HIGH COURT OF ORISSA: CUTTACK

W.P.(C) No.19508 of 2008

In the matter of applications under Articles 226 and 227 of the Constitution of India.

M/s Gupta Cables Private Ltd. ..... Petitioner
(Now Gupta Power Infrastructure Ltd.)

-Versus-

Assistant Commissioner of Sales Tax,
Puri Range, Bhubaneswar & another ..... Opp.Parties

For Petitioner : M/s S.Mohanty,R.K.Swain& P.K.Mudali.

For Opp. Parties : Mr.S.K.Patnaik, Standing Counsel,Revenue.

P R E S E N T:

THE HON'BLE MR.JUSTICE B.P.DAS
A N D
THE HON'BLE MR.JUSTICE INDRAJIT MAHANTY

Date of hearing: 27.8.2009 Date of Judgment: 2.9.2009

I.Mahanty, J. M/s Gupta Cables Private Limited(now known as Gupta Power Infrastructure Limited) a company registered under the Companies Act, 1956 is the petitioner in the present writ petition in which it has made prayer seeking quashing of the order dated 9.3.2009 (Annexure-8) passed by the Assistant Commissioner of Commercial Taxes,

Bhubaneswar Range, Bhubaneswar under Section 57(3) of the Orissa Value Added Tax Act, 2004(hereinafter referred to as "OVAT Act,2004"), rejecting the refund application of the petitioner dated 29.4.2009 and further seeking a direction to the Assistant Commissioner of Sales Tax Puri Range, Bhubaneswar to refund Rs. 6,56,77,059.97paise as unadjusted input tax credit under Section 58(4) of the OVAT Act, 2004 read with Rule 66 of the Orisisa Value Added Tax Rules, 2005(hereinafter referred to as "OVAT Rules,2005").

2. Sri Sanjit Mohanty, learned Senior Counsel appearing for the petitioner submitted that the petitioner was assessed for the assessment period 1.4.2005 to 31.3.2006 vide assessment order dated 10.7.2007(Annexure-1), in terms of which the Assessing Officer came to determine tax and penalty of Rs.1,21,96,698.12 and after adjusting the said demand against the input tax credit (in short "ITC") of Rs.7,81,73,758.09 came to hold that the balance amount of input tax credit of Rs.6,56,77,059.97 was directed to be carried forward to the next period. The petitioner further submitted that in terms of Section 58(4) of the OVAT Act, it was assessed to excess input tax credit for the assessment year 2005-2006 and since such input tax credit remained un-adjusted even after a period of twenty four months from the close of the year to which the tax period, for which the return showing the excess input tax credit relates, the petitioner may opt to claim for refund of the amount of such excess credit which remain unadjusted. It is further submitted that in terms of Rule 66 of the OVAT Rules, 2005 the petitioner made an application in form VAT-324 to the Assessing Authority within one month from the date of expiry of the period of twenty four months from the close of the year to which the tax period relates. It is therefore submitted that since the claim for refund related to the period 1.4.2005 to 31.3.2006, since the excess input tax credit determined for the said year was not adjusted during the subsequent twenty four months therefore,

the petitioner made an application on 29.4.2008(Annexure-2) in form VAT-324 opting for claiming refund of unadjusted input tax credit for the period 2005-2006.

3. Mr. Mohanty further submitted that although in the assessment order under Annexure-1 a sum of Rs.6,56,059.97 had been determined to be excess input tax credit for the said year, yet, since the Assessing Officer had refused to give credit to the petitioner input tax credit for an amounting of Rs.17,69,021.21 towards the tax paid by the petitioner on purchase of furnace oil, grease, adhesive, bitumen paper, cotton waste and spare parts, challenging the same, the petitioner had preferred an appeal before the Commissioner of Commercial Taxes, Orissa. This was registered as Appeal Case No. AA -12/ACST/Puri/2007-2008 and remained pending as on date of making necessary refund application under Annexure-2. While the refund application of the petitioner was not duly processed, in spite of reminders dated 5.9.2008 and 11.12.2008, the first appeal of the petitioner as referred herein above came to be allowed by the Commissioner of Commercial Taxes vide his order dated 31.12.2008(Annexure-5) wherein, the appellate authority declared that the appellant was entitled to its claim for input tax credit of the tax paid by them on the purchase of furnace oil, as has been decided by the Hon,ble High Court of Orissa in W.P.(C) No. 11333 of 2006 in the case of Reliance Industries Limited decided on 15.5.2008. It was further held in the said appeal that in case of other goods like Grease, Adhesive, Bitumen Paper, Polythene, Cotton Waste and Spare parts are concerned, the Assessing Officer has simply disallowed the input tax credit without ascribing any reason, the Assessing Officer was directed to go through the actual process of manufacture and decide the claim of input tax credit in accordance with the judgment of the Hon'ble High Court in the case of Reliance Industries Ltd (Supra). Accordingly, the order of assessment was

