BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No. 64(V) of 2017-18

(From the order of the ld. Addl. CST (Appeal), South Zone, Berhampur, in Appeal Case No. AA 9VAT)-42/2014-15, on 30.07.2015)

Present: Smt. Suchismita Misra, Chairman,
Sri Subrata Mohanty, 1st Judicial Member
&
Sri R.K. Pattnaik, Accounts Member-III

M/s. Ananta Automobiles Pvt. Ltd.,
Plot No.532/1023, Rasulgarh,
Bhubaneswar. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2011 to 31.03.2013

For the Appellant ... Mr. K. Roy Choudhury, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 12.09.2019 ******** Date of order: 19.09.2019

O R D E R

The unsuccessful dealer before both the fora below is the appellant herein in this second appeal. Challenge is the order of first appellate authority, whereby and wherein, the demand towards tax and penalty raised in an assessment u/s.42 of the Orissa Sales Tax Act, 2004 (hereinafter referred to as, the OVAT Act) is reduced in part but not to the satisfaction of the appellant, hence the appellant has prayed for deletion of the entire amount of demand as not sustainable in law and fact.

2. The appellant, a private limited company, as registered dealer engaged in purchase and sale of vehicle-'RIHNO' with its parts and accessories. A duly constituted audit team u/s.41(1) of the OVAT Act on visit to the dealer's unit submitted Audit Visit Report (in short, the AVR) suggesting audit assessment about the discrepancies like (i) wrong claim of ITC of Rs.1,46,538.00 against purchase of paper and paints, (ii) non-payment of VAT against sale of two cars value of Rs.7,68,192.00, (iii) non-inclusion of an amount of Rs.20,99,356.00 received against warranty replacement scheme in the GTO and TTO and (iv) stock discrepancy of the spare parts worth of Rs.61,63,973.00.

On the basis of AVR as above, learned DCST, Bhubaneswar I Circle, Bhubaneswar conducted the audit assessment covering the tax period from 01.04.2011 to 31.03.2013. In the assessment, learned assessing officer allowed ITC against the purchase from Heroes Automotive India Pvt. Ltd. and also allowed ITC on oil and lubricants on the basis of invoices but disallowed the claim of ITC on 'paper' and 'paints' treating the same as not consumed in the process of servicing of the vehicles. Further, the assessing authority added the value of two cars as suggested by the audit team to the GTO and TTO. It has also accepted the suggestion regarding addition of Rs.20,99,356.00 received against the alleged warranty replacement and similarly in absence of reasonable explanation from the dealer, it is also accepted the suggestion of stock suppression towards spare parts for Rs.61,63,973.00. Considering mismatch between old firm M/s. Sujata Corporation which is taken over by the present dealer, the opening stock on 01.09.2011 was treated as Rs.3,74,99,494.00. Thereafter, on determination of GTO at Rs.30,72,71,756.00, the TTO was determined at Rs.3,66,92,763.48, the dealer was allowed ITC of Rs.28,53,404.00, the deposit already made by the dealer at Rs.3,23,75,192.00 was adjusted and the

balance tax due was calculated at Rs.14,64,167.48. In addition the penalty i.e. twice of the tax due as per sec.42(5) of the OVAT Act calculated at Rs.43,92,502.00 was imposed.

3. Being aggrieved, with the order of assessment and demand above, the dealer preferred first appeal. Learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur as first appellate authority vide order dtd.30.07.2015 confirmed all the findings of the assessing authority except the findings relating to warranty replacement as it has reduced the amount from Rs.20,99,356.00 to Rs.17,57,642.18 granting the differential amount as deduction towards labour and service charges. In consequence thereof, there was re-determination of GTO and TTO and tax liability which was ended with balance tax liability and penalty payable by the dealer at Rs.14,18,036.11 and Rs.28,36,072.22 respectively. Thus, in total, the demand became raised at Rs.42,54,108.00.

4. Felt aggrieved and being dissatisfied with the impugned order, the dealer knocked the door of this Tribunal by way of second appeal.

