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. 168(V) of 2017-18

(Arising out of the order of the learned Addl. CST (Appeal), North Zone, Sambalpur, in Appeal CaseNo.AA-28(V)ACST(Asst)/SBP/07-08, disposed of on dtd.30.05.2017)

M/s. Ganesh Silicate Works,
N.H.-6, P.O./Dist.- Bargarh. ... 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.B. Panda, Advocate
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 30.12.2019 ******** Date of order: 27.01.2020

O R D E R

This appeal is directed against the order dtd.30.05.2017 passed by the learned Addl. Commissioner of Sales Taxes (Appeal), North Zone, Samblapur (hereinafter referred to as, the learned FAO) in Appeal CaseNo.AA-28(V)ACST(Asst)/SBP/07-08, wherein he confirmed the assessment made by the learned Asst. Commissioner of Sales Tax, Sambalpur Range, Sambalpur (hereinafter referred to as, the learned ACST) for the assessment period 01.04.2005 to 30.06.2006 u/s.42(4) 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 is a rice miller who procures paddy and effects sale of rice, broken rice

and rice bran. He was appointed as a miller agent by the Collector, Bargarh for supply of levy rice to F.C.I. Besides, the appellant-dealer undertakes custom milling of paddy of different agencies. In response to Audit Visit Report (in short, the AVR), the appellant-dealer had appeared and produced the books of account, where it was found that the appellant-dealer was allowed ITC on opening stock for Rs.2,22,686.00. The appellant-dealer was purchased gunny bags for Rs.36,37,983.00 from registered dealers inside the State against which he paid Rs.1,45,519.00 which was allowed to the appellant as ITC. The appellant-dealer was not entitled for claim of ITC of Rs.35,452.58 on purchase of capital goods from registered dealers inside the State like spares of machinery because these goods are not coming under the definition of capital goods. Similarly, the appellant-dealer had claimed ITC of Rs.22,392.00 on purchase of rubber goods and chemicals, where rubber goods are not consumables. The appellant-dealer had purchased chemicals for Rs.43,834.00 on payment of VAT which entitled him to get ITC. Thus, the total ITC on opening stock, purchase of gunny bags and chemicals calculating to Rs.3,73,068.89 was allowed by the learned ACST. On verification of the books of account of the appellant-dealer, the dealer has effected sale of rice to the FCI under the levy scheme, free sale rice in the open market of rice bran, broken rice and gunny bags. In view of the audit visit report, shortage of the items such as paddy, rice, broken rice and bran was detected in course of verification of physical stock with reference to the book balance on 25.07.2006.

In the assessment stage, the appellant-dealer contended that by the time of filing of original return the OVAT Act was just introduced and that the dealer was not expected to be well conversant with the provisions of the Act within such a short period. The learned ACST without accepting the plea of the dealer calculated the total taxable sales for the materials period which was determined at

Rs.6,45,18,828.73. VAT @ 4% thereon was calculated to be Rs.25,80,753.15. After allowing ITC of Rs.3,73,068.89 and payment of admitted tax of Rs.21,51,558.00 by challans and commercial tax check-gates, the balance tax payable came to Rs.56,126.26 which the appellant-dealer was required to pay. Being aggrieved by the order of the learned ACST, the appellant-dealer preferred appeal before the learned FAO, where the learned FAO without interfering with the order of the learned ACST just confirmed the assessment order.

3. The appellant-dealer came up with the second appeal on the following grounds:-

(i) The learned ACST has not followed the principles of laws and wrongly confirmed the order of the Court below in the particular circumstances of the case.

(ii) The impugned order is arbitrary and illegal being in violation of the principle of natural justice, mis-appreciation/non-appreciation of the facts and law and contrary to the settled principle of law.

(iii) The confirmation of disallowance of ITC to the tune of Rs.92,768.00 as being the capital goods is illegal and improper in view of Sec.2(8) of the OVAT Act which defines capital goods.

(iv) The addition of input of Rs.26,392.00 on the sale of broken rice during the period April, 2005 is disclosed in the revised return filed on 24.07.2006. The audit officials visited the appellant's place of business on 25.07.2006 and completed the audit visit report on 01.08.2006. As such the revised return is filed within the statutory period as prescribed u/s.33(5) of the OVAT Act, 2004 i.e. before the receipt of the audit report.

(v) The assessment order dtd.25.01.2007 being an audit assessment passed u/s.42 of the Act the statutory notice

u/s.49(1) in form VAT-306 was issued on 04.10.2006, communicated in memo No.17851 dtd.07.10.2006 and was received by the appellant on 19.10.2006 to make compliance for the purpose of assessment on 08.11.2006. As such the appellant was disallowed only 19 days i.e. less than 30 days. Hence for assessment of tax the minimum period of 30 days was not allowed for production of books of account which is invalid in law and hence the order of assessment and demand notice issued are not sustainable in the eye of law.

(vi) Non-submission of audit visit report to the assessing officer within seven days from the date of completion of audit as contemplated u/s.41(4) of the OVAT Act renders the AVR invalid and assessment made on such AVR is illegal for which the assessment order is liable to be quashed.

(vii) The assessment is not sustainable in law as the order of assessment is antedated and is liable to be quashed.