set-aside and direction was issued to make re-assessment in terms of the observations indicated in the first appellate order.

4. It is only after the disposal of the petitioner's first appeal, vide order dated 31.12.2008, that a show cause notice under Sec. 53(3) of the OVAT Act, 2004 was issued to the petitioner calling upon the petitioner to show case under Annexure-6 (noting therein that since the assessment order for the period 2005-2006 (which is the basis of refund application) had been set aside in the first appeal with a direction to the Assessing Officer to re-do the assessment) the application for refund could not be entertained at such stage. Therefore, the petitioner was called upon to show cause as to why its application for refund shall not be rejected under Section 57(3) of the OVAT Act, 2004. The petitioner responded to the aforesaid show cause notice under letter dated 2.2.2009(Annexure-7). The Assistant Commissioner considered the explanation submitted by the petitioner under Annexure-7, and came to a conclusion that, since the original assessment for the year 2005-2006 had been set aside in appeal and no re-assessment had been made, till then no claim for refund could be entertained and accordingly, rejected the petitioner's application for refund.

5. In the light of the aforesaid factual matrix, learned counsel for the petitioner vehemently argued that the order of rejection of refund application is wholly illegal, arbitrary, without jurisdiction, contrary to the law and completely mala fide. The petitioner submits that its application for refund was made under Section 58(4) of the OVAT Act, 2004 and Rule 66 of the OVAT Rules, 2005. He further submits that Section 58 of the OVAT Act, 2004 has been specifically enacted by the legislature for the purpose of refund of tax "under special circumstances". In terms of Sub-section 4 of Section 58 of the OVAT Act,2004 since the petitioner had been found to have excess input tax credit during the assessment year 2005-2006 and further since such excess input tax credit was

determined, through an assessment order and also remained unadjusted even after a period of twenty four months from the close of the year to which the tax period for which the return showing the excess input tax credit relates, this unadjusted input tax credit, which the petitioner submitted its option to claim for refund and made necessary application in form VAT-324.

5.1 It is submitted that such an application for refund tax under "special circumstances" cannot be denied by resorting to Sub-section 3 of Section 57 of the OVAT Act, 2004. It is submitted that Section 57 which also deals with a claim for refund of tax, interest or penalty paid by such dealer has no application to the application for refund sought for by the peetitioner. The present case is not a case covered under Sub-section 1 of Section 57 of the OVAT Act. It is further asserted that Sub-section 2 of Section 57 stipulates that where a claim for refund is made on the basis of return furnished by an assessee the Revenue have a right to provisionally adjust such refund claim against any tax due or tax payable by the assessee for any subsequent period. The first proviso thereof stipulates that excess input tax credit shall not be carried forward beyond a period of twenty four months from the close of the year to which the tax period is relates for adjustment against the tax due for the subsequent period or periods, except when dealer exercises "option" in writing for further carry-over. In the present case the petitioner asserts that in terms of Rule 66 of the OVAT Rules, 2005 the petitioner had exercised its option not to carry forward the excess input tax credit to any subsequent tax period and had instead sought for refund of the same. Therefore it is asserted that Sub-section 2 of Section 57 of the OVAT Act has no application to the facts of the present case.

5.2 In the light of the aforesaid contention, the petitioner asserts that an order under Sub-section 3 of Section 57 and exercise of such power in rejecting the petitioner's application for refund under Anexure-8 was not available, since clearly, the order allowing the petitioner's appeal

related to the petitioner's claim for additional input tax credit amounting to Rs.17,69,021.21 towards tax paid by the petitioner on purchase of furnace oil, grease, adhesive, bitumen paper, cotton waste and spare parts. Learned counsel for the petitioner further submitted that the appeal was limited to the aforesaid aspect and therefore, the order allowing the appeal and directing for reassessment, cannot in law be termed to be an "open remand" and instead, on reassessment the Assessing Authority in course of re-assessment could only determine, as to what extent the petitioner's claim for additional input tax credit could be allowed or not. In other words it is submitted that setting aside of the order of assessment and directing remand and re-assessment cannot be turned as an "open remand" and must be treated as "limited remand", limited only to the issue raised by the petitioner in the said appeal and the consequent determination made by the appellate authority on the specific contention raised in the said appeal.

