**BEFORE THE FULL BENCH : ODISHA SALES TAX TRIBUNAL: CUTTACK.**

**S.A. No. 287 (VAT) of 2014-15**
**&**
**S.A. No. 359 (VAT) of 2014-15**

(Arising out of order of the learned Addl. CST, Central Zone, Odisha, Cuttack in Appeal Case No. AA- CUII/JCST/484/2012-13, disposed of on dt. 27.11.2014)

**Present** : **Smt. Suchismita Misra**, **Chairman**
**Shri Subrat Mohanty, 2nd Judicial Member**
**&**
**Shri Rabindra Ku. Pattnaik, Accounts Member-III**

**S.A. No. 287 (VAT) of 2014-15**

M/s. Indian Farmers Fertilizers Co-operative Ltd.,
At- Musadia, Paradeep,
Dist. Jagatsinghpur. . . . Dealer

**- V e r s u s –**

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

**S.A. No. 359 (VAT) of 2014-15**

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

**- V e r s u s –**

M/s. Indian Farmers Fertilizers Co-operative Ltd.,
At- Musadia, Paradeep,
Dist. Jagatsinghpur. . . . Dealer

For the Dealer … Mr. P.K. Jena, Advocate
For the State … Mr. M.S. Raman, Addl. S.C. (CT)

---

Date of hearing: 29.01.2019 **** Date of order: 25.02.2019

---

## ***O R D E R***

The appeal bearing S.A. No.287 (VAT) of 2014-15 filed by the dealer-assessee and the appeal bearing S.A. No. 359 (VAT) of 2014-15 filed by the State are directed against the order dated 27.11.2014 passed by the Addl. Commissioner of Sales Tax (Appeal), Central Zone, Odisha, Cuttack (in short, "first appellate authority") in Appeal Case No. AA- CUII/JCST/484/2012-13 allowing the appeal in part by reducing the demand made in the order of assessment passed by the Joint Commissioner of Sales Tax, Cuttack-II Range, Cuttack (in short, 'assessing officer') u/S. 42(4) of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') for the tax period from 01.11.2008 to 31.10.2010 in the following circumstances. Therefore, both the appeals are taken up together to be disposed of by this common order for the sake of convenience.

2. The facts in brief, as revealed from the case record, are that the dealer-aassessee named and styled as "M/s. Indian Farmers Fertilizers Co-operative Ltd." (in short, M/s. I.F.F.Co. Ltd.) is a National Level Co-operative Society established under the Multi State Co-Op. Societies Act, 2002. The Head Office of the dealer-assessee is situated in New Delhi whereas its manufacturing Unit is situated at Paradeep in the State of Odisha. It manufactures fertilizers, phosphoric acid, sulphuric acid for sale. It also sells scraps and by-product i.e.

gypsum both inside and outside the State of Odisha. Apart from the aforesaid business activities it also receives fertilizers on stock transfer basis from ex-State branches for sale and collects VAT @ 12.5% on sale of by-product i.e. gypsum and @ 4% on MRP fixed by the Government on sale of fertilizers. When it was found by the Audit Team that this dealer had availed ITC inappropriately during the aforesaid period a notice was issued to it (the dealer-assessee) with a copy of the Audit Visit Report (AVR). Pursuant to the said notice, the representative of the dealer-Company appeared before the assessing officer and produced the books of account such as purchase register, sale register, stock register, purchase and sale invoices, way bills account, 'C' form account and production account for verification. The findings of the Audit Team in their report were confronted to the representative of the dealer-assessee and he explained how the dealer-Company was eligible to avail ITC on inputs and packing materials as per Sec. 20(3)(b) of the OVAT Act. At that time the dealer-Company submitted that for manufacture of chemical fertilizer, raw materials like rock phosphate, sulphur and ammonia were procured from outside territory of India and in the process of manufacturing and packing of the finished goods various chemicals and other materials such as caustic soda, cholorine/alum and coal were procured from the registered dealers of Odisha on payment of VAT. As these goods were directly used in the process of manufacturing

of finished product those were taken as inputs as defined u/S. 2(25) of the OVAT Act. However, after examination of the books of account of the dealer-Company with reference to the findings in the AVR and taking into consideration the definition of 'input' as provided u/S. 2(25) of the OVAT Act, the assessing officer determined the liability of the dealer and ordered that the dealer-assessee was to pay a sum of `15,60,692.44 towards VAT. Further it was also held liable to pay `31,21,384.88 i.e. twice the tax assessed as penalty u/S. 42(5) of the OVAT Act. Accordingly, a notice was sent to the dealer-assessee determining a sum of `46,82,077.00 to be paid by it for the aforesaid assessment period.

