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. 304(V) of 2017-18
(Arising out of the order of the learned JCST, Balasore Range, Balasore, in First Appeal Case No. AA-28/MB-2016-17(VAT), disposed of on dtd.10.10.2017)

M/s. Maa Ambika Enterprises,
At:- Kusumi, P.O.- Suliapada,
Dist.- Mayurbhanj. ... Appellant

- V e r s u s -

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

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

Date of hearing: 06.01.2020 ******** Date of order: 29.01.2020

O R D E R

This appeal is directed against the order dtd.10.10.2017 passed by the learned Joint Commissioner of Sales Tax, Balasore Range, Balasore (hereinafter referred to as, the learned JCST) in First Appeal Case No. AA-28/MB-2016-17(VAT), wherein he confirmed the assessment made by the learned Deputy Commissioner of Sales Tax, Mayurbhanj Circle, Baripada (hereinafter referred to as, the learned DCST) 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 appellant-dealer is a proprietorship concern dealing in agricultural, forestry and

horticultural machinery, cement, chemical fertilizers, pesticides, iron bars and rods on retail sale basis. On the basis of the Audit Visit Report (in short, the AVR) submitted by the Assessment Unit, Rairangpur, the appellant-dealer appeared and produced the books of account relating to purchase and sale register and invoices and details of purchase statement. On verification it was found that the appellant-dealer had disclosed gross purchase at Rs.1,03,44,820.00 and availed ITC of Rs.8,07,754.00. As per the pre-audit the appellant-dealer had availed ITC of Rs.1,00,386.00 for the year 2013-14 and Rs.57,944.00 for the year 2014-15 against fake TIN. The appellant-dealer had disclosed gross purchases at Rs.1,03,44,820.00 and gross sales at Rs.1,06,28,568.00, input tax was claimed at Rs.8,07,754.00 and output tax was disclosed at Rs.8,15,668.00. Accordingly, the GTO was determined at Rs.1,06,62,098.00. Tax @ 5% on Rs.8,70,940.00 came to the tune of Rs.43,547.00 and tax @ 13.5% on Rs.57,19,410.00 came to Rs.7,72,121.00. The total tax came to Rs.8,15,668.00. The appellant-dealer had paid an amount of Rs.7,916.00 at the time of filing of returns and an amount of Rs.6,49,424.00 was allowed towards ITC on purchase from registered dealers of inside the State of Odisha. So, the balance tax came to Rs.1,58,328.00 with penalty of Rs.3,16,646.00 thus the total came to Rs.4,74,984.00 which the appellant-dealer was required to pay. Being aggrieved by the order of the learned DCST, the appellant-dealer had preferred an appeal before the learned JCST. The learned JCST without interfering with the order of the learned DCST just confirmed the order of the assessment.

3. Being dissatisfied with the order of the learned JCST, the appellant-dealer has preferred this appeal before this forum with a prayer to quash the order of the learned JCST.

4. As the appellant-dealer did not appear the matter was heard from the side of the State-respondent but on merit. Perused the

orders of both the fora below so also the materials available on record. I also perused the grounds taken in the appeal so also the submissions made in the cross objection.

5. As per the OVAT Act a dealer on sale or purchase of goods has to file monthly/quarterly returns in form VAT-201. In form VAT-201 in Annexure-2 Col.57 is appended where a selling dealer has 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 ITC in accordance with Sec.20(3) read with 95 of the OVAT Act. Grant of ITC is subject to conditions and restrictions. In the present case the appellant has not disclosed the sales to the respondent by showing the transactions in Annexure appended to Sl. No.57 of VAT-201 return and has not paid the tax. Therefore, ITC cannot be availed by the appellant. The appellant has failed to discharge the burden of proof as required u/s. 95 (h) & (i)) of the OVAT Act. The appellant has also not furnished sufficient documentary evidence to substantiate the claim. Therefore, the current finding of both the fora below need not be interfered. The claim of ITC to be set off can only be allowed from the output tax discharged by the selling dealer under OVAT Act. 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 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 be set off is created by the taxing statute and the terms on which set off is granted must be strictly observed. The transaction between seller and purchaser is contractual in nature for sale and purchase of goods. In case of any 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 appellant failing which it will amount to unjust enrichment on the part of the appellant and unreasonableness in application of law. It is found from the VATIS that the dealer had purchased goods from registered dealer but has not disclosed the entire transactions in his returns and the same amounts to suppression of purchase and sales. The ingredients of Sec.42(1) is squarely attracted in the present case as the appellant has claimed erroneous deduction thereby affecting the tax liability. Therefore, levy of penalty is legal and is in accordance with law. In view of such discussion it is not necessary to interfere with the impugned order. It is also established from the orders of both the fora below that ITC of Rs.1,00,386.00 for the year 2013-14 and Rs.57,944.00 for the year 2014-15 are against fake TIN and the appellant-dealer has failed to produce any documentary evidence or proof regarding the transaction of the same.

6. In the net result, the appeal is dismissed and the impugned order is hereby confirmed. The cross objection is disposed of accordingly.

Dictated & corrected by me,

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

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