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

S.A. No. 22(V) of 2018

(From the order of the ld. Addl. CST (Appeal), Odisha, Cuttack, in Appeal Case No. Jajpur-AA-109/2007-08, disposed of on dtd.28.11.2017)

P r e s e n t: **Shri S. Mohanty,**
1st Judicial Member

M/s. Banspani Iron Ltd.,
At:- Baneikala, P.O.-Joda,
Dist.- Keonjhar. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2005 to 31.03.2006

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

Date of hearing: 13.08.2019 ******** Date of order: 13.08.2019

O R D E R

A confirming order of assessment u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) passed by the first appellate authority is under challenge in this second appeal by the assessee as appellant for the prayer to delete the tax liability and penalty raised.

2. **Factual Matrix**

A duly constituted audit team as per sec.41 of the OVAT Act conducted audit visit of the dealer's unit which is engaged in purchase of iron ore and processing of iron ore to iron ore size and fines for inter-State, intra-State and export trade and commerce. The audit team suggested for audit assessment with the allegations as follows:-

i) the dealer has wrongly availed ITC on alleged opening stock of Rs.5,77,864.00 on the appointed date 1.4.2005

ii) the dealer has wrongly availed ITC on goods claiming those as capital goods

iii) the dealer has wrongly availed ITC on the goods which are lost in the process of handling and processing

iv) the dealer has not paid tax on hire charges received against the machinery given on rent and

v) has wrongly claimed exemption in tax claiming export sale covered u/s.5(3) of the CST Act goods to the tune of Rs.2,94,022.28.

Basing on the AVR, in the audit assessment the assessing authority found the dealer has claimed and availed ITC on the alleged opening stock of goods on 01.04.2005 without any form VAT-608 from the competent authority. So, even though the dealer has produced evidence in support of his claim before competent authority as per section 117 of the act and Rule 123 of the OVAT Rules for grant of form VAT-608 but the same was treated as rejected as either pending for consideration or not considered favourably. The assessing authority treated the ITC availed by the dealer on the alleged opening stock as wrong. The assessing authority found that, the dealer wrongly availed ITC on spare parts of Rs.3,87,298.00 purchased prior to 01.06.2008, the effective date of amendment of provision u/s.2(8) of the OVAT Act. Further, as against the claim of ITC on the quantity of loss of raw

materials to the extent of 4687.208 MT sustained in the process of handling and processing, the assessing authority treated the same covered u/s.20(8)(f) of the OVAT Act disqualifying the dealer from claiming ITC. Similarly, though the dealer had claimed to have effected export sale as a penultimate seller covered u/s.5(3) of the CST Act for the goods worth of Rs.73,50,557.00 vide sale bill No.44/7.2.06, 45/7.2.06, 49/2.3.06, 55/27.3.06 and 56/27.3.06 but on examination of the copy of the order of the foreign buyer, particulars of 'H' forms, sale bill of the dealer and copy of bill of lading, the assessing authority found there was no co-relation between the export and the goods sold by the dealer to the exporter, as such the claim of 5(3) sale was also turned down and consequently the concession availed by the dealer was denied tax at appropriate as per OVAT Act. Lastly, the assessing authority held the rent received by the dealer against the machinery given on rent, treating the said as a transfer of right to use covered u/s.2(45)(f) of the OVAT Act, exigible to OVAT . In final calculation, the assessing authority held the dealer liable to reverse the ITC of Rs.12,05,496.64 and further liable to pay VAT of Rs.10,40,887.28.

3. Felt aggrieved, by the assessment and demand raised as mentioned above, the dealer knocked the door of first appellate authority. Learned Addl. Commissioner of Sales Tax (Appeal), Odisha, Cuttack as first appellate authority by reiterating the reasons given by the assessing authority did not interfere with the findings of the assessing authority under challenge before him, as a result, the unsuccessful dealer before both the fora below tried his luck before this forum by this second appeal.