The dealer-assessee preferred an appeal against this order of the assessing officer before the first appellate authority challenging reversal of ITC as well as levy of penalty from it as per the order of the assessing officer. The first appellate authority while examining the transactions carried on in the business establishment of the dealer-assessee in detail concluded that the reversal of ITC worth `12,27,128.00 on purchase of coal was correct since coal was utilized for production of electricity and subsequently the electricity was sold. It was also held by the first appellate authority that burning of sulpher was sufficient to generate enough steam so as to run the turbine for

production of electricity for which so much of coal was not necessary. The first appellate authority then calculating proportionate ITC for CST sale at `4,04,334.23 held that since the ITC was less than CST payable reversal of ITC amounting to `3,02,244.00 as determined by the assessing officer was disallowed. With regard to imposition of penalty u/S. 42(5) of the OVAT Act twice the tax found leviable in the assessment the first appellate authority held that Sec. 42(5) mandates such imposition of penalty and for all these reasons he allowed the appeal in part while reducing the demand to `37,75,344.00 with further order of refunding the excess tax, if any, paid by the dealer.

3. Being aggrieved with the said order, the dealer-assessee preferred this second appeal challenging the legality and correctness of the findings arrived at by the authorities below. It was submitted by the dealer-appellant that disallowance of ITC on coal which was used as a raw material in the Captive Power Plant of its manufacturing Unit is not sustainable in view of the judgment of the Hon'ble Orissa High Court in the case of NALCO Vs. DCIT, Bhubaneswar in W.P. (C) Nos. 1597 and 1686 of 2012 which were disposed of on 09.10.2012. Similarly reversal of ITC at `2,95,75,381.00 on the ground of branch transfer of finished goods to branches of the petitioner-Company outside the State on account of non-consumption of the same

inside the State of Odisha is no more res-integra in view of the decision of Hon'ble Karnataka High Court reported in [2012] 51 VST 496 (Karn) (Bharat Petroleum Corporation Limited Vs. Additional Commissioner of Commercial Taxes, Zone 1, Bangalore) on the ground that in case of branch transfer ITC cannot be refused. The dealer-assessee challenged mainly disallowance of ITC on coal and consequential imposition of penalty on it on the ground that coal is to be treated as a raw material in the instant case but the authorities below misinterpreting Sec. 2(25) of the OVAT Act excluded coal from the category of 'input'. Learned Counsel in course of hearing the appeal apprised the Court as to what test should be applied for determination as to whether certain goods are used as raw materials in the manufacturing process from which the finished product emerges. He cited the decision rendered by the Hon'ble Apex court in the case of J.K. Cotton Spinning & Weaving Mills Co. Ltd. Vs. Sales Tax Officer, Kanpur and another, reported in [1967] 16 STC 563 (SC), wherein it was held –

Quote- "The expression "in the manufacture of goods" in section 8(3)(b) should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process is so integrally connected with the ultimate production of goods that, but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would fall within the expression "in the manufacture of goods".

The process of designing may be distinct from the actual process of turning out finished goods. But there is no warrant for limiting the meaning of the expression "in the manufacture of goods" to the process of production of goods only. The expression "in the manufacture" takes in within its compass, all processes which are directly related to the actual production. Drawing and photographic materials falling within the description of goods intended for use as "equipment" in the process of designing, which is directly related to the actual production of goods and without which commercial production would be inexpedient, must be regarded as goods intended for use "in the manufacture of goods".