5. The contention of the dealer as per the grounds and additional grounds are:- the first appellate authority has committed error in confirming the order of assessing authority by disallowing the claim ITC on paper and paints used as consumable under the definition of input as per the OVAT Act. The dealer is eligible to ITC on purchase of paper and paints amounting Rs.1,46,538.00. Addition of Rs.7,68,192.00 to GTO and TTO as sale price of two cars is factually incorrect. Rejection of warranty replacement without considering the documents produced is illegal. The difference in the stock position as detected is, due to takeover of the business of M/s. Sujata Corporation by the dealer and further the calculation of scrap as

spare parts leading to sale suppression is incorrect in fact and law, whereas, penalty as imposed is illegal.

6. Claim of the Revenue in Cross Objection is, denial/reversal of ITC as per sec.20 of the OVAT Act relating to purchase of 'paper' and 'paints' by both the fora below is in accordance to law since these goods were not included in the R.C. of the dealer as input or consumable. The appellant-dealer has sold two nos. of cars of Rs.7,68,192.00 without collecting or paying VAT on it. Penalty as imposed as per sec.42(5) of the OVAT Act is just and proper.

7. **Findings and reasons thereof:**

Before delving into the discussion in detail on the merit of the case, in the beginning, it is apt to mention here that, the dealer is found to be very casual in representing its pleas right from the assessing authority to this Tribunal in every stage. On the other hand, the orders of the fora below are found quite cryptic, unspecific and almost, without lack of details with the reasons.

7-(a) Unfortunate to note that, the assessing authority has even dared to pass comment on the ratio laid down by the Hon'ble Apex Court in Mohd. Ekram Khan & Sons v. Commissioner of Trade Tax U.P. (2004) 136 STC 515. The words of the assessing authority are necessarily contemptuous. The relevant paragraph of the assessment order is treated as deleted/expunged).

7-(b) On the other hand, it is found that, only in the final argument, by written submission, the learned Counsel for the dealer advanced separate theories against each of the allegations under AVR.

7-(c) From the rival contentions which are unspecific, self-contradictory as well as in the final hearing, for sake of convenience, it is felt necessary to discuss the case in hand on each point of

allegations/suggestions in the AVR comparing necessary findings of both the fora below.

8. **Question No.(I)**

The audit team has suggested for reversal of ITC by disallowing the claim of ITC against the goods like paper and paints worth of Rs.46,538.00 as per the AVR.

The assessing authority has held that since no invoices against paper and paints which are only consumed in servicing are produced ITC to the tune of Rs.1,46,538.00 is disallowed.

The first appellate authority has confirmed the order of assessing authority with the findings that, the dealer has agreed with the observation of assessing authority.

Dealer's plea before the Tribunal:

Before this authority the dealer has questioned the legality of order of both the fora below by saying that, since paper and paints were utilized as input/consumables on which ITC is admissible.

8-(a) Drawing attention of the Bench to the definition of term 'input' under sec.2(25), the definition of input tax as per sec.2(46), the input tax credit as per sec.2(27) and the definition of works contract as per sec.2(63), learned Counsel for the dealer argued that, since the dealer has utilized these goods in the servicing work as input/consumable, the dealer is entitled to ITC on it. Learned Counsel gave much stress on the sentence used by the assessing authority in the assessment order that, "the goods were consumables in the servicing".

Plea of the Revenue:

The plea of the Revenue is, paper and paints were not included in the R.C. of the dealer. Further, these goods were not utilized as consumable, so the dealer's claim is not well grounded. It

is strenuously argued that, once the dealer has admitted in writing before the fora below to the extent of accepting the findings of assessing authority, in that event the confirming order of first appellate authority on admission on this question cannot be reopened.