Dealer's contention

4. It is contended by the appellant-dealer that though, the dealer had disclosed the closing stock position on the appointed date

i.e. 01.04.2005 but the assessing authority and thereafter the first appellate authority did not take consideration of the documents like form VAT-607 dtd.30.06.2005 submitted by the dealer before the Sales Tax Officer, Barbil Circle and the reminder letter dtd.28.07.2006 and 15.05.2012 with a request for issuance of form VAT-608. So, for the reason of any fault of the taxing authority by not issuing the form VAT-608, the innocent dealer should not be penalized. It is further contended that, in absence of any cogent and tangible evidence about any theft, damage, destruction or clandestine removal of goods by the dealer, the dealer should not have denied to avail ITC, as such, the first appellate authority is wrong in application of the sec.20(8)(f) of the OVAT Act in the fact of the case in particular. It is also contended that, the dealer had sold goods worth of Rs.73,50,557.00 as a penultimate seller to the exporter which is evident being supported with the declaration form 'H' bearing No.KOI431 submitted before the authority, then there was no reason for the assessing authority or the first appellate authority to decline the claim of exemption u/s.5(3) of the CST Act on the plea that, the documents are not co-related to the export sale.

The next contention of the dealer is, though the dealer had given machineries on rent but there was no kind of transfer of right of use goods as the dealer had kept his domain over the goods all along during the rent period and had exercised the option right to withdraw the machine at any time, so the hire charges received by the dealer is no way can be treated as sale as per sec.2(45)(f) of the OVAT Act. So, the levy of tax on such hire charges by the authority below is not in accordance to law.

5. The questions framed for decision in this appeal are,

(i) whether the first appellate authority is wrong in confirming the order of assessing authority by holding that the dealer has wrongly availed ITC showing closing stock of Rs.5,77,864.00 on 01.04.2005?

(ii) whether the dealer has wrongly availed ITC on spare parts treating the same as capital goods covered u/s.2(8) of the OVAT Act?

(iii) whether the first appellate authority is wrong in confirming the order of assessing authority by denying ITC on the loss of goods in course of handling and processing by the dealer?

(iv) whether the first appellate authority is wrong in confirming the order of assessing authority by treating the hire charges against the machinery given on rent is exigible to tax?

(v) whether the first appellate authority is wrong in confirming the order of assessing authority rejecting the claim of the dealer of the penultimate sale allegedly covered u/s.5(3) of the CST Act?

6. Question No.i

Learned Counsel for the dealer argued that, it had disclosed stock position on the appointed date i.e. on 01.04.2005 and submitted required form VAT-607 before the sales tax officer in accordance with the provision u/s.107 of the OVAT Act read with Rule 123 of the OVAT Rules. The dealer's self-assessment u/s 39 of the act was accepted without pointing no defect. In the present assessment proceeding, the dealer had brought the facts of compliance of sec.107 of the OVAT Act read with Rule 123 of the OVAT Rules and had prayed for waiting for the result of his prayer before the sales tax officer. But, the assessing authority simply proceeded with the assessment without ascertaining the result of the representation of the dealer relating to the claim of ITC on stock position on the appointed date. The orders of both the fora below as it revealed, the authorities have proceeded with denying the ITC to the dealer without waiting for the result of the application of the dealer mentioned above. The assessing authority or the first appellate authority should have ascertained the fate of the

claim of the dealer from the concerned authority so as to determine whether the dealer has got any ITC in his act on the stock available with him on 01.04.2005. But, it is found that both the fora below have mechanically proceeded with a view that, since no intimation was received by the dealer from the concerned authority, it is presumed, the dealer's claim was rejected. Such a hypothetical view is illegal and not sustainable in law. Hence, it can be said that, the authority has whimsically proceeded with this question and as such the findings on this point cannot withstand in law. Consequently, I am of the considered view that, the matter need to be remitted back to the authority below to reconsider this question after obtaining necessary information from the concerned Sales Tax Officer about the fate of the application of the dealer as per sec.107 of the OVAT Act read with Rule 123 of the OVAT Rules and form VAT-607 pending for consideration.