In the case of a company manufacturing for sale cotton textiles, tiles and other commodities, building materials including lime and cement not required in the manufacture of tiles for sale cannot be regarded within the meaning of rule 13, as raw materials in the manufacture or processing of goods or even as "plant".

In order that "electrical equipment" should fall within the terms of rule 13, it must be an ingredient of the finished goods to be prepared, or "it must be a commodity which is used in the creation of goods". If, having regard to normal conditions prevalent in the industry, production of the finished goods would be difficult without the use of electrical equipment, the equipment would be regarded as intended for use in the manufacture of goods for sale. This would not include electrical equipment and directly connected with the process of manufacture. Office equipment such as fans, coolers and air-conditioning units would not be admissible to special rates under section 8(1)." Unquote.

4. In the instant case as submitted by the learned Counsel for the dealer-assessee, the process involved in the manufacture of various chemical fertilizers like DAP/NP/NPK, phosphoric acid, sulphuric acid and gypsum as a waste and the process of generation of electricity for its captive requirement 'steam' is a necessary input for manufacturing of chemical fertilizers like DAP/NP/ NPK and for this process major quantity of steam is obtained from Sulphuric Acid Plant as a waste recovery steam and through coal fired boiler. Learned Counsel then submitted elaborately as to how the manufacturing process goes on in the dealer-Company which he has also described in his written note of submission filed in this case for which it is felt that there is no necessity of discussing the same entirely in this judgment. However, as it is understood that without use of coal in the manufacturing process of fertilizer it would be impossible to generate steam which is certainly/absolutely required for the manufacture of the end product like fertilizers. In the instant case the dealer-assessee has furnished the statement regarding details of purchases and the ITC claimed by it as well as reversal made alongwith statements regarding consumption of coal in detail as well as generation of steam and power and utilization of the same in the manufacturing process. From those documents and submission advanced by the learned Counsel for the dealer-assessee it could be gathered that coal is

a primary raw material for production of steam and without coal required steam cannot be generated for the process of manufacture of fertilizer.

Learned Counsel for the dealer-assessee cited the decisions rendered in the cases of J.K. Cotton Spinning & Weaving Mills Co. Ltd. Vs. Sales Tax Officer, Kanpur and another, reported in [1965] 16 STC 563 (SC); Indian Farmers Fertilizer Corp. Ltd. Vs. CCE, Ahmadabad, reported in 1996 (86) E.L.T. 177 (SC) as well as the decision rendered in the case of Collector of Central Excise Vs. Ballarpur Industries Ltd., reported in [1990] 77 STC 282 (SC) and urged before the Court to consider as to whether the material 'coal' can be regarded as consumable in the instant case which would come within the purview of Sec. 2(25) of the OVAT Act. He also cited the decisions rendered by the Hon'ble High Court of Orissa in the cases of Reliance Industries Ltd. Vs. Asst. Commissioner of Sales Tax and others, reported in [2008] 15 VST 228 (Ori.) and Visa Steel Ltd. and others Vs. State of Odisha and others, reported in [2011] 41 VST 238 (Ori.) in support of his contention. He brought to the notice of this Tribunal the ratio of the decision rendered by the Hon'ble Orissa High Court and Hon'ble Supreme Court in the cases of Paradeep Phosphates Ltd. Vs. State of Orissa and three others, reported in 2009 (II) OLR 769; National Aluminium Company Limited Vs. Deputy Commissioner of Commercial

Taxes, Bhubaneswar-III Circle, Bhubaneswar, reported in [2012] 56 VST 68 (Ori.) and State of Gujarat and another Vs. Ami pigments Pvt. Ltd. and others, reported in [2009] 22 VST 615 (SC) to impress upon the Bench that ITC on coal as claimed by the dealer-appellant has to be allowed in the instant case.