Learned Counsel for the dealer argued that, under the wrong notion the dealer has admitted a finding which is otherwise unsustainable in law. It never can be said that, the door of the Tribunal in second appeal is shut for him because question of estoppel can be raised at any stage. It is argued that, there is no estoppel on the point of law. Reliance is placed in the matter of **Srei International Finance Ltd. v. State of Orissa and Others**. The relevant question and answer given in the judgment is reproduced below:

> "In view of such rival contentions, the questions which fall for consideration by this Court are:
> (i) *** *** ***
>
> (ii) Whether a dealer is liable to pay tax on the ground that he admitted to pay tax on a certain transaction even if the said transaction is not taxable within the provisions of the OST Act?
> (iii) *** *** ***"

Answer:

> "27. Coming to question No. (ii), this Court holds that there is no estoppel against statute. If a person, is not liable within the four corners of statute to pay tax on any transaction, he cannot be assessed to tax merely because he previously admitted his liability on a wrong notion. Liability to pay tax has always to be imposed by law, it cannot be imposed on admission. Article 265 of the Constitution is very clear on this point."

In **Maynak Poddar v. Wealth Tax Officer,** the Hon'ble Apex Court held that:

> "10. Thus, unless the definition of 'net wealth' r/w the definition of 'asset' as provided in Section 2(m) and Section 2(ea), respectively, includes a building let out to a tenant used for

commercial purposes, the same cannot be subjected to wealth-tax. Even if the assessee had included the same in his return, that would not preclude the assessee from claiming the benefit of law. There cannot be any estoppel against statute. A property, which is not otherwise taxable, cannot become taxable because of misunderstanding or wrong understanding of law by the assessee or because of his admission or on his misapprehension. If in law an item is not taxable, no amount of admission or misapprehension can make it taxable. The taxability or the authority to impose tax is independent of admission. Neither there can be any waiver of the right by the assessee. The Department cannot rely upon any such admission or misapprehension if it is not otherwise taxable."(underlined by me)

Other decision relied **SAIL DSP v. Employees Association** held that:

"17. The question of estoppel because of option exercised with eyes open to the subsequent modification cannot be sustained. What is not otherwise taxable cannot become taxable because of admission of the assessee. Nor there can be any waiver of the right otherwise admissible to the assessee in law. The chargeability is not dependent on the admission of or waiver by the assessee. Chargeability is dependent on the charging section, which needs to be strictly construed. Referring to the decision in CIT v. Bhaskar Mitter (1994) 73 Taxman 437 (Cal) at p. 442 (paragraph 8), we had occasion to so hold in the decision in Maynak Poddar (HUF) v. WTO (IT Appeal No. 84 of 1998, dated 24-2-2003)."

Reliance also placed in **M/s. Kiran Stone Crusher v. State of Orissa**, wherein it is held that:

"In response to the aforesaid contentions, learned counsel for the petitioner placed reliance on a decision of the High Court of Mysore in the case of Giridharilal Parasmal Vrs. The State of Mysore, 1967 (Vol--20) STC 64 and in particular, the finding of the Court in paragraph--6 thereof, which is quoted herein below:

"When the facts are not disputed and the law is so clear, we fail to understand how the assessing authorities could at all impose tax. We are clearly of the opinion that the duty of the assessing officers is not merely to impose tax that is lawfully exigible but also to give to the assessees the benefit of any reduction or exemption that mav become due to them upon facts actually found to be true by the assessing authorities, whether or not the assessees, out of ignorance or by mistake, make a claim thereto. When the mistake is so obvious and the matter is taken up on

appeal, We are of the opinion that it is the duty of the appellate authorities to correct the mistake."