7. Question No.ii

This question relates to wrong claim of ITC on spare parts. The decision on this question by both the fora below though challenged, but in the final hearing the learned Counsel for the dealer fairly submitted and conceded to the findings of both the fora below, hence this question is treated as not pressed. In consequence thereof, the finding of the fora below is hereby confirmed.

8. Question No.iii

As regards the ITC on the loss sustained to the goods on account of process loss and due to handling and in transportation, the assessing authority and thereafter the first appellate authority denied the loss amounting to Rs.2,39,834.04 qualified for ITC in favour of the dealer. Claim of the dealer is, loss of these types are inhabitable and sustained under unavoidable circumstances. So, the loss under the heads above does not cover u/s.20(8)(f) of the OVAT Act. The loss is natural in the process of handling and in transportation so it should not be covered u/s.20(8)(f) of the OVAT Act is the argument from the side of the dealer. The assessment order as it revealed, the assessing

authority applied the provision u/s.20(8)(f) of the OVAT Act, whereas, the first appellate authority has taken consideration of provision u/s.20(8)(f) of the OVAT Act and provision u/s.20(9)(b) of the OVAT Act and held that, the dealer is bound to reverse the ITC already availed on the loss amount of Rs.2,39,834.04.

9. This Tribunal in earlier period by the decision of different benches while dealing with the similar question has held that, when the loss is inhabitable or is invisible loss in that case the provision u/s.20(8)(f) of the OVAT cannot be attracted.

9-(a) Learned Standing Counsel Mr. Agarwal vehemently argued that, the provision u/s.20(9) clearly prohibits the dealer to avail ITC in the event of damage/loss or for any reason. The relevant provisions under the Act are reproduced below:-

Sec.20(8)(f) of the OVAT Act:-

> "(f) in respect of goods purchased on payment of tax, if such goods are not sold because of any theft, damage and destruction;"

Sec.20(9)(b) of the OVAT Act:-

> "(b) are lost due to theft, damage or for any other reason, or"

When the question of ITC is under consideration, we are abide by the statute and statute is clear regarding no input tax credit when the goods are not sold because of any theft, damage and destruction. The provision u/s.20(8) starts with the word 'no' by itself indicates, it is a disabling provision which cannot be interpreted to give any other meaning except denial of the ITC in case of theft, damage and destruction. On the other hand, if we take consideration of the provision u/s.20(9)(b) of the OVAT Act, it contemplates, if the goods purchased are loss due to theft, damage or for any other reason, the ITC availed in respect of purchase of such goods shall be deducted from the ITC admissible for the tax period during which any one or more of such event occurs. Now, such being the statutory mandate. It is only to be seen that, whether any loss in the handling,

processing, transporting etc. are covered under the term theft, damage destruction etc. Here, it is not the case that, the loss is due to the failure on the part of the dealer to take proper care. If the loss is inhabitable and where it is not the intention of the dealer but is a natural and compulsory consequence in the, in that case the dealer should not be suffered for no fault on his part. It is only to be seen that, the loss claimed by the dealer is invisible loss which is inevitable or the claim is on higher side with an intention to evade tax. There is no standard format to ascertain or calculate the loss. If the claim of the dealer for different tax periods are considered and the loss claimed by other dealer in similar trade also considered, it can very well ascertain what should be the standard amount of loss a dealer sustain in the handling and processing of the particular goods. In the result, if it is found that the percentage of loss is intentionally shown in higher side, in that case Revenue can discard the claim of the dealer. Unfortunately, the State has no such claim.

Thus, from the discussion hereinabove, here in this case it is held that, in the remand case the assessing authority will do well to reappraise the particular question in the light of observation here in above so as to give a finding on this contest afresh. However, it is made clear that, in any case the amount of ITC cannot exceed the output tax, the calculation is subjected to provision u/s.20(8-a) of the OVAT Act.

10. Question No.iv

Learned assessing authority has held that, a sum of Rs.59,74,924.00 received by the appellant-dealer as hire charges against pay-loaders, dumpers and proclaim given on rent covered under the tax net as there was transfer of right to use amounting to deemed sale as per sec.2(45)(f) of the OVAT Act. The claim of the dealer is, on the basis of hire purchase agreement the machines like pay-loaders, dumpers and proclaim given but the assessee-dealer was exercising control over the machineries given on rent during the rent

period as per the terms of the agreement for which no inference can be drawn that, there was transfer of right to use amounting to sale.