5. The learned Counsel for the dealer-assessee then challenged imposition of penalty twice the amount of tax assessed in respect of the dealer as per Sec. 42(5) of the OVAT Act on the ground that when there has been no suppression of sales or GTO or TTO by the dealer-appellant the assessment u/S. 42(4) of the Act is illegal, invalid, untenable and unsustainable. In this regard, he also cited some decisions rendered in the cases of Krishna Alloy Steels Vs. Registrar, Tamil Nadu Taxation Special Tribunal, Chennai and another, reported in [2008] 13 VST 424 (Mad.); Sree Krishna Electricals Vs. State of Tamil Nadu and another, reported in [2009] 23 VST 249 (SC); Union of India Vs. Rajasthan Spinning & Weaving Mills, reported in 2009 (238) ELT 3 (SC); CCE, Chandigarh Vs. Pepsi Foods Ltd., reported in 2010 (260) ELT 481 (SC); Hindustan Steel Ltd. Vs. State of Orissa, reported in [1970] 25 STC 211 (SC); Commissioner of Central Excise, Vapi Vs. Kisan Mouldings Ltd., reported in 2010 (260) ELT 167 (SC); Commissioner of Central Excise, Calcutta-II Vs. Indian Aluminium Co. Ltd., reported in 2010 (259) ELT 12 (SC); Commissioner of C. Ex. Jaipur Vs. Shree

Rajasthan Syntex Ltd., reported in 2015 (318) ELT 626 (SC) including the decisions of this Tribunal in some other cases.

6. The State-respondent while advancing its argument in terms of cross-objection submitted that the dealer-appellant challenged the order of first appellate authority raising the following issues :-

(i) Whether coal and gas used for production of steam which in turn used in generation of electricity in the captive power plant falls within the connotation of "input" defined under Sec. 2(25) of the OVAT Act ?

If the answer to the above is in positive, then :

Whether the appellant-Company is entitled to avail "input tax credit" defined under Sec. 2(27) read with Sec. 20(3) of the OVAT Act on account of tax paid on purchase of coal and gas ?

(ii) Whether the first appellate authority was justified in confirming the assessment wherein the assessing authority imposed penalty invoking power under Sec. 42(5) of the OVAT Act ?

(iii) Whether the first appellate authority while passing order dated 27.11.2014 was correct in holding that "as ITC is less than CST payable is not reversible ?

7. So far as claim of ITC on coal is concerned, it is submitted by the learned Addl. Standing Counsel (CT) for the State that the judgment cited by the dealer-appellant rendered in the case of National Aluminium Company Ltd. Vs. Deputy Commissioner of Commercial Taxes, [2012] 56 VST 68 (Ori), has been under challenge before the Hon'ble Supreme Court in SLP (C) Nos. 38103-38104 of 2013 (Deputy Commissioner of Commercial Taxes Vs. National Aluminium Company Ltd.) which is sub judice as on date. He then cited some decisions to apprise the Court that the materials which are used in the manufacturing process but do not go into or tend to the making of the end product cannot be taken as raw materials or in other words as 'input' in the manufacturing process. In the instant case the dealer-appellant manufactures fertilizer. The ITC on caustic soda and ferric alum were allowed by the assessing officer whereas ITC on coal was disallowed because it was observed by the assessing officer that except coal, other goods on which the dealer-Company had availed ITC were used directly in the process of manufacturing without which production of fertilizer was not feasible and as such the orders of the assessing officer as well as the first appellate authority in disallowing ITC on coal was proper and should not be interfered with by this forum. He further submitted that it was observed by the first appellate authority that the dealer-appellant utilized coal for heating the boilers so as to produce

steam for production of electricity as well as production of sulphuric acid and ultimately to produce phosphoric acid and further the instant dealer had sold power worth `7,58,99,600.00 during the relevant period. He also cited some decisions in support of his contention that the dealer-Company is not entitled for ITC as claimed by it on the material like coal as input in the manufacturing process underwent in its business Unit. Learned Addl. Standing Counsel (CT) for the State further submitted that disallowing the reversal of ITC amounting to `3,02,244.00 by the first appellate authority is erroneous and based on presumption since the assessing officer had thoroughly examined the CST payable by the dealer-assessee towards inter-State sale and found the said amount to be in excess of CST payment whereas he calculated the proportionate ITC for CST sales which came to `4,04,334.23. That apart the penalty imposed on it u/S. 42(5) of the OVAT Act is justified because that goes as per the mandatory provision as envisaged under the aforesaid section. He thus urged before the Court to confirm the impugned order.

