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

S.A. No. 347 (VAT) of 2013-14

(Arising out of order of the learned Addl. CST (Appeal), Central Zone, Odisha, Cuttack in Appeal Case No. AA- CUII- 142/2007-08, disposed of on dt. 06.12.2013)

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

M/s. Field Motors,
Telengapentha, Cuttack. . . . Appellant

- V e r s u s –

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

For the Appellant … Mr. D.K. Sahu, Advocate
For the Respondent … Mr. M.S. Raman, Addl. S.C. (CT)

Date of hearing: 05.02.2019 **** Date of order: 28.02.2019

O R D E R

This appeal is directed against the order dated 06.12.2013 passed by the Addl. Commissioner of Sales Tax (Appeal), Central Zone, Odisha, Cuttack (in short, "first appellate authority") in Appeal Case No. AA- CUII- 142/2007-08 reducing the order of assessment to `20,69,083.00 passed by the Asst. Commissioner of Sales Tax (LTU), Cuttack-II Range, Cuttack (in short, 'assessing officer') u/S.

42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') for the tax period from 01.04.2005 to 28.02.2007.

2. The facts as revealed from the case record are that the dealer-assessee named and styled as "M/s. Field Motors" carries on business involving purchase and sale of motor vehicles of Toyata brand like Innova, Corolla, Qualis alongwith its spares and accessories. On the basis of Audit Visit Report (AVR) in respect of aforesaid business concern of the dealer-assessee a notice was issued to it alongwith AVR and accordingly on assessment thereafter it was found that the dealer-assessee for the purpose of its business maintains stock register, stock dispatch register, sale register and sale invoices which are maintained electronically. It utilizes Government Waybills to bring goods from outside the State and issues Form 'C' to outside parties in respect of purchases made from them. Since stock discrepancy to the tune of `1,18,63,806.00 was noticed the dealer was confronted with the same. However, the dealer stated that there was no discrepancy in the books of account verified by the CTO, Audit but the figures arrived at by him (the CTO, Audit) was due to addition of imaginary profit margin of 15%. The dealer-assessee further submitted that as they were maintaining proper books of account like purchase, sale, stock account and were issuing sale memo in each and every case and further used to sell vehicle at the price fixed by the Company the report submitted by the

CTO, Audit was without any basis and had no merit at all. The assessing officer then verified the allegations made in the AVR vis-à-vis the evidence produced before him and calculated the GTO, TTO, tax due and penalty to be imposed on the dealer-assessee. Thus on proper calculation he determined total tax and penalty at `5,75,59,329.00 which includes penalty of `26,39,067.00 and since the dealer-assessee had already paid tax of `5,33,04,980.00 he was issued with a notice to pay the balance amount of tax and penalty due amounting to `42,54,349.00 for the relevant period.

Being aggrieved with the said order the dealer-assessee preferred an appeal before the first appellate authority challenging the order of assessment on the ground of its being illegal, arbitrary and bad in law. It was contended on behalf of the dealer-assessee before the first appellate authority that the goods sold for `9,56,298.08 under CST Act cannot be assessed under OVAT Act for non-submission of 'C' form as the assessing officer did not have the jurisdiction to convert the inter-State sale to intra-State sale. Further the dealer-assessee had produced the books of account before the assessing authority in response to a notice in VAT-306 issued u/R. 49(1) of the OVAT rules but the assessing authority passed the order of

assessment u/S. 42(3) of the OVAT Act enhancing the demand of `53,06,013.14 which is not permissible under law. The dealer-assessee further contended that the vehicles which were purchased by it at the cost of `38,47,419.00 from outside the State were used by the dealer only for demonstration purposes and as such those vehicles were not taxable since those were not sold in the aforesaid amount. However, the assessing officer assessed the said amount disallowing such deduction even though no such deduction was claimed by the dealer. The dealer-assessee also took a plea that goods worth `57,52,552.00 were purchased and those were given to the customers as gifts but the assessing authority assessed this turnover u/S. 12(ii)(a) of the OVAT Act which is not permissible.

3. Learned first appellate authority having gone through the order of assessment and the materials available on record considered the same vis-à-vis the grounds of appeal. He could ascertain from all those documents that the assessing authority found the dealer getting 3% gross profit on sale of spares and observed that with that 3% gross profit he cannot manage its establishment. Therefore, the assessing authority added 15% profit margin to the turnover of the dealer which came to `53,06,013.14 and assessed the same @ 12.5%. However, the assessing authority did not assign any reason as to why

he added the aforesaid amount of `53,06,013.14 and further he (the assessing authority) also did not find any evidence regarding suppression of sale. Thus, the first appellate authority deleted this addition of `53,06,013.14 for calculation of tax thereon. The first appellate authority then found that the dealer had sold vehicles worth `9,56,298.08 u/S. 3 of the CST Act vide invoice No. 92 dated 31.07.2005 to Gargya Autocity Pvt. Ltd., Dispur, Guwahati but could not file the 'C' forms. In the result, the aforesaid sale was considered as a sale to an unregistered dealer which is assessable under the CST Act. However, as the first appellate authority found that the assessing authority had not assigned any other reason for assessing tax on the aforesaid amount except the reason that the dealer-assessee could not submit any 'C' form for the aforesaid sale. Thus the first appellate authority deleted the same on the ground that the said turnover is not assessable under OVAT Act. The dealer had explained that five vehicles were purchased at `38,47,419.00 from outside the State and were used for demonstration purposes in course of its business as customers were allowed to be convinced regarding the pliability as well as quality of the vehicles. Those vehicles were subsequently sold at a less price than the purchase price on account of those being used ones and further it was

found that the sale price of those vehicles was `22,79,927.00. Accordingly the assessment in respect of this turnover was deleted by the first appellate authority. However, the first appellate authority reversed the ITC amounting to `7,19,069.00 claimed on purchase of spares and accessories for `57,52,552.00 for which the dealer-assessee preferred this appeal.