Per contra, advancing a copy of the assessment order of the first appellate authority for the tax period 01.04.2006 to 31.03.2007 Learned Counsel for the dealer submitted that, the taxing authority has treated the rent under the similar contract for different period as not covered under the definition of transfer of right to use u/s.2(45)(f) read with sec.2(46)(c) of the OVAT Act and argued that on application of principle of consistency to the case in hand, the dealer should not be taxed on rent amount.

11.(a) To appreciate the fact, the terms of the rent agreements submitted are perused. The terms of the agreement in all cases are same. For better understanding the terms of the agreement in one case are reproduced below:-

(1.) The company will deploy Pay Loader on hire basis for your work. It will also provide operator and other personnel to operate the Pay Loader. The Pay Loader will be at ready condition to operate as per your requirement.

(2.) The Pay Loader will be used only at our designated places within our plant premises. The Pay Loader in no circumstances will be allowed to be moved from our premises.

(3.) The Pay Loader shall be only used by you for loading of materials at our railway siding & plant premises and you will not be at liberty to use the machinery other than our work.

(4.) You will not enjoy any control over the Pay Loader and the ownership remains with the company.

(5.) The company will maintain its Pay Loader and all the cost of repair and maintenance will be borne by the company.

(6.) The company will raise hire charges on the basis of number quantity in MT loaded, certified by both representative of you and the company.

(7.) The per MT rate is Rs.5.00 and the company will charge service tax thereon if applicable.

(8.) Any willful damage caused to the machinery by or on behalf will be recovered from you.

(9.) In case of exigency the company can withdraw the Pay Loader without any notice.

(10.) There will be a weekly off to maintain the Pay Loader and during that day the Pay Loader will be examined, repaired and maintained for smooth running.

(11.) The machinery will be under the control of Plant Head and all the facts relating to machinery will be intimated to him.

11.(b) With the terms above agreed into between the assessee-dealer and the other persons, let us examine the well settled principle under law as laid down by the authorities to ascertain if the rent received by the dealer in the present case is covered u/s.2(45)(f) of the OVAT Act read with sec.2(46)(c) of the OVAT Act.

11.(c) Right to use of tangible goods service has also been brought under service tax net by the Finance Act, 2008, w.e.f 16-05-2008 vide **notification No. 18/2008-ST, dated 10-05-2008**.whereby taxable service has been defined u/s 65(105)(zzzzj) of Finance Act, 1994 to mean as *"any services provided or to be provided, to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances".*

When Transfer of right to use is a deemed sales: The phrase "transfer of right to use" any goods for any purpose is of great significance to impose tax on it as deemed sales. It means in case of transfer of right to use goods all the rights except the ownership

rights are transferred by the transferor to the transfree so as to enable him to use the goods at his own will to the exclusion of the transferor. The Hon'ble Supreme court in **BSNL vs Union of India (2006) 145 STC 91 (SC)** held as under:

To constitute a transaction for the transfer of right to use goods, the transaction must have the following attributes:

a. There must be goods available for delivery;

b. There must be consensus ad idem as to the identity of goods;

c. The transferee should have a legal right to use the goods- consequently all legal consequences of such use including any permissions or licenses required there for should be available to the transferee;

d. For the period during which the transferee has such legal right, it has to be for the exclusion to the transferor this is the necessary concomitant of the plain language of the statue – viz. a "transfer of the right to use" and not merely a licence to use the goods;

e. Having transferred the right to use goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

11.(d) The judicially evolved principles to identify a transaction involving the transfer of right to use goods to be a sale clearly exclude the indispensability of delivery of physical possession thereof an essential precondition. Similarly in **20th century Finance Corporation Limited v State of Maharashtra-** 2000 (6) SCC 12 at 44 ruled that-

> *"(c) Where the goods are available for the transfer of right to use the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.*
> *(d) in cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of goods. In such cases the taxable event would be on the delivery of goods".*