5.3 In other words, it is submitted that, the fact that the assessee had been determined to have a balance amount of input tax credit of Rs.6,56,77,059.97 is no longer open for re-consideration. The additional claim of the petitioner for additional input tax credit for Rs.17,69,021.21 could be the only issue that the Assessing Officer could enter into and determine in course of the re-assessment. Therefore, petitioner submitted that quantification of excess input tax credit of Rs. 6,56,77,059.97 had obtained a finality and since the application for refund made by the petitioner under Annexure-2, pertains to the said amount and in no manner covering the additional input tax credit that may be determined to be available to the petitioner on completion of the re-assessment proceeding, is of no relevance at present. In the light of the aforesaid submission, learned counsel for the petitioner submitted that the order impugned under Annexure-8, rejecting the petitioner's application for refund may be quashed and direction may be issued to the authorities to effect refund of the amount applied for by the petitioner.

6. Mr. S.K.Patnaik, learned counsel appearing for the Revenue on the other hand, submitted that there is no legal error what-so-ever in the order passed by the Assistant Commissioner of Sales Tax, Puri Range, Bhubaneswar, in rejecting the application for refund made by the petitioner, since the order of assessment on the basis of which refund application has been made, has been set aside in first appeal preferred by the petitioner and the matter stands remitted back to the Assessing Officer for reassessment. Learned counsel, placed reliance on Section 57(3) of the OVAT Act and submitted that no claim for refund is entertainable unless the re-assessment as directed by the first appellate authority is concluded. A further plea was sought to be advanced by the Revenue in the counter affidavit is to the effect that, the petitioner is not entitled to refund of excess input tax credit for the year 2005-2006 since the excess input tax credit for the said year has been adjusted during the subsequent year, i.e., 2006-2007 towards output tax under OVAT and CST Act. Sri Patnaik further submitted that Section 58 of the OVAT Act provides that if the input tax credit at the end of any year remains unadjusted against the output tax of two subsequent years, then only the assessee has option to claim for refunding of the unadjusted amount. It is asserted that since input tax credit for the year 2005-2006 was adjusted during the year 2006-2007, no refund under Section 58 of the OVAT Act could be claimed. It is further submitted that on a conjoint reading of Sections 57 and 58 of the OVAT Act it would be clear that when there is a direction for re-assessment, no refund can be granted even under Section 58 of the OVAT Act. In this respect learned counsel for the Revenue presented before this Court a statement of the returns filed by the petitioner for 2006-2007 in a tabular form. Such statement has been signed by the Joint Commissioner of Commercial Taxes, Bhubaneswar Range, Bhubaneswar.

In the matter of M/s.Gupta Cables Pvt. Ltd. Vrs. ACST, Puri Range, Bhubaneswar in W.P.(C) No.19508 of 2008 before the Hon'ble High Court of Orissa.
Details of original return for the year 2006-07.

Tax period	Date of filing of return	I.T.C.(B/F)	Out put VAT	CST Adjusted	Balance ITC 3-(4+5)=6	I.T.C.	Reversed ITC	Balance ITC (6+7)8=9
1	2	3	4	5	6	7	8	9
April,06	20.5.06	74306022.11	77959.61	2867455.18	71360607.32	8355406.51	151964.54	79564099.29
May,06	21.6.06	79564049.29	263091.97	2342236.99	76958720.27	12812965.16	177052.84	89594632.65
June,06	21.7.06	89594632.65	439959.61	3228647.72	85926025.26	9581582.02	75429.66	95432177.66
July,06	21.8.06	95432177.68	2061.74	7965036.83	87465079.05	12173673.12	98504.86	99540247.37
Aug.,06	21.9.06	99540247.37	320163.14	6123307.29	93096776.88	11534823.34	691044.92	103940555.36
Sept.06	23.10.06	103940555.36	4330362.13	6257781.04	93352412.13	18370630.29	511553.42	111211489.06
Oct.,06	21.11.06	111211489.06	3563013.07	7030345.52	100618130.41	16830450.48	331237.21	117117343.06
Nov.,06	21.12.06	117117343.74	4186466.12	8019442.82	104911434.74	12796378.67	22625.48	117685187.99
Dec.,06	21.1.07	117685187.99	6787618.38	3924830.08	106972739.47	12442481.36	250149.00	119165071.87
Jan.,07	21.2.07	119165071.89	6483269.97	4568368.62	108113433.24	15335277.45	198908.14	123249802.61
Feb.,07	21..3.07	123249802.64	6486057.68	5195343.55	111568401.32	12505022.61	724513.01	123348910.98
Mar.,07	23.4.07	123348910.98	6299651.43	10170884.00	106878375.55	17149869.44	203786.92	123824458.07
Total			39239674.85	67693679.64		159888560.45	3436770.00	

