BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.
S.A.No. 60(V)/2013-14

(Arising out of order of the ld.DCST (Appeal), Bhubaneswar Range, Bhubaneswar, in Appeal No. AA-106111110000019, disposed of on dtd.31.10.2012)

Present: Sri S. Mohanty
2nd Judicial Member

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

-Versus-

M/s. Sunita Engineering Works,
At/P.O./Plot No.169,
Sector-A, Zone-A,
Mancheswar Industrial Estate,
Bhubaneswar. ... Respondent

For the Appellant : Mr. S.K. Pradhan, Addl. Standing Counsel (C.T.)
For the Respondent : None

Date of Hearing: 12.06.2018 Date of Order: 18.06.2018

ORDER

This second appeal is preferred by Revenue against the order of First Appellate Authority/Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (in short, FAA/DCST) whereby the FAA has reduced the tax due as calculated and deleted the penalty as imposed in a proceeding u/s.42 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act) by the Assessing Officer, Bhubaneswar-III Circle, Bhubaneswar (in short, AO) during audit assessment for the tax period 01.04.2005 to 31.03.2008.

2. The assessee-delaer in the case in hand is a manufacturer and seller of sanitary wires, fittings, steel furniture on retail basis in its place of business. It effects purchases from outside as well as inside the State. Tax Audit unit of Bhubaneswar-III Circle on 05.08.2009 conducted tax audit to ascertain the correctness of the returns filed by the dealer. The tax audit team on verification of the books of account and connected documents like purchase

register, purchase invoice, sale register and sale invoices submitted a report stating therein the discrepancies found by them.

(i) Claim of ITC of Rs.918.16 effected on purchases of Rs.22,954.08 against Retail Invoices;

(ii) Erroneous claim of ITC of Rs.16,010.10 on inter-state purchases of Rs.4,06,551.00; and

(iii) Non-production of original Tax Invoices amounting to Rs.2,98,892.02 but claimed ITC of Rs.32,771.13 against these purchases.

3. On the basis of the aforesaid discrepancies in Audit Visit Report, the AO initiated proceeding u/s.42 of the OVAT Act. On consideration of the books of account and connected documents produced by the dealer, the AO found that the dealer has claimed ITC on inter-state purchase, on purchases without tax invoices and in some cases on retail invoices as alleged by the audit team and then calculated the tax due to be paid by the dealer at Rs.57,423/-. Besides the tax due, he imposed penalty u/s.42(5) of the OVAT Act i.e. twice of it calculated to 1,14,846/-. As a result, the total due raised to 1,72,269/-.

4. Being aggrieved with such assessment, the dealer had preferred first appeal. The FAA accepted the argument of the dealer to the extent that, the production of tax invoices before him was accepted and ITC on that tax invoices was also allowed, he has also allowed the dealer to avail ITC on retail invoices whereas held the dealer is guilty of wrong claim of ITC on interstate purchases as determined by the AO. In the result, the tax due became reduced to Rs.23,906/-.

5. When the matters stood thus, Revenue being aggrieved with the reduction of tax due and deletion of penalty has preferred this appeal with the contention like, the FAA is wrong in not imposing penalty since it is mandatory in nature and the FAA is wrong in allowing the claim of ITC in contravention to the provision u/s.20(6) of the OVAT Act.

6. In the case in hand, audit team has reported in three points. One is, the dealer has claimed ITC of Rs.918.16 on purchase of Rs.22,954.08

against the retail invoices. The FAA has taken cue from the circular issued by the Commissioner of Commercial Tax vide SRO No.317/2005 dtd.16.07.2005 and held that, as per the circular, STO is empowered to allow ITC on purchase made on retail invoice in absence of tax invoices. Such finding of the FAA has almost remained unchallenged. It is because the dealer has effected purchase through retail invoice but not through tax invoices from registered dealers of the Orissa, the dealer cannot be denied the input tax credit on such purchases. Thus, the finding of the FAA on this score is legally sustainable.