8. After perusing the record and the oral submissions as well as on perusal of the written notes of argument submitted by the learned Counsels appearing from both the sides respectively, it could be gathered that in course of hearing argument the learned Counsel for the dealer-assessee pointed out that the dealer-assessee waive its claim for

reversal of ITC on account of branch transfer but so far as the ITC on coal is concerned he urged before the Court to go through all the decisions cited by him which would ultimately give a clear picture as to how the item 'coal' can be treated as 'input' or raw material or consumable in the manufacturing process of fertilizer and as such attract the ITC in favour of the dealer-appellant. Admittedly the dealer-appellant is a business establishment which carries on manufacturing of fertilizer. The said manufacturing Unit of the dealer-assessee was assessed by the Sales Tax authority u/S. 42(4) of the OVAT Act on the basis of AVR. It was also found then that the dealer-assessee had claimed ITC on purchase of coal. The assessing officer considering the said claim as not being appropriate disallowed the same and then taking into consideration some other factors also determined the tax liability of the dealer-assessee for that relevant period and imposed penalty in accordance with law. The dealer-assessee in course of hearing this appeal limited its grievance to the extent of disallowance of ITC on coal and urged before the Court that the ITC in its favour should not be disallowed and the penalty imposed on it should not have been done because there was no suppression of its liability with the intention of evading the tax. In this circumstance we would, therefore, like to find out whether coal can be brought under the definition of "input" as per Sec. 2(25) of the OVAT Act for manufacture of fertilizer so as to entitle

the dealer-assessee for ITC. In this regard we would like to quote a portion of the judgment of the Hon'ble Orissa High Court rendered in the case of Reliance Industries Ltd. Vs. Asst. Commissioner of Sales Tax and others, reported in [2008] 15 VST 228 (Ori.), for proper appreciation of the question as to whether coal can be termed as input/consumable or raw material in the facts as emerged in the instant case.

Quote- "The definition of "input" in section 2(25) of the Orissa Value Added Tax Act, 2004 comprises four different types of articles, viz. articles or goods for resale, goods used in the execution of works contract, goods used in processing or manufacturing, where such goods directly go into the composition of the finished products and consumables directly used in such processing or manufacturing. Since separately, by an inclusive definition consumables which are directly used in such processing or manufacturing have been included, the inclusive definition does not refer to any goods which must be used in processing or manufacturing where such goods directly go into the composition of finished products. The only requirement is that the consumables are directly used in such processing or manufacturing. "Consumables" need not directly go into the composition of the finished products. The very expression "consumables" postulates that such articles are destroyed or used upon the processing or manufacturing of goods. It is for this reason that while consumables by an inclusive definition are included in the definition of "input" under section 2(25) of the Act the Legislature did not insist upon the requirement which appears

in the earlier clauses that such goods must go into the composition of the finished products.

The expression "directly go into composition of finished product" and "directly used in manufacturing or processing of finished product" are not the same. There is a clear distinction. In the former, while the goods directly go into the composition of finished product, in the latter, the consumable is directly used in the manufacturing process of finished products.

According to Notification No. 17800-CTA-19/2005F bearing SRO No. 209/2005 dated April 4, 2005 of the Government of Orissa "input" comprises of two types of commodities, i.e. (i) those commodities which should directly go into composition of the finished product, and (ii) the consumables directly used in such manufacturing process for production of the finished product. Therefore, it is not at all necessary that consumables in order to qualify as "input" should directly go into the composition of the finished product. What is required is that the consumables should be directly used in manufacturing process for production of finished product.

The expression "consumable" has not been defined in the Act. In the absence of any such statutory definition the expression has to be understood in the meaning assigned to it by various dictionaries and how it is understood in trade and commerce." Unquote.