Sd/-
JOINT COMMISSIONER OF COMMERCIAL TAXES,
BHUBANESWAR RANGE, BHUBANESWAR

7. Sri Patnaik placing reliance on the aforesaid statement stated that in terms of the monthly returns filed by the assessee itself, in the month of April, 2006, the assessee had shown the input tax credit brought forward from the earlier assessment year, i.e., 2005-2006. He therefore submitted that once the petitioner has brought forward the input tax credit from the earlier year and sought adjustment of the same in course of the subsequent year i.e., 2006-2007, such excess input tax credit having been adjusted, no claim for refund of the same under Section 58 of the OVAT Act, would be entertainable.

7.1 Sri Patnaik further submitted that the writ petition deserves to be dismissed for the reasons noted in the order under Annexure-8 as well as on the legal grounds raised in the counter affidavit filed by the Revenue.

8. Sri Mohanty, learned Senior Counsel for the petitioner stated in response to the assertion made by the Revenue that the petitioner had already sought adjustment of the excess input tax credit for the

assessment year 2005-2006 during the subsequent assessment year 2006-2007, is wholly erroneous and baseless. Learned counsel placed reliance on Annexure-B to the counter affidavit of the petitioner which was the assessment order for the assessment year 2006-2007. In particular he drew the attention of the Court to the conclusion, reached by the Assessing Officer, that the tax for 2006-2007 was determined to Rs.4,10,69,342.00 where as the input tax credit availed to the petitioner during the said year, i.e., 2006-2007 was Rs.15,91,03,885.51. From the aforesaid availed input tax credit during the said year of assessment, i.e., 2006-2007, an amount of Rs.4,10,69,342.00 was deducted as "output tax" and a further amount of Rs.5,82,09,363.25 was deducted as "CST" and a further amount of Rs.34,90,753.28 was deducted towards "reverse credit" and once again excess input tax credit for the assessment year 2006-2007 was determined to be Rs.5,63,34,436.98.

8.1 Sri Mohanty submitted that since during 2006-2007 the petitioner also had excess input tax credit available during very same year, no question of seeking adjustment of excess input tax credit was available to the petitioner for the earlier year i.e., 2005-2006 could nor does arise. Further learned counsel submitted that for the assessment year 2006-2007 the excess input tax credit determined as noted herein above, was also not adjusted in the subsequent two accounting years, i.e., 2007-2008 and 2008-2009 and consequently thereto the petitioner had sought for refund of the said excess input tax credit under Section 58(4) and Rule 66 of the OVAT Act & Rules respectively. Most importantly the said application for refund for the year 2006-2007 was allowed vide order dated 2.6.2009 passed by the Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar under Annexure-10 to the rejoinder affidavit. In terms of the said order while the petitioner had been found to have excess input tax credit at the end of March, 2007 of an amount of Rs.5,63,34,436.98 after adjusting a demand of Rs.16,79,945.00 as due for the assessment year 2006-2007 (by virtue of rectification order

No.1730 dated 2.6.2009) refund was granted for an amount of Rs.5,46,54,492.00 in form VAT-319 and Rs.16,17,945.00 was refunded by way of refund adjustment voucher in form VAT-318 to square up the demand payable by the dealer. Learned counsel for the petitioner therefore submitted that the excess input tax credit for the year 2005-2006, refund of which was rejected vide impugned order under Annexure-8, yet the self-same officer has allowed the refund of excess unadjusted input tax credit for the subsequent year 2006-2007 and hence, there can be no justifiable ground for denying refund to the petitioner for an earlier period, i.e., 2005-2006 for which there is no demand pending against the petitioner. Apart from the above, the petitioner's counsel drew our attention to the impugned order Annexure-8 and in particular to the following observation:-