Apart from the above, learned counsel for the petitioner also places reliance on the judgment of the Hon'ble Supreme Court in the case of Commissioner of Income Tax, Delhi v. Mahalaxmi Sugar Mills Co. Ltd., AIR 1986 SC 2111 and in particular, the findings arrived at in Paragraph-12 thereof which is quoted hereinbelow:

*** *** ***"

9. In all the decisions mentioned above, the ratio as laid down by the authorities are, if a goods is not lawfully exigible to tax it cannot be taxed for the ignorance or mistake by the dealer. There is no reason to take a departure from the ratio laid down by the authorities above. But, reverting to the case in hand, we are unable to arrive at a definite conclusion that, the paper and paints used by the dealer whether can be covered under the definition of input/consumable. At the cost of repetition it is said that, since the impugned order as well as the assessment order both are cryptic, no definite opinion can be conferred on it. We are not agree with the submission of the learned Counsel for the dealer and further it is unsafe to arrive at a definite conclusion about the nature and use of the goods by the dealer on the basis of a solitary line casually written by the assessing authority. The claim must be supported with evidence. On the other hand, we are also not accepting the straight jacket argument by the Revenue that, because R.C. does not contain these goods, the goods cannot be termed as consumable if otherwise it is actually found used as consumable/input.

Thus, we are of the view that, the matter need to be remitted back to the assessing authority for decision on this question afresh on scrutiny of the evidence in details.

10. **Question No.(II)**

Addition of Rs.7,69,192.00 towards sale of two nos. of cars to the GTO and TTO for the purpose of levy of VAT as suggested

in AVR, the assessing authority just added the amount to the GTO and TTO for levy of VAT.

The first appellate authority confirmed the findings as the dealer accepted the findings of the assessing authority. Before this forum, the plea of the dealer through additional grounds and written submission is, actually, there was no sale of these two cars. The cars were demo cars ply on the road. Because for the purpose of plying on road, registration was required under the Motor Vehicle Act, there was paper transaction as nominal sale. Same and one person became seller and purchaser and it was meant for obtaining registration certificate to ply the demo car on road. These two cars were sold to customers in a later period and there was collection of VAT on it which was duly deposited by showing return. It is claimed, the sale to self by the dealer is not exigible to tax. Learned Counsel for the dealer furnished the retail invoice/tax invoice in support of the claim.

11. Learned Addl. Counsel, Mr. Raman submitted that, there cannot be issuance of invoice without actual sale. Since sale always includes two leaving persons, the claim of the dealer is an afterthought and has no sanction under any law.

Firstly, we found there is a discrepancy as well as confusion regarding sale price of two nos. of cars, the price suggested in AVR which was accepted by the assessing authority does not tally with the sale price on the invoice for two nos. of cars produced by the dealer. Both the fora below had no occasion to deal with this question on the above pleas of the dealer, more to say, the dealer admitted the fact of non-collection of VAT had accepted the findings of the assessing authority for payment of tax.

12. Learned Counsel for the dealer repeated the argument against Question No.(I) above and claimed for reconsideration of the fact and tax liability on such nominal sale in case of sou motu cars.

Similar to Question No.(I) here also, we found, all these facts advanced by the dealer were not there before the authorities below. On the other hand, the authorities below also found to have proceeded in a slip-shod manner without mentioning the facts in detail with a reasoned order. Be that as it may, we are constrained to hold that, this question also needs to be answered afresh on due consideration of the dealer's plea.

13. **Question No.(III)**

It is suggested that, payment received from the manufacturer towards warranty replacement to the tune of Rs.20,99,356.00 is under OVAT Act. The Audit team has suggested for levy of VAT on the amount towards warranty replacement. Learned assessing authority accepted the suggestion and added the aforesaid amount to the GTO and TTO for the purpose of levy of tax.

Dealer's plea

The relationship between the manufacturer and the dealer is a transaction between principal to principal in case of warranty replacement of the spare parts, the dealer has not sold the goods to the customer or not received any price from the customer, the amount received from the manufacturer is not towards any sale consideration exgible to tax. In support of her contention, learned Counsel strongly relied on the decision in the matter of **C.T.O. (AE) v. Marudhara Motors (Rajasthan)**. Ld. Counsel also placed certain documents toward warranty replacement scheme for the purpose of giving to the customers.

Per contra, learned Addl. Standing Counsel placed reliance in the matter of **Mohd. Ekram Khan & Sons** (supra) and the decision in **State of Karnataka v. Cauveri Motors Pvt. Ltd. (2014) 68 VST 124 (Ker.)**.

