the OVAT Act, 2004 basing on the audit visit report submitted in form VAT-303 by the audit officer disallowing the input tax credit worth Rs.27,251.00 against the purchases made from the seller Sunayana Metal Industries Ltd., Rourkela for the reason of mismatch of input tax credit and output tax in Commercial Tax Department portal. Section 20 of the OVAT Act, 2004 only provides allowance and disallowance of input tax credit and the relevant rules are Rules 11 to 14 of the Orissa Value Added Tax Rules, 2005 and nowhere in the said provisions it is envisaged that the ITC claimed by the purchaser should be disallowed if the selling dealer did not upload the details of relevant tax invoices while e-filing of his returns. Hence, the action of the LAO is illegal and arbitrary in view of the decision of the Hon'ble High Court of Orissa in the cases of Nayak Variety Store v. of Commissioner of Sales Tax, Orissa as reported in 18 VST 500 and Jindal Stainless Ltd. v. State of Orissa as reported in 54 VST 1.

(iii) The audit officer has not confronted the matter to the appellant which is illegal since at Col. No.15 of the audit visit report in form VAT-303 it has been clearly provided that the audit officer has to confront the specific

discrepancies found at the time of audit and to record the explanation if any offered by the dealer. In the instant case no such explanation was called for from the dealer but the same was charged behind the knowledge of the dealer-appellant which is illegal in view of the decision of the Hon'ble High Court of Orissa in the case Bhusan Power and Steel Ltd. v. State of Orissa and another reported in 47 VST 466. The Hon'ble Court in the said decision observed that it is settled law that if any person likely to be affected by the use of any materials against him that is to be brought to his notice for rebuttal. The appellant at the time of assessment had produced the genuineness of the transaction made with the seller but without considering the legality of the case the LAO illegally disallowed the ITC claimed by the appellant.

(iv) The disallowances of input tax credit against the goods purchased from Sunayana Metal Industries Ltd., Rourkela vide tax invoice Nos. 454 and 455 dtd.06.12.2013 for Rs.3,81,907.00 and Rs.1,96,083.00 include VAT of Rs.18,006.00 and Rs.9,245.00 respectively which are genuine transactions of purchases since the goods as well as the said tax invoices were verified by the Asst. Commissioner of Sales Tax, Enforcement Range, Sambalpur on 07.12.2013 while transporting the goods from Rourkela to Nuapada. Hence disallowances of input tax credit of Rs.27,251.00 is illegal and arbitrary for the reason that the seller had not uploaded the sale voucher in the Commercial Tax Deptt. portal. The copies of said tax invoices in original were produced before the LAO as well as the first appellate authority for verification. Further, in the AVR submitted in form VAT-303 the stock

found on the date of visit tallied with the books of account of the appellant and tax had already been paid by the appellant on the goods purchased from Sunayana Metal Industries Ltd., Rourkela. No suppression of purchases or sales are established at any point of time by the Audit Officer or by the LAO for which the appellant is not liable to pay tax again with penalty on the same goods.

(v) The audit visit was conducted on 26.08.2015 by the learned ACST, Nuapada Circle, Khariar Road and was not submitted to the Assessing Officer within seven days violating sub-section (4) of Section 41 of the OVAT Act and sub-rule (3) of Rule 45 of the Orissa Value Added Tax Rules, 2005. Hence initiation of proceeding u/s.42 on the basis of such defective and irregular audit visit report in form VAT-303 is illegal and unsustainable in the eye of law as observed by the Hon'ble High Court of Orissa in the case of Jindal Stanless Ltd. v. State of Orissa reported in 54 VST 1.

(vi) The LAO has imposed penalty u/s.42(5) amounting to Rs.21,887.00 while passing the order of assessment and again has passed a corrigendum order imposing the penalty of Rs.43,774.00 which is illegal in view of the observation of the Hon'ble Apex Court in the case of Hindustan Steel Ltd. v. State of Orissa reported in 25 STC 211 where the Hon'ble Apex Court held that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged acted deliberately in defiance of law. Penalty will also not be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform

a statutory obligation is a matter of discretion of the authority to be exercised judiciously on consideration of all the relevant circumstances. But in the present case the LAO has imposed penalty only to discharge the statutory obligation and not acting judiciously.