In the said case Hon'ble Court followed the decision of Hon'ble Apex Court rendered in the case of Coastal Chemicals Ltd. Vs. Commercial Tax Officer, reported in [2000] 117 STC 12 (SC), wherein interpreting Section 5B of the Andhra Pradesh General Sales Tax Act Hon'ble Apex

Court held that the word "consumables" used in the said provision, i.e., Andhra Pradesh General Sales Tax, 1957 takes colour from and must be read in the light of the words that are its neighbors, namely, raw material, component part, sub-assembly part and intermediate part. So read, the word "consumables" therein refers only to raw material which is used as an input in the manufacturing process but is not identifiable in the final product by reason of the fact that it has got consumed therein. It is for this reason that "consumables" have been expressly referred to in the said provision, though they would fall within the broader scope of the words "raw material".

In the decision rendered in the case of Reliance Industries Ltd. Vs. Asst. Commissioner of Sales Tax and others (supra), it is also held by the Hon'ble High Court that –

Quote- "In view of the proposition of law laid down by the honourable apex court, different High Courts and the views taken by Taxation Tribunals, the contention of the opposite parties that furnace oil used by the dealer is to produce flame and therefore it is fuel and not consumable which is directly used in processing or manufacturing of finished product is totally misconceived and not sustainable in law. On the other hand, it boils down to an irresistible conclusion that furnace oil is one of the primary and essential commodities which has a direct relation in the manufacturing process and "direct relation" means without which the manufacturing of end-product is not possible at all. In that view of the matter, we are of the considered view that furnace oil

used by the petitioner in the process of manufacture without which production of PSF is not feasible is nothing but consumable.

Now it is to be examined whether section 2(25) requires that furnace oil, in order to be treated as input, should directly go into the composition of finished product. In the definition of "input" under section 2(25), the Legislature has included various types of articles. "Input" has been defined to mean 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 and includes consumables directly used in such processing or manufacturing. It will appear therefore that the definition of "input" comprises four different types of articles, viz., articles or goods for resale, goods used in the execution of works contract, goods used in processing or manufacturing, where such goods directly go into composition of finished products and consumables directly used in such processing or manufacturing. Separately, by an inclusive definition, consumables which are directly used in such processing or manufacturing have been included. Therefore, the inclusive definition does not refer to any goods which must be used in processing or manufacturing, where such goods directly go into composition of finished products. As per inclusive definition, the only requirement is that the consumables are directly used in such processing or manufacturing. "Consumables" need not be required to directly go into composition of finished products. The very expression "consumables" postulates that such articles are destroyed or used upon the processing or manufacturing of goods. It is because of this reason that while consumables by an inclusive

> definition are included in the definition of "input" under section 2(25) of the VAT Act, the Legislature did not insist upon the requirement which appears in the earlier clauses that such goods must go into composition of finished products. When the Legislature does not insist upon such requirement, the insistence by opposite party No.1 that consumables must go directly into composition of finished product is totally misconceived and runs contrary to the very definition of "input" under section 2(25) of the VAT Act." Unquote.

Thus it can be gathered very well from the above decision of the Hon'ble Court that it is not at all necessary that consumables in order to qualify as input should directly go into composition of finished product. What is required is that consumables should be directly used in the manufacturing process for production of finished product. As held in the above decision of the Hon'ble Court the expression "directly go into composition of finished product" and "directly used for manufacturing or processing of finished product" are not one and the same thing. There is a clear distinction. In the former, while the goods directly go into composition of finished product, in the latter, the consumable is directly used in the manufacturing process of finished products. It has already been held in the aforesaid decision that furnace oil is consumable which is directly used in the manufacturing process for production of finished product. Certainly it does not directly go into composition of finished product. Inspite of the same, since

"input" as defined u/S. 2(25) of the OVAT Act includes consumables which are directly used in the manufacturing of finished product, furnace oil is nothing but an "input" and tax paid on purchase of such input shall qualify for set off against the output tax and it was ultimately held that input tax which has been paid on purchase of furnace oil can be claimed as ITC u/S. 2(27) of the OVAT Act against the tax payable on finished product.

9. In the instant case it is found that without use of coal in the dealer-appellant's manufacturing Unit no fertilizer i.e. the finished product could have been produced. Therefore, coal has to be treated as consumable so far as the manufacturing process involved in production of fertilizer is concerned. Hence, disallowance of the claim of ITC on coal by the dealer-assessee is not justified. However, both the authorities below have computed the tax liability of the dealer-assessee ignoring this fact as well as proposition of law involved therein.

