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

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

S.A. No. 129(V) of 2018
(Arising out of the order of the learned Add. CST (Appeal), Bhubaneswar, in First Appeal No. AA (OVAT) 21/2017-18, disposed of on dtd.21.03.2018)

M/s. Airplaza Retail Holdings Pvt. Ltd.,
Plot No.7, Western Market Building,
Unit-II, Ashok Nagar, Bhubaneswar. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. B.K. Pattnaik, Advocate
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 13.01.2020 ******** Date of order: 01.02.2020

O R D E R

This appeal is directed against the order dtd.21.03.2018 passed by the learned Addl. Commissioner of Sales Tax (Appeal), Bhubaneswar (hereinafter referred to as, the learned ACST) in First Appeal No. AA (OVAT) 21/2017-18, wherein he confirmed the assessment order made by the learned Deputy Commissioner of Sales Tax, Bhubaneswar II Circle, Bhubaneswar (hereinafter referred to as, the learned DCST) for the assessment period 01.04.2014 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 was in the trading business of grocery items, readymade garments,

footwear, saree, FMCG products, electronic items, glass wares, crockery items, cosmetics, plastic goods & soft drinks. On the basis of Audit Visit Report (in short, the AVR) from the DCST, Bhubaneswar III Circle, Bhubaneswar, the LAO, prima facie, had reason to believe that the petitioner made incorrect tax compliances and hence initiated assessment proceeding u/s.42 of the OVAT Act. In the tax audit report it was pointed out that there was ITC mismatch of Rs.18,35,070.00. As per the appellant-dealer on ledger details for the year 2014-15, the dealer had claimed ITC against the seller for Rs.5,92,36,517.00 but the dealer had claimed ITC of Rs.5,87,49,782.00. On verification of dealers ledger details the audit found that the selling dealer had not shown output tax, shown less tax collected on return did not file periodic return and its registration certificate was cancelled for which Rs.18,35,070.00 was found to be ITC mismatch. While examining the books of account, the LAO took the view that the adjustment of ITC is a dynamic process changing day by day. However, the latest figure on the date of assessment was taken for consideration. It was further found by the LAO that in case of some selling dealers in all the four quarters of the financial year 2014-15 the appellant had claimed excess ITC when compared with the seller's figures. Therefore, the submission made by the appellant was rejected and the claimed ITC was disallowed. In the submission the appellant-dealer claimed that the excess ITC related to the last year, but the LAO verified the VATIS figure of the last year and found that there was excess ITC claimed by the dealer for the four quarters taken together. Ultimately, the LAO allowed Rs.11,99,158.00 towards ITC as against the mismatch of ITC of Rs.18,35,070.00. While disallowing the ITC of Rs.6,35,912.00 the LAO concluded that the selling dealers had not deposited due tax into the Government Treasury and relied upon the decision of Hon'ble Bombay High Court in Mahalaxmi Cotton Ginning Pressing & Oil Industries v. State of

Maharashtra & Others as reported in (2012) 51 VST wherein it has been observed that set off of ITC is to be allowed only if tax is actually paid by the selling dealer into Government Treasury. Accordingly, the learned DCST assessed upon the appellant-dealer raising an extra demand of Rs.28,55,832.000 including penalty.

3. Being aggrieved by the order of the learned DCST, the appellant-dealer preferred an appeal before the learned ACST who without interfering with the order of the learned DCST just confirmed the order of assessment.

4. Being aggrieved by the order of the learned ACST, the appellant-dealer has preferred this second appeal on the grounds urging that, the learned DCST found no discrepancy in the books of account at the time of assessment as the appellant had maintained proper accounts and other records but disallowance of the ITC on flimsy grounds is an error of law. The appellant-dealer also stated that it had not violated any provision of Sec.20 of the OVAT Act to claim ITC and being a registered dealer and having valid tax invoices the appellant had correctly claimed ITC. The appellant-dealer has also filed two previous orders of this forum bearing S.A. No.405(V) of 2016-17 disposed of on 18.07.2018 and S.A. No.286(V) of 2017-18 disposed of on 10.07.2019, wherein this forum has given favourable decision against such dispute. The appellant-dealer has also relied upon the decision of our own Hon'ble High Court in the case of Jindal Stainless Ltd. v. State of Orissa and Others (2012) 54 VST 1 (Orissa), wherein it is held as follows:-

> "Law is well settled that when the statute requires to do certain thing in certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressio unius est exclusion alteris", meaning thereby that if a statute provides for

a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible."

5. No cross objection has been filed by the respondent-Revenue.

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.

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. In view of such analysis, I hold that the matter is to be remitted back to the learned DCST for fresh assessment.

9. In view of the discussion made above, the appeal is allowed to the extent indicated above. The impugned order passed by the learned ACST is hereby set aside. The matter is remanded to the learned DCST to ascertain the genuineness of the claim of the

appellant-dealer and to pass a fresh order of assessment on consideration of the entire observations made in the foregoing paragraphs. There is no necessity of issuance of any further notice to the appellant-dealer by the learned DCST. The appellant-dealer is directed to appear before the learned DCST *suo motu* within three months from the date of receipt of this order to receive further instruction from him. The learned DCST is further directed to complete the assessment within a reasonable period.

Dictated & corrected by me,

Sd/-
(A.K. Dalbehera)
1st Judicial Member

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