5. The Revenue has filed the cross objection as follows:-

(i) There is no reasonable merit in the second appeal filed by the dealer which is not sustainable in the eye of law.

(ii) The LAO and the first appellate authority have rightly completed assessment and appeal respectively on the statutory provisions under the Act and Rules to the extent the dealer has raised the point.

(iii) In the order of the first appellate authority at page-4 it is clearly mentioned that the selling dealer i.e. M/s. Sunayana Metal Industries Ltd., Rourkela (bearing TIN-21795400233) has not filed periodical returns for the relevant tax period from 01.10.2013 to 31.12.2013 and not deposited output tax of Rs.27,251.00 into Government exchequer. So, the instant purchasing dealer is not eligible to get adjustment of ITC of Rs.27,251.00 as he failed to produce proper evidence regarding deposit of output tax of Rs.27,251.00 as laid down u/s.95 of the OVAT Act. Accordingly, the LAO has rightly disallowed the same by establishing the tax audit objections.

(iv) No such specific mention of the consequences in the statute is there if the audit report has not been submitted within the specified time limit of seven days. The case has been referred to larger bench of Hon'ble High Court of Orissa in case of Pal Construction v. Assessing Authority in W.P.(C) No.16957 of 2009. So it is still subjudice for which annulment in this case will be a premature

decision likely to affect natural justice in the interest of public.

(v) For technical reasons the demand cannot be vitiated as per the decision of the Hon'ble Apex Court in the case of Deepak Agro Food who observed that irregular order is curable for which Section 98 is envisaged. The Hon'ble Apex Court also upheld in Shree Durga Oil Mills case that public interest must override any consideration of private loss and gain.

(vi) The statute provides penalty and there is no need of proving mens rea to it and the same has been decided by the Hon'ble Apex Court as reported in 18 VST 180 in the case of Dharmendra Textiles. So, there is no question of applying any discretion to it.

(vii) The order of first appellate authority is crystal clear with respect to the other points raised by the dealer who has dealt each and every item being self-explanatory and rightly set aside the order for redressal of grievances of the dealer who requires no further interference.

6. Heard both the sides. Perused the orders of both the fora below and other materials available on record. The claim of the dealer-appellant was denied by the assessing authority. It is to be remembered that due to the fault of the selling dealer, the assessee-dealer should not suffer. The authority has also to rely upon the documents produced before him in support of the claim that the assessee-dealer has paid tax to the selling dealer (if any) if the documents are found genuine.

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.
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> 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."

7. 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.

A bonafide purchasing dealer cannot be denied his claim because of the intentional default of the selling dealer over whom the purchasing dealer has no control. The taxing authority may also as per law collect tax from the defaulting dealer and punish him, but it is to be seen whether the selling dealer is a registered dealer or not. If the purchasing dealer has shown that he has complied with the requirements he cannot be denied ITC only because the selling dealer fails to discharge his obligation under the Act by not depositing the tax collected under the law.

8. It is held that mismatch of ITC can never be a ground to disallow ITC to a bonafide purchasing dealer who has acted in good faith. But in the event it is found that the selling dealer is a fake dealer where there is no question of collection and payment of output tax, in that event it is nothing but a commission of fraud and the question of ITC shall not arise. Hence this is a fit case where the matter should be remitted back for a limited purpose of enquiry into the identity of the selling dealer and to determine the legitimacy of the claim of ITC. As regards the question of imposition of penalty it is the mandate of the provision u/s.42 of the OVAT Act that in case of wrong claim of ITC or erroneous claim of ITC, the dealer can be assessed

u/s.42(3) or 42(4) of the OVAT Act. Further, Sec.42(5) of the OVAT Act speaks of penalty as a mandatory consequence in case the dealer is found liable to pay tax in an assessment u/s.42(3) or 42(4) of the OVAT Act. Thus when there is an assessment u/s.42 of the OVAT Act and there is a wrong claim of ITC, then penalty can be imposed in that case. However, in the case in hand, the question of penalty will arise only when it is found that the claim of the dealer for the admissible ITC is found wrong.

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 appellant-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 appellant-dealer as per the observation made above within three months from the date of receipt of this order. The cross-objection is disposed of accordingly.

Dictated & corrected by me,

(A.K. Dalbehera)
1st Judicial Member

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