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. 214(V) of 2017-18
(Arising out of the order of the learned JCST, Puri Range, Puri, in First Appeal Case No. 106111711000027, disposed of on dtd.30.06.2017)

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

- V e r s u s -

M/s. Dinesh Trading Company, Court Road, Khorha. ... Respondent

For the Appellant ... Mr. M.L. Agarwal, S.C.
For the Respondent ... N o n e

Date of hearing: 09.01.2020 ******** Date of order: 29.01.2020

O R D E R

This appeal is directed against the order dtd.30.06.2017 passed by the learned Joint Commissioner of Sales Taxes, Puri Range, Puri (hereinafter referred to as, the learned JCST) in First Appeal Case No. 106111711000027, wherein he allowed the appeal in part by reducing the demand from Rs.2,73,561.00 to Rs.528.00 in the assessment made by the learned Sales Tax Officer, Assessment Unit, Balugaon (hereinafter referred to as, the learned STO) for the assessment period 01.04.2013 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 respondent-dealer is a proprietorship concern carrying on business in purchase and sale

of two wheelers of Hero make, its spare parts and accessories. On the basis of Audit Visit Report (in short, the AVR), the learned STO had disallowed the claim of ITC involving an amount of Rs.88,511.00 by treating the claim as erroneous and levied penalty of Rs.1,77,022.00. In other words the issue raised in this appeal is against reversal of ITC and levy of penalty equal to twice the amount of tax reversed. By doing so the learned STO has determined the creditable ITC at Rs.2,33,72,308.00 against the claim of Rs.3,24,60,819.00 as had been exhibited in the books of account and periodic returns.

3. Being aggrieved by the order of the learned STO, the respondent-dealer had preferred an appeal before the learned JCST. The learned JCST after verifying the assessment order opined that, the learned STO had not applied his mind and set aside the same by reducing the tax and penalty to Rs.528.00.

4. Being dissatisfied with the order of the learned JCST, the Revenue as appellant has come up with this second appeal through various grounds of appeal before this forum with a prayer to set aside the order of the learned JCST and restore the order of the learned STO. The grounds taken by the appellant-State are as follows:-

(i) The order of the first appellate authority appears to be unjust and improper.

(ii) It is a cardinal principle that burden of proof lies with the assessee for filing of return and availing ITC i.e. the tax collected from is remitted as observed by the Hon'ble Court in the case of M/s. Packwell Industries.

(iii) In the case of M/s. Mahalaxmi Cotton Spinning v. State of Maharashtra the Hon'ble Court held that set off of ITC is to allow only if tax is actually paid by the selling dealer to the Government treasury. Deduction of output tax in the case of purchasing dealer amounts to remission of revenue which is conditional when the tax invoice is there

but without being backed by the seller's deposits. Allowing remission of revenue under the circumstances is not just and proper. So in this case the inference drawn by the first appellate authority is fallacious in nature.

(iv) The order of the first appellate authority is liable to be set aside and that of the assessing authority should be restored.

5. The respondent-dealer filed cross objection as follows:-

(i) The order of the learned First Appellate Authority by allowing ITC of Rs.88,511.00 is legal and correct for which the said order is sustainable in law.

(ii) The order of the learned first appellate authority is legal, proper, correct and sustainable in the eye of law and the present appeal by the State has no merit and deserves to be dismissed.

6. In the first appeal the learned JCST allowed the appeal granting the ITC and dropping the suppression to the tune of Rs.1,301.00 thereby reducing the tax and penalty demand to Rs.528.00. The charge of sale suppression of Rs.19,814.00 is deleted by the learned JCST. It is seen that the respondent-dealer had purchased goods worth Rs.16,830.00 involving ITC of Rs.8,272.00 which has been reflected by the selling dealer M/s. Bharat Motors, Bhubaneswar and which has not been shown in the periodical return by the respondent-dealer. Hence the respondent-dealer has concealed the said transaction and therefore the allegation of suppression has been proved beyond reasonable doubt. The learned JCST has allowed ITC of Rs.86,510.00 without any valid reason which is against the provisions of the Act and Rules. Under the Act a dealer on sale or purchase of goods has to file monthly/quarterly returns in form VAT-201. In the said form VAT-201, two annexures are appended in Col.57 in which a selling dealer is obliged to mention the details of sales

effected to registered dealers. If such sales are reflected in the returns and consequent tax is paid then only the purchasing dealer can claim and avail the consequent tax paid by the selling dealer as its ITC in accordance with Sec.20(3) read with Sec.95 of the OVAT Act. The ITC of Rs.88,510.68 has been allowed in the first appeal which on the facts and circumstances of the case is not in accordance with law. Hence there is infirmity in the order passed by the learned forum below. It is not out of place to mention here that the grant of ITC is subject to conditions and restrictions. In this case the selling dealer has not disclosed the sales to the present respondent-dealer by showing the transactions in Annexure appended to Sl. No.57 of return VAT-201 and has not paid the tax. Therefore, ITC cannot be availed by the respondent-dealer. The respondent-dealer has failed to discharge the burden of proof as per Sec.95(h) & (i) of the OVAT Act. The respondent-dealer has also not furnished proper documentary evidence to substantiate the claim. Therefore, the order of the learned JCST is not proper.

7. The claim of ITC to be set off can only be allowed from the output tax discharged by the selling dealer under the OVAT Act and no set off can be allowed otherwise. The allowance of set off of ITC is conditional in nature as per the provisions of the Act. The amount of set off of ITC is only from the payment of output tax by the selling dealer and there is no independent right to grant set off. The entitlement to a set off is created by the taxing statute and the terms on which the set off is granted must be strictly observed. It is well settled that no ITC can be allowed on bogus transactions or when genuineness of the transactions are doubtful. The transaction between the seller and purchaser is contractual in nature for sale and purchase of goods. In case of breach by either of the parties he will be liable in a civil suit. The onus for claim of ITC is on the dealer purchaser which is to be proved beyond reasonable doubt. In the case

of **Commissioner of Customs (Import), Mumbai v. M/s. Dilip Kumar and Co. (2018) 9 SCC 1** the Hon'ble Apex Court have held that exemption has to be strictly construed and to be proved by the person who claims the same to avail the benefit. The Hon'ble Apex Court also in the case of **State of MP v. Indore Iron & Steel Pvt. Ltd. AIR 1998 SC 3050** have also held that exemption/set off cannot be allowed unless actual payment of tax is made. In absence of payment of tax by the selling dealer the ITC cannot be granted to the respondent as it will amount to unjust enrichment on the part of the respondent and unreasonableness in application of law. The ingredients of Sec.42(1) of the OVAT Act is squarely attracted in the present case as the respondent has claimed erroneous deduction thereby affecting tax liability. The levy of penalty is mandatory u/s.42(5) of the OVAT Act. Hence it is necessary to restore the order of assessment by setting aside the impugned order.

8. In the net result, the appeal is allowed and the impugned order is set aside. The order of assessment is hereby restored. The cross objection is disposed of accordingly.

Dictated & corrected by me,

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

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