7. The second allegation in the AVR is, there was erroneous claim of ITC of Rs.16,010.10 on inter-state purchases of Rs.4,06,551/-. The provision u/s.20(8)(d) as it envisages, no input tax credit shall be claimed by or allowed to a registered dealer in respect of goods brought from outside the State against the tax paid in any other State. The provision speaks when the dealer has not paid tax to the State at the purchase point, he cannot claim ITC against such purchases, which was in fact paid to a different State. Thus, here the dealer is not entitled to avail ITC on the purchases from outside the State. The impugned order as it reveals the FAA has taken cognizance of the provision and moreover such finding of the FAA has not been challenged by the dealer, as such remained undisturbed.

8. The third allegation in the AVR is that, the dealer has not produced original tax invoices amounting to Rs.2,98,892.02 but claimed ITC of Rs.32,771.03 against such purchases. The fact remains, the dealer could able to produce original tax invoices before the FAA except one i.e. against purchase from one dealer called M/s. Gayatree Hardware, Bhubaneswar. As a result, the FAA on acceptance of the original tax invoices allowed ITC to the tune of Rs.26,524.38 to the dealer instead of Rs.32,771.13 as claimed by the dealer. The allowance of ITC on the basis of retail invoices and the acceptance of original tax invoices and ITC on those are almost gone unchallenged by the dealer and to that effect it can be concluded by saying that the impugned order of FAA suffers no illegality. Thus, the tax due as calculated by the FAA is hereby confirmed.

9. Next point for determination is, whether the FAA is wrong in not imposing penalty on the tax due invoking provision u/s.42(5) of the OVAT Act. The impugned order as it revealed the FAA has treated the mistake of the dealer as not an intentional one but on bona-fide belief. So he did not impose penalty. Learned Addl. Standing Counsel vehemently argued that, when in a tax audit the dealer is found liable to pay tax u/s.42(4) of the OVAT Act, then penalty u/s.42(5) is a mandatory consequence. It is argued that, the FAA has no jurisdiction under law to exonerate the dealer from paying penalty. Validity of the provision u/s.42(5) regarding imposition of penalty has been upheld by the Hon'ble Court from time to time. Hence, the provision and its application cannot be denied when a dealer comes under the ambit of Sec.42(3) or (4) of the OVAT Act. Section 42(1) includes erroneous claim of ITC. *Mens rea* is not a pre-condition for imposition of penalty. However some authorities are there where lenient view has taken in favour of dealer while interpreting the provision u/s.42(5) to the extent that, if the mistake is not an intentional one and it is simply a calculation mistake or some typographical mistake of that kind, authority can be lenient by not imposing penalty. Here in the case in hand, the dealer is found to have claimed ITC on retail invoice and on inter-state purchase. Besides the dealer has failed to produce original tax invoice against one purchase from M/s. Gayatri Enterprises. So far as the production of original tax invoice is concerned, it is not within the control of the purchasing dealer. So it is believed that, the instant dealer in anticipation of obtaining the original tax invoices, must have claimed ITC on it and such claim is not illegal. On the contrary, when the dealer is found to have claimed ITC on inter-state purchases which is not available as per Sec.20(d) of the OVAT Act, it is believed that, the dealer is guilty of intentional mistake. Ignorance of law has no excuse is the well settled principle. So the dealer cannot take that plea in his favour to rescue himself from paying penalty. Thus, here in this case, it is held that the dealer is liable to pay penalty on the tax due against the ITC claimed on inter-state purchases, whereas the dealer should not be asked to

pay penalty for the amount of ITC claimed without original tax invoices i.e. from M/s. Gayatri Enterprises.

Thus, in ultimate analysis, it is held that, the tax due as calculated by the FAA is hereby confirmed. The findings of the FAA to that extent need not be disturbed. Besides the tax due the dealer is liable to pay penalty u/s.42(5) on the wrong claim of ITC against the inter-state purchase only. Hence, this is fit case where the matter should be remitted back to the AO for re-calculation of the penalty as per observation above and to raise demand of tax and penalty accordingly. Hence, ordered.

The appeal is partly allowed on contest. The tax due calculated by the FAA is confirmed. The matter is remitted back to the AO for computation of penalty on the tax on ITC wrongly claimed against inter-state purchases.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

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