> ".....The refund application was sent to the CCT Orissa for withholding of refund vide this Office letter No.421/CT dated 6/9/08 on the ground that the dealer has preferred 1st appeal before the Additional Commissioner of Sale Tax (Revenue) u/s. 60(1) of the OVAT Act. The CCT, Orissa, vide letter No.19190/CT, dated 10/12/08 returned the proposal with an observation to dispose of the application after necessary enquiry".

9. Relying on the above, learned counsel for the petitioner submitted that since the Commissioner had returned the proposal made by the Assistant Commissioner for withholding the refund and had further directed the authorities to dispose of the application after necessary enquiry. Since the Commissioner had refused to exercise the power under the OVAT Act, it was no longer possible nor permissible for the Assistant Commissioner to effectively seek to withhold the refund by resorting to the purported power or the authority vested under Section 53 of the OVAT Act and which has no application to the fact of the present case/situation.

10. Sri Mohanty submitted that the submission made by the learned counsel appearing for the Revenue by relying on the tabular statement submitted in the Court (extracted herein above) is wholly erroneous. He further submitted that the prayer of the petitioner to quash Annexure-8 and to direct the authorities concerned to effect the refund, is within the competence of the High Court and in this respect he placed reliance on the judgment of the Hon'ble Supreme Court in the case of **The Comptroller and Auditor General of India, Gian Prakash, New Delhi and another v. K.S.Jagannathan and another,** reported in AIR 1987 SC 537 and in particular para-20 thereof which is extracted herein below:-

> "There is thus no doubt that the High Courts in India exercising their jurisdiction under Article226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has filed to exercise or has wrongly exercise the discretion conferred upon it by a statute or a rule or a policy decision or the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

11. Learned counsel for the petitioner also placed reliance on a recent judgment of the Hon'ble Supreme Court in the case of **Destruction of Public and Private Properties v. State of A.P. and Ors,** reported in

JT 2009(6) SC 1, where in the Apex Court reiterated the principle applied in the case of the Comptroller and Auditor General of India, Gian Prakash, New Delhi and another (supra) and further enunciated the said principle in para-28 of the said judgment which is extracted herein below:-

> "The principle enunciated in the above case was approved and followed in **King v. Revising Barrister for the Borough of Hanley**. In **Hochtief Gammon** case this Court pointed out (at p. 675 of Reports: SCC p. 656) that the powers of the courts in relation to the orders of the government or an officer of the government who has been conferred any power under any statute, which apparently confer on them absolute discretionary powers, are not confined to cases where such power is exercised or refused to be exercised on irrelevant considerations or on erroneous ground or mala fide, and in such a case a party would be entitled to move the High Court for a writ of mandamus. In **Padfield v. Minister of Agriculture, Fisheries and Food**, the House of Lords held that where Parliament had conferred a discretion on the Minister of Agriculture, Fisheries and Food to appoint a committee of investigation so that it could be used to promote the policy and objects of the Agricultural Marketing Act, 1958, which were to be determined by the construction of the Act which was a matter of law for the court and though there might be reasons which would justify the Minister in refusing to refer a complaint to a committee of investigation, the Minister's discretion was not unlimited and if it appeared that the effect of his refusal to appoint a committee of investigation was to frustrate the policy of the Act, the court was entitled to interfere by an order of mandamus. In Halsbury's Laws of England, 4th Edn., vol.I, Para 89, it is stated that the purpose of an order of mandamus:
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> "is to remedy defect of justice; and accordingly it will issue, to the end that justice maybe done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."
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> 20. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass

> orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised, the discretion conferred upon it by a statute or a rule or a policy decision of the government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy of implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice preventing to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

11.1 Sri Mohanty learned counsel for the petitioner submitted that the ordered under Annexure-8 deserves to be quashed and a further direction be issued for effecting refund to the petitioner along with interest thereon.

