



business concern. An Audit Visit Report (in short, the AVR) containing allegation of sale suppression of Rs.35,690.00 and excess claim of ITC led the taxing authority to assess the dealer. The assessment order of the STO, Ganjam I Circle, Berhampur, the learned assessing authority was an exparte order since the dealer did not turn up in the hearing. Learned assessing authority accepted the allegation in the AVR that, on the date of visit, the dealer had unaccounted for cash in counter of Rs.35,690.00. The explanation of the dealer like, the money relates to previous day sale and payment towards credit sale are declined as concocted one, consequently the suppression was treated as established. On the other hand, the audit report regarding excess claim of ITC was also accepted as the assessing authority found the dealer had purchased goods to the tune of Rs.69,60,096.96 and claim credit of ITC amounting to Rs.2,58,567.66 which includes carry forward ITC of Rs.6,470.00 on 01.04.2011. On the contrary, the dealer was found to have affected VAT sale amounting to Rs.2,20,57,673.80 including tax exempted sale of Rs.4,38,610.00 and has collected output tax of Rs.8,64,820.06. It had deposited Rs.5,83,364.00 only thorough challan, so the assessing authority recalculated the ITC admissible to the dealer. The suppressed amount of Rs.35,690.00 above was taxed @ 12.5%, the rest amount of transactions disclosed by the dealer was taxed @ 4%. The GTO and TTO was accordingly determined. The tax due was calculated after adjusting the admissible ITC. The dealer was found liable to pay balance tax of Rs.27,350.00, penalty u/s.42(5) of the OVAT Act was imposed at twice of the tax due, as a result the total demand was raised to Rs.82,050.00.

3. The assessment order was carried in appeal before the first appellate authority who in turn vide impugned order confirmed the same, as a result the demand remained as it is. The first appellate authority has reaffirmed the findings of the assessing authority in the impugned order. Thus, this appeal by the dealer with the contentions

like, both the fora below have not taken into consideration of the dealer's explanation against the recovered cash from counter on the day of visit which led to wrong conclusion of sale suppression. There was a calculation mistake in the claim of ITC. The first appellate authority ignored the chart of calculation given by the dealer and even did not bother to verify the same from the VATIS. It is further contended that, the assessment order was antedated one and thus barred by limitation

In the argument, learned Counsel for the dealer advanced one more grounds such as, the imposition of tax @ 12.5% on the suppressed amount is baseless and exorbitant.

4. The appeal is heard with cross objection, whereby the Revenue has supported the impugned order.

5. **Findings:**

So far as the sale suppression as detected and determined to the tune of Rs.35,690.00, the claim of the dealer is, it is baseless as the cash relates to previous day sale and payment towards credit sale. The assessment order was an exparte order but the order of the first appellate authority was a contested one. The dealer has not filed a scrap of paper to establish the explanation that, the money relates to previous day collection or towards credit sale collection. This is a finding of fact by the audit team confirmed by the assessing authority and reaffirmed by the first appellate authority. In absence of any cogent and rebuttal evidence, this finding of fact cannot be interfered into on surmises and conjecture, hence the same is not interfered with, therefore hereby confirmed.

So far as tax @ 12.5% on this amount, the chart prepared by the assessing authority as per the assessment order reveals, the entire amount of sale transactions was taxed @ 4%, whereas, the suppressed amount was taxed @ 12.5%. No reasonable cause is given by the assessing authority why 12.5% was charged. If the goods dealt by the dealer were charged @ 4%, then why the rate is 12.5% on the

suppressed amount ? This question remained unanswered, hence it is held that though the suppression is established but rate of tax in no case can be 12.5%. Accordingly, it needs to be recalculated by imposition of tax @ 4% only.

6. So far as the excess claim of ITC is concerned, on perusal of LCR it is found that, the dealer has submitted a chart showing the payment of admitted tax. The impugned order is silent about the claim of the dealer. The evidence given by the dealer shows it only can be said that, the first appellate authority has dealt this question in a parrot like manner by reiterating the findings of the assessing authority. The impugned order is silent on the evidence led before the first appellate authority, hence the same is not sustainable. If that be, the matter need to be remanded back to the assessing authority for recalculation of the ITC amount admissible to the dealer. needless to repeat here that, it is a matter of calculation only.

The other question raised by the dealer is, the assessment order is antedated one. According to the dealer, the order was purported to have passed on 28.02.2012 but served on the dealer on 08.06.2012. The delay of three months and more in service of assessment order indicates the fact that, the assessment order was not passed within time and thus is time barred. Above is the argument of the learned Counsel of the dealer. This is a mixed question of law and fact. Here, it is not the case that the date of order is beyond the period of limitation. A suspicion arose because of the fact that, there was delay in dispatch of the order but such delay is not an inordinate delay as it is experienced in the similar matter many a times. It needs an enquiry into the fact that, when the order was given to the Dispatch Section and when it was actually dispatched. Though the dealer has taken this plea of limitation but has not filed any documents, which he could have been obtained to establish the claim of antedating the order by the assessing authority. Moreover, this question of fact was neither raised before the assessing

authority nor before the first appellate authority. So, in no case it can be said that, the authorities below have committed wrong in not dealing this question. This being a mixed question of law and fact without any cogent evidence and further looking at the little delay in dispatch of order it is held that, no conclusive inference can be drawn that the order is passed beyond the period of limitation.

7. All the questions raised by the dealer are decided hereinabove. Accordingly, it is held that, this matter needs to be remitted back to the assessing authority for assessment afresh by re-determining the tax slab i.e. @ 4% on the suppressed amount and recalculation of the ITC on proper verification of the VAT paid by the dealer.

In the result, it is ordered.

The appeal is allowed in part. The assessing authority will do well to recalculate the tax liability as per the observation hereinabove and demand be raised accordingly within a period of three months hence.

Dictated & corrected by me,

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

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