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. 323(V) of 2017-18

(Arising out of the order of the learned JCST, Jajpur Range, Jajpur Road, in First Appeal Case No. AA 671 KJB 16-17, disposed of on dtd.24.07.2017)

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

- V e r s u s -

M/s. Jagadamba Motor, Keonjhar. ... Respondent

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

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.24.07.2017 passed by the learned Joint Commissioner of Sales Tax, Jajpur Range, Jajpur Road (hereinafter referred to as, the learned JCST) in First Appeal Case No. AA 671 KJB 16-17, wherein he set aside the first appeal by remanding the matter to the learned Sales Tax Officer, Barbil Circle, Barbil (hereinafter referred to as, the learned STO) in an assessment u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) for reconsideration of the claim of ITC of the respondent-dealer taking into account the transactions made by him as per the tax evasion report for the assessment period from 01.04.2013 to 31.03.2015.

2. The brief facts of the case are that, the respondent-dealer carried on business in automobile parts and accessories. On the basis of Audit Visit Report (in short, the AVR) with the allegation of mismatch of ITC, the dealer was subjected to assessment u/s.42 of the OVAT Act covering the tax period from 01.04.2013 to 31.03.2015. On being noticed, the respondent-dealer appeared and produced the sale and purchase statement and invoices for verification. On verification, it was found that calculation of tax @ 5% and 13% on TTO determined was arrived at Rs.3,134.00 and Rs.24,05,538.00 for collection of output tax. The differential tax of Rs.50,592.00 was required to be paid by the respondent-dealer. Though the respondent-dealer had already paid Rs.54,695.00 during the period under assessment, he was liable to refund of Rs.4,103.00. The learned STO disallowed the claim of the ITC of Rs.64,860.00. After deducting of Rs.4,103.00, the respondent-dealer was required to pay the balance of Rs.60,757.00 along with penalty u/s.42(5) of the OVAT Act thus together amounting to Rs.1,21,514.00.

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 examined the veracity of the tax invoices produced by the respondent-dealer. As such, the learned JCST set aside the order of the learned STO with a direction to re-examine the veracity of the transactions effected by the respondent-dealer in strict adherence to Sec.20 of the OVAT Act and not exclusively on the basis of mismatch report as available on VATIS.

4. Being dissatisfied with the order of the learned JCST, the Revenue as appellant has come up with this second 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 in the second appeal are as follows:-

(i) The order of the 1st appellate authority appears to be unjust and improper.

(ii) The learned STO has rightly disallowed the ITC mismatch as it is a cardinal principle that burden of proof lies with the assessee for filing of return and availaing ITC and to ensure that the tax collected from it 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 Ginning vrs. State of Maharastra, the Hon'ble Court held that "set off" ITC is to be allowed only if tax is actually paid by selling dealer to the Govt. Treasury. Reduction 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 deposits. Allowing remission of revenue under the circumstances is not just and proper. So in this case the inference drawn by the 1st appellate authority is fallacious in nature.

5. No cross objection has been filed in this case by the respondent-dealer. Due to non-appearance of the respondent-dealer the appeal was heard exparte but on merit.

6. The dealer on sale or purchase of goods has to file monthly/quarterly returns in form VAT-201. In the said form two annexures are appended in Col.57 in which the selling dealer has to mention the details of sales effected to registered dealers. If such sales are reflected in the returns and the consequent tax is paid then only the purchasing dealer can claim and avail the claimed tax paid by the selling dealer as its ITC in accordance with Sec.20(3) read with Sec. 95 of the OVAT Act. It is seen that the ITC has been allowed erroneously in first appeal which is not in accordance with law in the facts and circumstances of the case. Grant of ITC is subject to

conditions and restrictions. The selling dealer 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. Hence 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 any documentary evidence such as bank statement etc. to substantiate the claim. 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. Thus, 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 set off is created by the taxing statute and the terms on which a set off is allowed must be strictly observed.

7. It is to be noted that the transaction between the 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 under civil law. The onus for claim of ITC is on the dealer purchaser 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-dealer and unreasonableness in application of law. The ingredients of Sec.42(1) is squarely attracted in the present case as the respondent-dealer has

claimed erroneous deduction thereby affecting tax liability. The levy of penalty is also mandatory u/s.42(5) of the OVAT Act. Hence, it is required to restore the demand of tax along with penalty. Hence the order of the learned JCST needs to be set aside by restoring the order of assessment.

8. In the result, the appeal is allowed and the impugned order is set aside. Accordingly, the order of assessment is hereby confirmed.

Dictated & corrected by me,

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

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