It is noteworthy to mention here that, in State of Karnataka v. Cauveri Motors Pvt. Ltd., the Hon'ble High Court of Kerala following the ratio laid down by the Apex Court in Mohd. Ekram Khan & Sons (supra) has held as follows,

> "7. In the instant case, customers have purchased the Motor Vehicles from the Manufacturers through the assessee. The sale price includes the price of warranty. The assessee has supplied spare parts, replaced defective parts and returned the defective parts to the manufacturer. Along with the defective parts, the assessee has raised a debit note in the name of the manufacturer. Thereafter the manufacturer has raised a credit note. In other words, the manufacturer has paid the assessee the price of the spare parts, which were replaced. If the said spare parts had been purchased in the open market, both of them have to pay sales tax. Therefore, in view of the law laid down by the Apex Court in Mohd. Ekram Khan's case the consideration paid by the manufacturer to the assessee by way of a credit note represents the sale price of the spare parts which are replaced and is liable to tax."

Conversely, learned Counsel advanced the ratio laid down in **C.T.O. (AE) v. Marudhara Motors** (supra), wherein and whereby, the Hon'ble Court has distinguished the cases not in their hand covered under the ratio of the case of **Mohd. Ekram Khan & Sons** (supra). The relevant portions of the reported case reads as follows:-

> "19. From the dispassionate and closer consideration of the material on record, it appears to this Court that facts of the present case obtaining in the case of respondent assessee dealer are distinguishable from the facts obtaining in Mohd. Ekram's case (supra) before the Hon'ble Supreme Court, therefore, the said
> 1. C.T.O. (AE), Jodhpur vs.M/s Marudhara Motors, Jodhpur - S.B.C SALES TAX REVISION NO.118/2008 & 11 others connected matters DATE OF JUDGMENT :16th March, 2009 judgment of Apex court in Mohd. Ekram's case (supra) could not be blindly applied by the Revenue authorities to the facts of respondent assessee's case.
> 20. The major points of distinction between the two are as follows:
> (i) In Mohd. Ekram's case relationship between assessee Mohd.Ekram and manufacturer was that of agent and principal, whereas, in the case in hand before this Court the relationship

is that of principal to principal and not principal to agent, and that makes the foundational difference.

(ii) In Mohd. Ekram's case, as can be seen from para no.5, the assessee had supplied the goods for which it received the consideration by way of credit notes and/or other modes of payments whereas in the present case the spare parts or defective parts collected by the assessee M/s Marudhara Motors are sent back physically to the manufacturer M/s TATA Motors, who either replenishes those spare parts or gives credit note equal to the value of such replaced new parts. Thus, transactions between dealer assessee and customer is independent from the one between dealer and the

1. C.T.O. (AE), Jodhpur vs.M/s Marudhara Motors,Jodhpur - S.B.C SALES TAX REVISION NO.118/2008 & 11 others connected matters DATE OF JUDGMENT :16th March, 2009 manufacturer here.

(iii) Such spare parts are supplied by the present assessee free of cost to the customers is a fact not disputed by the Revenue in the present case, whereas in Mohd. Ekram's case Hon'ble Supreme Court observed in para no.6 that, `in case the manufacturer may have purchased from the open market parts for the purpose of replacement of the defective parts, for such transactions, it would have paid taxes and the position here is not different because the assessee had supplied the parts and received the price.'

21. From the perusal of the agreement between the respondent assessee and the manufacturer, particularly clause 18 relating to warranty as quoted above, it appears to this Court that in the present case the respondent assessee is merely working on behalf of manufacturer in discharge of manufacturer's contractual obligation under the warranty agreement while replacing such spare parts which have gone defective and such defective parts are sent back by the respondent assessee to the manufacturer, who may either physically replace or replenish them or issue credit notes of value of the new parts replaced on its behalf of the respondent dealer. Since title of

1. C.T.O. (AE), Jodhpur vs.M/s Marudhara Motors,Jodhpur - S.B.C SALES TAX REVISION NO.118/2008 & 11 others connected matters DATE OF JUDGMENT :16th March, 2009 property in goods namely spare parts passes from the hands of respondent assessee to the customer free of cost and such title of property in spare parts does not pass from assessee dealer to the manufacturer, no taxable sale can be said to have taken place in the hands of respondent assessee at all.