12. In the light of the submission advanced by the learned counsel for both the parties it would be most relevant to take note of Sections 57 & 58(4) of the OVAT Act, 2004 and Rule 64, 65(4) and 66 of the OVAT Rules, 2005 and the same are quoted below :-

> "**Section 57**.**Refund**-(1) Subject to other provisions of this Act and the rules, the assessing authority shall refund to a dealer, within a period of sixty days of the date of receipt of such order giving rise to such refund, the amount of tax, including interest or penalty of both, if any, paid by such dealer in excess of the amount due from him, through refund adjustment or through refund voucher:

Provided that the assessing authority shall first adjust such excess amount towards the recovery of any amount due in respect of which a notice under Sub-section(4) of Section 50 has been issued , or any amount due for any period covered by a return but not paid and, thereafter, refund only the balance, if any.

(2) Where any refund is due to any dealer according to return furnished by him for any period, such refund may provisionally be adjusted by him against the tax due or tax payable, as per the returns filed under Section 33, for any subsequent period:

Provided that the excess input tax credit for any period shall not be carried forward beyond a period of twenty four months from the close of the year to which that tax period relates for adjustment against the tax due for subsequent period or periods, except when the dealer exercises option in writing for further carry over.

Provided further that the amount of tax, including interest of penalty or both if any, due from, and payable by, the dealer on the date of such adjustment shall first be deducted from the amount of such refund before adjustment.

(3) No claim for refund of any tax, including interest or penalty or both, if any, paid for any tax period or periods under this Act shall be allowed in any case where there is an order for reassessment for such period until such reassessment is completed.

Section 58. Refund tax under special circumstances:

xx xx xx xx

(4) (a) Where any excess input tax credit for a tax period is carried forward for adjustment against the tax due for subsequent tax period or periods and such credit or part thereof remains unadjusted even after a period of twenty four months from the close of the year to which the tax period for which the return showing the excess input tax credit relates, the dealer may opt to further carry forward the credit till final adjustment or may claim refund of the amount of such excess credit remaining adjusted.

(b) Where a dealer opts for refund under Clause (a), he shall make an application to that effect to the assessing authority within such time and in such manner as may be prescribed.

(c) Any refund covered under the sub-section shall be granted in such manner and subject to such conditions and restrictions as maybe prescribed.

"Rule **64. Refund**-(1) No application is required for sanction of refund arising out of any order of appeal, revision or

rectification under the Act and such refund shall be allowed within sixty days of the date of receipt of such order.

(2) Refund sanctioned under Sub-rule (1) shall be paid, either through refund adjustment voucher or through refund payment voucher or both.

(3) The refund adjustment voucher shall be in Form VAT 318 and the refund payment voucher shall be in Form Vat 319.

(4) Refund arising out of a return furnished for any tax period subject to exceptions as specified under Rule 66, shall be carried forward for adjustment of tax due and payable in subsequent tax period or tax periods, until the expiry of a period of twenty four months, from the end of the year to which that tax period relates.

65. Refund under special circumstances:-

xx xx xx

(4) (a) The claim of refund arising out of Clause (a) of Sub-section(2) of Section 58 shall be made by application in Form VAT 323 signed and verified by an authorized officer.

(b) The grant of refund claimed under this sub-rule shall be subject to the following conditions:-

(i) the purchase should have been made from a registered dealer in the state on payment of tax supported by a retail invoice;

(ii) each retail invoice shall be in the minimum for a tax-exclusive price of Rs.1,000/-.

(iii) the claim shall be made quarterly;

(iv) the goods involved in the purchases are only for official use; and

(v) the application for refund shall be filed within a period of fourteen days from expiry of the quarter.

66. Refund of input tax credit carried forward beyond a period of twenty-four months- The claim of the refund under Clause (a) of Sub-section (4) of Section 58 shall be made in Form VAT 324 to the assessing authority of the circle or range, as the case may be, within one month from the date of expiry of the period of twenty four months from the end of the year to which the tax period relates.

Provided that where the application as referred to in this Rule is not made within the period of one month, it will be deemed that the dealer has exercised option to carry forward the excess input

tax credit for adjustment against output tax payable in such subsequent tax periods:

Provided further that an application for refund made after the period of one month may be admitted by the assessing authority if he is satisfied that the dealer had sufficient cause for not making the application within the said period."