In the circumstances, it is felt that this is a fit case to be remanded back to the assessing officer for fresh computation of VAT liability of the dealer-assessee keeping in view the observations of this Tribunal regarding the nature of coal as consumable in the manufacturing process of fertilizer.

10. Regarding disallowance of reversal of ITC of `3,02,244.00 by the first appellate authority, it is submitted by the

Revenue that learned first appellate authority has computed the figures roughly without adhering to the actual facts revealed from the books of account vis-à-vis returns. He has not even discussed about the method and manner adopted by him to arrive at the figures of proportionate ITC in the instant case. Therefore, the same needs fresh appraisal. In this regard as it appears from the impugned order (page-5) learned first appellate authority has computed the tax on CST sale at `40,76,689.92 taking into consideration 2% CST on sale turnover of `20,38,34,496.00 and thereby determined the proportionate ITC for CST sale at `4,04,334.23. Therefore, he disallowed the reversal of ITC of `3,02,244.00 whereas the assessing officer reversed the said amount of ITC availed by the dealer-assessee in excess of CST payable towards inter-State sale as per the AVR. When the matter is already under remand to the assessing officer, this aspect needs to be re-examined by him in accordance with provisions of law vis-à-vis the books of account alongwith returns for the relevant period under assessment.

11. So far as imposition of penalty is concerned, Sec. 42(1) and (5) of the OVAT Act provide as follows :-

Quote- "(1) Where the tax audit conducted under sub-section (3) of Section 41 results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit, evasion of tax or contravention of any provision of this

Act affecting the tax liability of the dealer, the assessing authority may, notwithstanding the fact that the dealer may have been assessed under Section 39 or Section 40, serve on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report, requiring him to appear in person or through his authorized representative on a date and place specified therein and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report." Unquote.

Quote- "(5) Without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under sub-section (3) or sub-section (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-sections." Unquote.

In the instant case if it would be found by the assessing officer that there has been suppression of purchases or sales or both, erroneous claims of deduction including ITC, evasion of tax or contravention of any provision of this Act affecting the tax liability of the dealer then he can impose penalty but not otherwise. In this regard learned Counsel for the dealer-assessee also cited some decisions rendered in the cases of Krishna Alloy Steels Vs. Registrar, Tamil Nadu Taxation Special Tribunal, Chennai and another, reported in [2008] 13 VST 424 (Mad.) and Sree Krishna Electricals Vs. State of Tamil Nadu and another, reported in [2009] 23 VST 249 (SC) to apprise the Court

that before imposition of penalty malafide on the part of the dealer-assessee has to be established. The assessing authority must come to a conclusion that there was a deliberate attempt by the dealer-assessee to evade tax either by fraud or misrepresentation. Suppression of purchases and sales by the dealer-assessee with an intention of evading tax must be found out. In this case no clear finding on this aspect has been given either by the assessing officer or by the first appellate authority. However, in view of the aforesaid position of law the assessing officer to whom the case is being remitted back for fresh assessment must take a decision with reasons regarding imposition of penalty on the dealer-assessee in the instant case in accordance with law.

12. In the result, as per the discussion made in the foregoing paragraphs, the appeals preferred both by the dealer-assessee and the State are disposed of accordingly. The impugned order of the first appellate authority is hereby set aside. The assessing officer is required to make fresh assessment of the tax liability of the dealer-assessee in accordance with law keeping in view the observations made by this Tribunal with regard to the claim of ITC on coal as well as reversal of ITC on CST sale including imposition of penalty within a period of four months from the date of receipt of this order. Cross-objections are disposed of accordingly.

Dictated & Corrected by me,

**Sd/-**
**(Smt. Suchismita Misra)**
**Chairman**

**Sd/-**
**(Smt. Suchismita Misra)**
**Chairman**

I agree,

**Sd/-**
**(Subrat Mohanty)**
**2nd Judicial Member**

I agree,

**Sd/-**
**(Rabindra Ku. Pattnaik)**
**Accounts Member-III**