22. Whenever assessee dealer sells such spare parts to other customers who are not getting defective parts replaced under the warranty, the assessee is collecting due RST or local tax, as

these parts were purchased by it from the Manufacturer under independent contract after paying due CST, but when such parts are replaced under warranty, they are supplied free of cost to the customers and thus no sale in such cases can be said to have taken place at the hands of the assessee. In other words, where there is supply of spare parts to the customer by the dealer there is no consideration passing as it is free of cost and where such consideration or payment is being received by the dealer from the manufacturer in the form of credit notes in discharge of manufacturer's warranty obligations, there is no transfer of property in goods viz. spare parts from dealer to the manufacturer. These two transactions viz. one between customer and

 dealer, and another between dealer and manufacturer are independent and are not linked to each other. First is sans consideration against goods and second one is sans transfer of property in goods. The credit notes given by manufacturer to dealer in discharge of its warranty obligations to customers cannot be taxed under sales tax laws in the hands of the dealer.

23. For levying tax on the sale in the hands of respondent assessee, it is sine qua non by definition of `sale' itself that transfer of property in goods takes place for consideration. Admittedly, in the present case customer is not charged anything for the parts replaced by the respondent assessee as a dealer of the manufacturer M/s TATA Motors under the warranty agreement between the manufacturer and the customer. The manufacturer in discharge of its warranty obligation either replaces those defective parts which are physically sent back by the dealer or gives the equal credit in the form of credit notes against the debit notes sent by the assessee dealer and, therefore, such credit notes cannot be said to be consideration or payment for such spare parts supplied by assessee to the customer free of any cost. Thus, it appears to be more plausible to arrive at a

1. C.T.O. (AE), Jodhpur vs.M/s Marudhara Motors,Jodhpur - S.B.C SALES TAX REVISION NO.118/2008 & 11 others connected matters DATE OF JUDGMENT :16th March, 2009 conclusion that the same is in discharge of manufacturer's warranty obligation and amounts to reduction in sale value of the vehicle itself.

Cost of such spare parts is also included in the cost of vehicle while giving such warranty for limited period to the customer and warranty is given by the manufacturer, therefore, replacing of spare parts cannot be taxed as a sale taxable in the hands of

assessee dealer at all.There is yet another aspect of the matter. If the defective parts are returned by the customer to the dealer and by the dealer to the manufacturer, it amounts to `sales returns' in the hands of dealer and therefore, proportionate sales tax rebate should be given to the dealer, as tax was duly charged on the sale of the entire vehicle. If tax were to be levied in the hands of the dealer upon such sale or supply of new spare parts in place of defective parts, any such tax levied would be set off by the sales tax rebate on such `sales returns' by the customer to the dealer. In this context the above quoted portion of Supreme Court judgment in Premier Automobiles case (supra) appears to support the case of assessee whereas the later decision in Mohd. Ekram's case (supra) on aforesaid three counts appears to be distinguishable from the facts of the present case."

14. On the above backdrop, it is apposite to mention here that, the Hon'ble Apex Court while dealing the question of warranty replacement and tax liability in the matter of **Tata Motors Ltd. v. Deputy Commissioner of Commercial Tax SPL and Another (2019) 62 GSTR 1 (SC)** has referred the matter to Larger Bench in disagreement with the ratio laid down by the earlier decision in **Mohd. Ekram Khan & Sons** (supra) on same aspects. The relevant portion of the judgment in Tata Motors (supra) is reproduced as follows:

"20. We are not delving into the controversy in any further detail as we are of the opinion that the issue raised is required to be looked into by a larger Bench. The crucial point which would arise for consideration, and over which the matter needs to be debated, is as to whether, in the case of such a warranty for the supply of free spare parts; once the replacement is made, and the defective part is returned to the manufacturer, sales tax would be payable on such a transaction relating to the spare part, based on a credit note, which may be issued for the said purpose.