11.(e) The important attribute constituting Transfer of right to use goods as deemed sales is that there should be transfer of effective control and possession of the goods. If the owner retains effective control over the equipment, it is not a transfer of right to use. So the intention of the parties, mode of use and several other surrounding and relevant aspects have to be considered to come to the conclusion whether or not under a particular contract, there is transfer of right to use any goods. A mere contract of hiring, without transfer of control, may be a contract of bailment and not a contract for transfer of right to use goods. Transfer of a right to use goods implies that full liberty is vested in the transferee to have the right to use goods to the exclusion of all other including the owner of goods. In State of **A.P. vs. Rashtriya Ispat Nigm Limited (RIN) (2002) 126 STC 114(SC) Rashtriya Ispat Nigam Limited**. The Hon'ble Court has held as follows:-

> *"In our view, whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. To determine the nature of transaction, the agreement has to be read as a whole. From a close reading of all the clauses in the agreement, it appears to us that the contractor is entitled to make use of the machinery for purposes of execution of the work of the petitioner and there is no transfer of right to use as such in the favour of contractor because the effective control of the machinery even while the machinery is in use of the contractor is that of the petitioner-company. The contractor is not free to make use of the same for other works or move it out during the period the machinery is in his use. The condition that he will be responsible for the custody of the machinery while the machinery is on the site does not militate against the petitioner's possession and control of machinery. Therefore, the transaction does not involve transfer of the right to use the machinery in favour of the contractor."*

12. On application of settled principle as derived from the authoritative pronouncements time to time discussed above when it applied to the present case in hand, it can safely be said that, at no point of time the dealer had given scope to the persons to use the machines as they likes in their own way. The domain over the

machineries given on rent all along. So, the hire charges does not fall under the ambit of Sec.2(45)(f) read with Sec.2(46)(c) of the OVAT Act as claimed by the Revenue.

13. Question No.v:-

With regard to rejection of the claim of penultimate sale effected by the appellant and application of provision u/s.5(3) of the CST Act, the claim of the dealer is, it has sold goods to Indian exporter M/s. Emras Mining & Construction Pvt. Ltd., Joda for export of goods to foreign buyer, Adani Global PTE Ltd. So, the goods were moved in accordance to the agreement for sale between the exporter and foreign buyer and the purchase order placed by the exporter before the assessee-dealer, so the sale is squarely covered u/s.5(3) of the CST Act qualifying the dealer for exemption from paying tax and to that effect the dealer had produced valid declaration form 'H' issued by the purchaser. Per contra, the claim of the taxing authority is, the 'H' form and documents do not co-relate with the sale effected by the dealer. So, the sale under question amounting to Rs.73,50,557.00 do not qualify the concession u/s.5(3) of the CST Act.

13.(a) Learned Counsel for the dealer vehemently argued that, there was an agreement between the exporter and foreign buyer on 21.12.2005 containing a delivery schedule in between 1st to 15th January, 2006. The purchase order was issued accordingly by the exporter on dtd.21.12.2005 to the dealer with a direction to deliver the goods within twenty days. The period of supply was amended extending the delivery period up to March, 2006 and again vide agreement No.2, the delivery period was extended up to 15th April, 2006. It is also submitted that, in the beginning of the year there was a general purchase order placed before the assessee-dealer by the exporter. However, the sale and delivery were made in accordance to the particular contract entered into between the exporter and the foreign buyer and the movement of goods takes place in consequence

and in compliance to the purchase order generated on the basis of agreement between the exporter and foreign buyer.