4. The cross objection was filed by the respondent-Revenue stating that:-

(i) There is no reasonable merit in the second appeal which is not sustainable in the eye of law.

(ii) The learned Assessing Officer and the First Appellate Authority have rightly completed assessment/appeal basing on the statutory provisions under the Act and Rules.

(iii) The order of the First Appellate Authority is crystal clear with respect to the other points raised by the dealer. The First Appellate Authority has dealt each and every item which is self-explanatory and requires no interference.

5. I have meticulously considered the rival contention of both the sides, gone through the grounds taken in the appeal memo and the submissions made in the cross objection so also the arguments advanced by both the sides at the time of hearing. I have also gone through the orders of both the fora below. The contention of the appellant-dealer is that there was violation of the provision of Sec.41(4) of the OVAT Act as regards the audit report. In this context it is necessary to cite the provision of Sec.41(4) of the OVAT Act (as then was) which reads as under:-

> "(4) After completion of tax audit of any dealer under sub-section (3), the officer authorized to conduct such audit shall, within seven days from the date of completion of the audit, submit the audit report, to be called ***"AUDIT VISIT REPORT"***, to the assessing authority in the prescribed form along with the statements recorded and documents obtained evidencing suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit and evasion of tax, if any, relevant for the purpose of investigation, assessment or such other purposes."

But it was admitted by the appellant-dealer both before the first appellate authority as well as before this Tribunal in the grounds taken by it that the audit visit report was completed on 01.08.2006 which was submitted before the learned assessing officer (learned ACST) on 04.08.2006 which is within seven days. Hence, I do not find any reason for violation of Sec.41(4) of the OVAT Act. There is also no violation of Rule 49(1) of the OVAT Rules, 2005 as there is no specific time of thirty days. Rule 49(1) of the OVAT Rules (as then was) reads as under:-

> "(1) If the tax audit conducted under Section 41 results in findings, which the assessing authority considers to be affecting the tax liability of a dealer for a tax period or tax periods, such authority shall serve a notice in Form VAT-306 along with a copy of the audit visit report, upon such dealer, directing him to appear in person or through his authorized

representative on such date, time and place, as specified in the said notice for compliance of the requirements of sub-rules (2) and (3)."

6. The learned Counsel for the appellant-dealer drew attention of the previous order of this Tribunal vide S.A. No.4(V) of 2010-11 dtd.27.06.2013. The learned Standing Counsel also relied upon the said decision. The learned Standing Counsel appearing on behalf of the State vehemently argued that in the order of assessment only the tax is levied, but penalty is not imposed which is mandatory under OVAT Act. Hence the learned Standing Counsel submitted that tax should also be imposed in addition to the tax calculated. As per the assessment order the appellant-dealer has claimed ITC of Rs.22,392.60 on purchase of rubber goods and chemicals. The learned ACST rightly allowed the claim of ITC on purchase of chemicals as they are used directly in manufacturing process and consumed therein. The learned ACST has also rightly held that rubber goods are not consumables. The same was also confirmed by the learned FAO. Rubber is not directly required for manufacturing of rice. Without rubber also rice can be manufactured. In the case of **Dy. CST v. Thomas Stephen & Co. Ltd., (1988) 69 STC 320 (SC)** it has been held that the consumption must be in manufacturing of the end product for availing concession. In case of **Costal chemical Ltd. v. CTO (2000) 117 STC 12 (SC)** it has been held that only materials which are inputs in manufacturing process are entitled for claim of ITC. The appellant-dealer has not proved and has also failed to demonstrate as to why rubber is directly used in the process of manufacturing as per Sec.2(8) read with 2(25) of the OVAT Act. The burden which lay on the appellant-dealer in this case to prove has not been discharged. The Hon'ble Apex Court in the case of Madras Cements Ltd. v. CCE 2010 AIR SCW 3633 held that the assessee has to satisfy the assessing authority that the capital goods in form of components, spares and accessories had been utilized during the

process of manufacturing of finished products. The learned assessing officer while making assessment although calculated the tax but has not imposed any penalty upon the appellant-dealer. Penalty is automatic in view of Sec.42(5) of the OVAT Act. The same view has also been taken by this Tribunal in S.A. No.4(V) of 2010-11 relied upon by both the sides. Both the fora below have over sighted the said aspect as they lack jurisdiction to waive the penalty which is mandatory u/s.42(5) of the OVAT Act as per the reported case decided by our own Hon'ble High Court in the case of Jindal Stainless Ltd. reported in (2012) 54 VST 1 (Orissa). Hence the matter has to be remitted back to the learned ACST to make fresh computation by imposing the penalty u/s.42(5) of the OVAT Act. The learned Standing Counsel has urged for a direction to the fora below for imposing penalty on the tax assessed u/s.42(5) of the OVAT Act in accordance with law which appears to be reasonable.

7. In view of my aforesaid discussion I am of the considered view that there is no merit in the appeal but in view of the mandatory provision of Sec.42(5) of the OVAT Act the matter has to be remitted back to the learned ACST for limited purpose of making necessary computation. Hence it is ordered.

The appeal is allowed in part on contest and the matter is remitted back to the learned ACST for making fresh computation in view of the aforesaid analysis and findings. The Cross Objection is disposed of accordingly.

Dictated & corrected by me,

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

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