This is in the context of the observations discussed aforesaid regarding the price of the car being inclusive of the cost of the spare parts, the latter being supplied for free, upon replacement. Sales tax on the car is paid. Sales tax on the inventory purchased by the dealer is paid. Thus, if there is no consideration for these replaced parts, can sales tax be levied at all? The judgment in the Mohd. Ekram Khan & Sons23 case refers to the credit notes received as consideration for the replacement; but it is a moot point whether credit notes can be treated as a mode of payment or not.

> The judgment in Premier Automobiles Ltd. & Anr. Etc.24 case is stated to contain a different factual situation, as per the observations in the Mohd. Ekram Khan & Sons25 case. There are observations referred to above, again in the Mohd. Ekram Khan & Sons26 case, of the possibility of the manufacturer having purchased, from open markets, the parts for replacement, on which taxes would be paid. In that context, it was observed that "the position is not different because the assessee had supplied the parts and received the price." The assessee actually had purchased the parts and paid sales tax on it, but on return of the defective part to the manufacture, was given a credit note.
> 21. We have some reservations in respect of the observations and legal propositions laid down in the Mohd. Ekram Khan & Sons27 case and consider it appropriate that the matter be considered by a larger Bench."

15. Reverting to the case in hand, here the learned Counsel for the dealer's argument is, the case in hand is not covered under the ratio laid down by the **Mohd. Ekram Khan & Sons** (supra) case but as per the ratio in **C.T.O. (AE) v. Marudhara Motors** (supra). On the other hand, learned Addl. Standing Counsel, Mr. Raman argued that, till the view under **Mohd. Ekram Khan & Sons** (supra) case is reversed or till the operation of the precedent in the reported case is stayed, the ratio decidendi, in that case should hold the ground. On a careful perusal of the reported case in **C.T.O. (AE) v. Marudhara Motors** (supra) when the order of assessing authority is considered, we are to afraid to say that the reported case may not be applicable to the case in hand. The assessing authority has categorically mentioned that, the defective spare parts were not returned to the company by the dealer. If the statement is based on record/evidence then, the whole gamut of argument by the learned Counsel taking cue from the authority in **C.T.O. (AE) v. Marudhara Motors** (supra) will have no avail to the dealer.

Findings of first appellate authority on this question is quite peculiar. Learned first appellate authority has proceeded in a different direction to give certain amount of relaxation to the dealer in the garb of deduction towards labour and service charges i.e. on the

basis of self made got up theory. He has tried to develop a new case, where the parties were not at disputed. Therefore, the finding of first appellate authority on this question is not sustainable in law and fact both.

While deciding the Question No.(I), we have held that, taking cue from a stray line of the assessment order, a definite conclusion cannot be drawn. On this question also the matter need to be remitted back for appraisal afresh.

However, it is made clear that, the assessing authority is bound under law to follow the ratio laid down by **Mohd. Ekram Khan & Sons** (supra) unscrupulously unless and until the ratio has been reversed by the Larger Bench of Apex Court. The assessing authority is required to scrutinize the details of the contract between the dealer and the manufacturer which is not produced before us so as to ascertain the relationship between them and the transactions and conditions involved in case of warranty replacement. Basing on the agreement and lawful terms and conduct, the tax liability towards warranty replacement should be decided.

16. **Question No.(IV)**

As regards, determination of suppression on the basis of stock discrepancy amounting to Rs.61,63,973.00, the claim of the taxing authority is, there is mismatch of the figure between the books of account and return figure to which the dealer had admitted. The dealer's claim before the assessing authority was, it had taken over the business of M/s. Sujata Corporation w.e.f. 01.09.2011 along with all its assets and liabilities showing opening stock of Rs.3,74,99,494.00. The assessment order is cryptic and not clear on this question. The order of the first appellate authority is found to be mechanical as it has confirmed the suppression amounting to Rs.61,63,973.00 for want of proper explanation only.