Law is well settled that, exemption to penultimate sale is subject to the condition like, the sale is for purpose of complying with agreement or order in relation to export and such sale is made after the agreement or order in relation to export and some same goods which were sold in penultimate sale should be exported though may not be in same form. In other words, the final exporter should be in possession of the export order from foreign buyer and should take delivery of the goods from the supplier making penultimate sale solely for execution of such export order and export the same goods though not in same form. In other words, when the movement of goods were preceded by existence of a foreign buyer's contract, in compliance of which the goods were sold by dealer to exporter and the goods were ultimately exported out of the territory of India by the merchant exporter, then the requirement of the provision u/s.5(3) of the CST Act is treated to be fully complied with in consonance to Rule 6D of the CST(O) Rules which speaks of movement of goods in a sale. For the purpose we can place reliance in the matter of **Consolidate Coffee Ltd. v. Coffee Board, Bangalore [1980] 164 STC 46**. Similarly, in **K. Gopinath Nayer v. State of Kerala (1997) Vol. 10 SCC 1,** it was held that, Sec.5(3) applies to penultimate sale, if such sale satisfies two conditions (a) that such penultimate sale must take place after agreement or order under which the goods are to be exported and (b) it must be for complying with such agreement or export order.

Further, dealing with a similar case, the Hon'ble Apex Court in **State of Madras V. Radio and Electricals (1966) 18 STC 222 (SC)** has held :

> "Indisputably the seller can have in these transactions no control over the purchaser. He has to rely upon the representations made to him. He must satisfy himself that the purchaser is a registered dealer, and the

> goods purchased are specified in his certificate : but his duty extends no further. If he is satisfied on these two matters, on a representation made to him in the manner prescribed by the Rules and the representation is recorded in the certificate the selling dealer is under no further obligation to see to the application of the goods for the purpose for which it was represented that the goods were intended to be used. If the purchasing dealer misapplies the goods he incurs a penalty under section 10. That penalty is incurred by the purchasing dealer and cannot be visited upon the selling dealer. The selling dealer is under the Act authorized to collect from the purchasing dealer the amount payable by him as tax on the transaction, and he can collect that amount only in the light of the declaration mentioned in the certificate. He cannot hold an enquiry whether the notified authority who issued the certificate of registration acted properly, or ascertain whether the purchaser, notwithstanding the declaration, was likely to use the goods for a purpose other than the purpose mentioned in the certificate. There is nothing in the Act or the Rules that for infraction of the law committed by the purchasing dealer by misapplication of the goods after he purchased them, or for any fraudulent misrepresentation by him, penalty may be visited upon the selling dealer".

13.(b) The impugned order as it revealed, the first appellate authority, without giving any cogent and elaborate reason just confirmed the order of assessing authority on this point. It is not out of place to mention here that, the dealer's claim u/s.5(3) of the CST Act is found to have accepted by the authority in the first appellate stage vide its order dtd.27.11.2017 under CST assessment. Learned Counsel vehemently argued that in the CST assessment when the aforesaid export sale was accepted, and then there is no reason before the assessing authority under VAT Act to bring the sale amount under VAT net. A sale if covered u/s.5(3) of the CST Act or not should be considered only in CST assessment. In an assessment under VAT Act, the assessing authority cannot give a contradictory finding to the assessment under CST Act. Yes, the authority can suggest to reopen the CST assessment consequent upon detection of wrong claim of.

The argument of the learned Counsel for the dealer on this point has got force in law.

14. From the facts and circumstances and the well settled principle laid down by the authorities discussed above, here in this case it is held that, if the movement of goods took place in consequence to agreement between foreign buyer and exporter and it was a prearrangement between the merchant exporter and the assessee-dealer, in that event the sale by the assessee-dealer as a penultimate sale is qualified for exemption. So, in the remand assessment the assessing authority is required to determine this question afresh as per the observation hereinabove.

15. All the questions for points for determination are decided hereinabove. Resultantly, it is held that this is a fit case where the matter should be remitted back to the assessing authority for assessment afresh in the light of the observation hereinabove.

Accordingly, it is ordered.

The appeal is allowed in part on contest. The impugned order is set aside except to the extent of denial of ITC on purchase of spare parts as per Question No.(ii) above. Further, the dealer is not liable to pay tax on rent received as per decision in Question No.IV. The ld. Assessing authority is required to decide the other questions afresh. The matter is remitted back to the assessing authority for assessment afresh who will do well to dispose of the matter within a period of four months hence after giving a fair chance of hearing to the dealer.

Dictated & corrected by me,

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

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