13. On an analysis of Sections 57 & 58 of the OVAT Act, we are of the considered view that both provides for refund. Whereas Section 57 is the general clause covering refund, Section 58 has been enacted for refund of tax under "special circumstances". A person who seeks to claim for refund of "un-adjusted excess input tax credit", is required to make an application signifying his option for the same and in terms of Rule 66 such option is to be exercised within a period of one month from the date of expiry of the period of twenty four months from the end of the year to which the tax period relates. In the present case there is no dispute that the refund application relates to the assessment year 2005-2006 and petitioner has made an application for refund under Annexure-2 in form VAT-324 on 29.4.2008, i.e., within the period stipulated under the Act and Rules. Clearly the intention of the legislature in this regard is that once an assessee who has "un-adjusted excess input tax credit" and such credit is not adjusted within twenty four months from the end of the year to which the tax period relates, is required to, within one month therefrom exercise his option for either adjustment against output tax payable in subsequent periods or for refund of the same. There is no other pre-condition prescribed in the statute apart from the above for entertaining an application for refund. Clearly in the present case this requirement of law has been met by the petitioner.

14. On a reading of the Sections 57 & 58 along with Rules 64,65 and 66 of the OVAT Act,2004 and OVAT Rules,2005 respectively it would be clear that legislature mandates differential treatment for application for refund under Sections 57 & 58. Whereas for refund under Section 57 no application is required for sanction of refund

arising out of any order, appeal, revision or rectification under the Act and such refund shall be allowed within sixty days of the receipt of such order.

14.1 As far as Section 58 is concerned, an application in form VAT 324 is required to be made by an assessee and that to within the period of one month from the date of expiry of the period of twenty four months from the end of the year to which the tax period relates. Apart from the aforesaid distinction it is clear whereas under Sec.57 refund flowing there under does not contemplate the necessity for making an application for refund, since it is mandated therein, that refund shall be allowed within sixty days of receipt of such order. Section 58 deals with "special circumstance" in which an assessee has unadjusted input tax credit still available even after twenty four months from the end of the year to which tax period relates and it is only in such case, that an assessee may within one month therefrom opt either to carry forward of input tax credit for adjustment against output tax payable in subsequent tax period or to seek refund thereof. Therefore Sections 57 & 58 being distinct, we are therefore unable to accept the contentions of the Revenue that Sections 57 and 58 must be read together. We are of the considered view that both the provisions have distinctly different circumstances for application and therefore cannot be read together.

15. On a detailed reading of the impugned order, under Annexure-8 by which order the Assistant Commissioner rejected the petitioner's refund application, it is clear that the only reason described in the said order relates to the condition imposed under Section 57(3) of the OVAT Act, i.e., since the petitioner had succeeded in his appeal, the matter had been remanded back for reassessment by the Assessing Officer which was not yet done.

15.1 In this respect we are in complete agreement with the contention advanced on behalf of the petitioner and do not find any merit on the contention raised by the Revenue. It is absolutely clear from the

assessment order 2005-2006 that the petitioner had a balance amount of input tax credit of Rs.6,56,77,059.97 which was directed to be carried forward to the next period. Though an appeal was preferred by the petitioner against the assessment order under Annexure-1, the same was limited to the question of disallowance of the claim for additional input tax credit of Rs.17,69,021.21. The said claim was based on tax paid by the petitioner on account of purchase of goods like Furnace oil, Grease, Adhesive, Bitumen paper etc. The claim of the petitioner was dealt with by the appellate authority and by making various observations in the appellate order, the assessment order was set aside and direction was issued for reassessment. This direction for reassessment in our considered view has not resulted in any "open remand" but amounted to a "limited remand" and therefore the consequence of such limited remand would be limited to the extent to which the petitioner's claim for "additional input tax credit", over and above, the input tax already determined in course of the original assessment. In other words, we are of the considered view that in course of the reassessment, the Assessing Officer, in terms of the direction issued by the first appellate authority, would have to reassess the claim of the petitioner relating only to the claim for "additional input tax" of Rs.17,69,021.21 for having paid tax on purchase of Furnace oil, Grease etc. The reassessment proceeding not is being an "open remand". It would not have any impact on the amount of "excess input tax credit", already determined in course of the original assessment, i.e., Rs.6,56,77,059.97. In view of this, we are of the view that Section. 57(3) would have no application in such circumstances since the present claim of the petitioner is not dependent upon any re-determination that the Assessing Officer is required to do on remand.