The plea of the dealer before this Tribunal is, the damaged spare parts received when the business of M/s. Sujata Corporation was taken over by the dealer. The defective spare parts which should have been treated as scrap are taken into account as spare parts of good condition and accordingly the suppression was determined in a wrong manner.

Learned Addl. Standing Counsel argued that, scrap is something which is a waste and discarded material. So, the claim of the dealer is evasive.

17. It is apt to mention here that, this plea is taken for the first time before this Tribunal. The audit team found discrepancy between the books of account and return figure, whereas, the plea of the dealer is, scrap was taken into consideration while determining the stock suppression. The plea of the dealer is not supported by any evidence, the pleas are found to be afterthought. The grounds in appeal at the first instance is silent on this question, whereas the statement of additional grounds raised this question with the above plea. The question of damaged goods, the spare parts or even the plea like the scrap were not there all along till filing of the additional grounds. This is a question of fact which only can be gathered from examination of the goods itself. It is disputed that, the fact and figures and the discrepancies as it emerges from the books of account and periodical return are incorrect. We are of the view that, in case of remand the assessing authority will not a get a fair scope to examine the goods or any new documents relating to stock position so as to determine the suppression afresh. The determination of such suppression being remained uncontroverted by adducing any rebuttal and trustworthy evidence, it will be unsafe to disturb the findings of both the fora below. Both the fact finding authorities cannot be disbelieved on a mere submission during argument without

supporting evidence. Therefore, the findings on this question calls for no interference.

18. **Question No.(V)**

The penalty u/s.42(5) of the OVAT Act is claimed to be not warranted in the case in hand. The question of penalty and its validity under law has been tested time and again by this Tribunal particularly, in adherence to the views of the Hon'ble Court and Apex Court time to time including very often cited authority in **Jindal Stainless ltd. vrs. State of Orissa, (2012) 54 VST 1 (Ori.)** and **Union of India v. Dharamendra Textile Processors, (2008) 18 VST 180 (SC)**. We are not in disagreement with the learned Addl. Standing Counsel that in Union of India v. Dharamendra Textile (supra), the Apex Court has opined that, the penalty levied in the assessment is civil in nature. Although there are decision of Hon'ble High Court and Apex Court time to time with the view that, in absence of *mens rea* no penalty should be imposed in tax matters but the fact remains, irrespective of the nature of the penalty whether it is civil liability or criminal liability, it should not be treated as an automatic one in every audit assessment. however, we are refrained ourselves from giving any finding on this question and left it remained open for the assessing authority who will do well to decide this in the remand assessment looking at the latest view of the authorities like Hon'ble Court or Apex Court before him on the date of order of assessment.

19. On a conspectus of discussion above, we can summarize the findings as below.

The matter need to be remitted back to the assessing authority for assessment afresh. The findings against Question No.(I), (II), (III) are set aside, whereas, the findings against Question (IV) is confirmed. The penalty determined in Question No.(V) is set aside but

it depends on the determination of tax liability afresh as per the observation above.

It is made clear that, the assessing authority is independent to form his views on each question in accordance to law and in any case he should not be influenced by any of the findings on fact given by us.

In the result, it is ordered.

The appeal is allowed in part. The impugned order is set aside to the extent of findings on Question No.(I), (II), (III) and (V) above. The findings in question No.(IV) is confirmed. The assessing authority is directed to do well to dispose of the remand assessment within a period of four months hence. The dealer is directed to appear before the assessing authority suo motu to take further instruction without waiting for the notice of hearing.

Dictated & corrected by me,

Sd/-
(Subrata Mohanty)
1st Judicial Member

Sd/-
(Subrata Mohanty)
1st Judicial Member

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

Sd/-
(R.K. Pattnaik)
Accounts Member-III