4. It is contended on behalf of the dealer-assessee that the order of assessment as well as the order passed by the first appellate authority having bereft of merits are to be dismissed in limine. He challenged the order of the first appellate authority with regard to reversal of ITC calculated @ 12.5% on `57,52,552.00 amounting to `7,19,069.00 on the ground that the spares and accessories worth the aforesaid amount were purchased from outside the State and all those goods were bought only for the purpose of giving gifts to the customers in order to attract them to purchase all types of motor vehicles of Toyata brand but transactions involving those goods were not considered as purchases made from outside the State by the assessing officer as well as by the first appellate authority and as such it resulted in reversal of ITC of the dealer. Further learned Counsel for the dealer-assessee submitted that the first appellate authority should not have

imposed penalty of `13,79,388.70 as the same is not fair in view of the decisions rendered in the case of M/s. Hindustan Steel Ltd. Vs. State of Orissa, reported in [1970] 25 STC 211 (SC) and in the case of State of Kerala Vs. M/s. Jyothy Laboratories, reported in [2011] 46 VST 330. He thus urged before the Court to set aside the orders passed by the authorities below.

5. The State-respondent has filed cross-objection in this appeal stating therein that both the assessing officer as well as the first appellate authority have rightly completed the assessment and passed the orders correctly following the statutory provisions under the relevant Act and rules involving this matter. Further as per the statute the authority has no discretion but to follow the rules provided for imposing penalty on proof of certain facts as happened in this case. The first appellate authority has clearly dealt all the points raised by the dealer and assigned reasons for coming to its (first appellate authority) conclusion. Under such circumstances the order passed by the first appellate authority should not be interfered with in any manner.

6. In the present case as revealed from the submission and counter submission advanced on behalf of the parties respectively it could be gathered that the issue raised by the dealer-assessee is with regard to reversal of ITC to the extent of the amount spent on purchases of spares and accessories during the relevant period.

However, on perusal of the order of the first appellate authority it could be gathered that he has categorically explained as to why he rejected the claim of ITC by the dealer on this score. As revealed from his order goods worth `57,52,552.00 were purchased admittedly from the registered dealers on payment of VAT and all such goods were given as gifts to the customers who had purchased vehicles. In course of hearing before the first appellate authority it was submitted by the Advocate for the dealer that value of those gift items was realized within the sale price of the vehicles but no evidence could be adduced before him towards realization of the value of gift items in sale transactions of the vehicles. Thus, he concluded that even though the dealer claimed to have given those goods as gift the same could not be termed as gifts if their value was realized. This is precisely the bone of contention in this appeal. The dealer had admitted to have purchased taxable goods worth `77,81,013.42 on payment of VAT and out of this the dealer had gifted goods to the customers worth `57,52,552.00 but it could not prove with sufficient evidence regarding the nature of transaction of those goods in its business for which the first appellate authority did not accept his explanation and then held that as per Sec. 20(3) of the OVAT Act when the goods were neither sold nor the sale is subject to '0' rated sales and further the goods were not transferred to outside the State the ITC

thereon is not admissible. Accordingly the ITC calculated at the rate of 12.5% on `57,52,552.00 amounting to `7,19,069.00 was reversed.

On a bare perusal of the impugned order it could be gathered that learned first appellate authority had mentioned everything to the point regarding the opening balance of ITC as on 01.04.2005; the ITC accrued during the period 01.04.2005 to 28.02.2007; the ITC carried forwarded to 03/07; the balance ITC available and then further availing of ITC by the dealer which was reversed in appeal and thus adjusted the net balance ITC against the output tax.

7. So far as imposition of penalty is concerned since Sec. 42(5) of the OVAT Act provides that the penalty shall be twice the amount of tax due we find no reason to come to any other conclusion in this regard.

8. In the instant case the first appellate authority after proper calculation determined the GTO of the dealer at `42,73,82,927.98 and allowed deduction of `7,68,742.34 towards exempted sales being sales to UNICEF and thus determined the TTO at `42,66,14,184.94 and after due calculation and adjustment of tax determined the net balance due at `6,89,694.35 and then after imposing penalty calculated the total demand which came to `20,69,083.00. We do not find any infirmity or

irregularity in the aforesaid findings of the first appellate authority in the facts and circumstances of the case.

9. In the result, as per the discussion made in the foregoing paragraphs we confirm the order passed by the first appellate authority. Accordingly the second appeal preferred by the dealer-appellant is dismissed. Cross-objection is 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