16. We are further of the considered view that the additional plea raised by the Revenue, in its counter affidavit in support of its order under Annexure-8 is not at all germane nor entertainable under the settled law since it is well settled principle of law that the impugned order

must speak for itself and no additional ground can be taken in the counter affidavit where the order impugned is under challenge. So on this score itself we are of the view that the contentions raised by the Revenue in the counter affidavit itself are wholly baseless.

16.1 Even though we are of the view that the additional reasons stated in the counter affidavit can't but rest on the reasons cited in Annexure-8, even then, we are of the view that the claim made by the learned counsel for the Revenue that the excess input tax credit for 2005-2006 had been adjusted during the assessment year 2006-2007 is also wholly baseless. The tabular statement filed by the Revenue in course of hearing, noted herein above, itself clearly shows that whereas input tax credit brought forward in April, 2006(relatable to assessment year 2005-2006) is Rs.7,43,06,022.11, the amount indicated in col.3 for the subsequent months is seen, in no month during the year 2006-2007, has the input tax credit carried forward been less than the brought forward balance amount shown in April, 2006. Therefore on this ground alone it would be clear from the tabular statement itself, that, in fact there has been no adjustment of the excess ITC of the year 2005-2006 during the year 2006-2007.

16.2 A further reason as to why we cannot accept the stand of the Revenue on the score is that for the year 2006-2007 whereas VAT dues calculated to be Rs.4,10,69,342.00 yet, in the assessment order (Annexure-B) to the counter affidavit, the Assessing Officer had determined that in course of said year, i.e., 2006-2007 the petitioner was entitled to input tax credit of Rs.15,91,03,885.51 and after deducting a sum of Rs.4,10,69,342.00 towards VAT and Rs.5,82,09,363.25 towards CST as well as after adjusting Rs.34,90,743.28.00 towards reverse credit it was determined that the petitioner still had a balance amount of ITC for 2007-2008 amounting to Rs.5,63,34,436.98. Therefore, since there was never any short fall of tax paid/payable during the year 2006-2007, no

question of adjustment of excess input tax of 2005-2006 could or does arise in the fact of the present case.

17. Apart from the views expressed by us herein above in the present case, the facts emanate therefrom, clearly indicate that while the petitioner had applied for refund on 29.4.2008 yet, the said application was not processed and instead recommendation was made to with-hold the said refund application vide letter dated 6.9.2008 by the Assistant Commissioner of Sales Tax, Puri, on the ground that the dealer had preferred first appeal before the Additional Commissioner Sales Tax under Section 60(1) of the OVAT Act. This request of the Assistant Commissioner was specifically turned down by the Commissioner Commercial Tax, vide his letter dated 10.12.2008 by returning the proposal with a further direction to dispose of the application for refund after necessary enquiry. Thereafter, it appears that instead of dealing with the petitioner's refund application, the self-same authority chose to instead, dispose of the petitioner's pending appeal on 31.12.2008 under Annexure-5 and only thereafter, vide a show cause notice dated 7.1.2009, called upon the petitioner to show cause as to why his application for refund should not be rejected. The aforesaid facts are tell tale. While the petitioner's refund application was not processed even after the Assistant Commissioner's request to the Commissioner of Commercial Taxes to withhold the refund was turned down by the Commissioner on 10.12.2008 with a further direction to him to dispose of the refund application after necessary enquiry, instead of doing so, he disposed of the pending appeal on 31.12.2008 and thereafter sought to use the directions made in the said appeal, as the basis of the show cause for rejecting the refund application. This fact clearly indicates mala fide in exercise of quasi judicial authority.

18. In the light of the findings arrived by us as noted herein above and keeping in view the principle of law evolved by the Hon'ble Supreme Court in the cases of, the Comptroller and Auditor General of

India, Gian Prakash, New Delhi(supra) and another and Destruction of Public and Private Properties (supra), we allow the writ application and quash the order dated 9.3.2009(Annexure-8) rejecting the petitioner's refund application, and direct the opposite parties to effect the refund amount claimed by the petitioner under Annexure-2 within a period of two months from the date of communication of this order along with interest due to the petitioner in terms of Section 59 of the OVAT Act, 2004.

19. With the aforesaid direction and observation, the writ petition is allowed but in the circumstances without cost.

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I.Mahanty, J.

B.P.Das,J. **I agree.**

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B.P.Das,J.

ORISSA HIGH COURT, CUTTACK
2nd September, 2009 /AKD