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

S.A. No.70(V) of 17-18

(Arising out of the order of the learned JCST(Appeal), Sambalpur Range, Sambalpur First Appeal No. AA 22/BGH/VAT/2016-17, disposed of on 27.03.2017)

Present: **Shri G.C. Behera, Chairman**
Shri S.K. Rout, 2nd Judicial Member &
Shri B. Bhoi, Accounts Member-I

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

-Vrs.–

M/s. Shree Laxmi High-Tech Food Products, Brahman Tukra, Godbhaga, Kulta, Bargarh. ..... Respondent.

For the Appellant : Mr. N.K. Rout, A.S.C.(C.T.)
For the Respondent : Mr. U. Behera, Advocate

Date of Hearing : 05.01.2024 * Date of Order : 03.02.2024**

O R D E R

The State is in appeal against the order dated 27.03.2017 of the Joint Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur (hereinafter referred to as 'ld.FAA') passed in the First Appeal Case No. AA22/BGH/VAT/2016-17 reducing the demand to ₹19,905.00 as against the demand of ₹15.99,389.00 raised under Section 43 of the Odisha Value Added Tax Act, 2004

(in short, 'OVAT Act') by the Sales Tax Officer, Bargarh Circle, Bargarh (hereinafter referred to as 'ld. Assessing Authority') pertaining to the tax period from 01.04.2009 to 30.06.2012.

2. The facts of the case in nutshell are that M/s. Shree Laxmi High-Tech Food Products, Brahman Tukra, Godbhanga, Kulta, Bargarh is a Rice Mill engaged in custom milling of paddy supplied by the Odisha State Civil Supply Corporation Ltd., (OSCSC Ltd.), Odisha State Cooperative Marketing Federation (MARKFED) and National Agricultural Cooperative Marketing Federation of India Ltd., (NAFED) and handed over the rice after milling of paddy to the aforesaid agencies duly packed in gunny bags. Basing on a Fraud Case Report submitted by the DCST, Enforcement Wing, Sambalpur, the ld. Assessing Authority initiated proceedings under Section 43 of the OVAT Act and raised demand of ₹15,99,389.00 including penalty of ₹10,66,259.00. The first appeal as preferred by the dealer-assessee against the order of assessment resulted in reduction of demand to ₹ 19,905.00.

3. The State being aggrieved with the order of the first appeal approached this forum endorsing grounds of appeal stating that the ld. FAA basing on the report of the officials of the Civil Supply Department deleted the suppression being swayed by the contention of the dealer-assessee. Although there is no cross

objection filed by the dealer-respondent, Mr. U. Behera, ld. Advocate appearing for the dealer-assessee has submitted a written submission of cross objection contending that without assessing the dealer under Section 39 or 42 of the OVAT Act, the impugned assessment as made under Section 43 of the OVAT Act is ab initio void. A bare look of sub-section (1) of Section 43 goes to show that assessment under Section 43 can be made only after assessment is made under Section 39 or 42, but in the instant case, no assessment has been made under Section 39 or 42 of the OVAT Act before resorting to Section 43 of the OVAT Act and as such, the impugned assessment is null and liable to be annulled. Mr. Behera further submits that since no formal communication or acknowledgement has been issued, communicated and served by the Department on the dealer regarding self-assessment under Section 39 of the OVAT Act, the impugned assessment under Section 43 of the OVAT Act is not maintainable being without jurisdiction and without any authority of law. Mr. Behera relies on the decision of the Hon'ble High Court of Odisha in the case of ***Keshab Automobiles v. State of Odisha*** vide judgment dated 01.12.2021 in STREV No.64 of 2016 which has been confirmed by the Hon'ble Apex Court in the case of ***Deputy Commissioner of Sales Tax Vs. Rathi Steel and Power Limited*** arising out of

Special Leave to Appeal (C) No. 9912/2022. On the other hand, Mr. N.K. Rout, ld. Addl. S.C. (C.T.) who represents State has submitted a written note of submission holding that as per the power envisaged under section 77(7), the ld. FAA disposed of the appeal by order dated 27.03.2017 in appeal case No. AA 22/BGH/VAT/2016-17 and the said appellate order have attained finality under law in view of the laws enumerated under Section 77(8) of the OVAT Act, 2004. It is also submitted by the State that the protection provided under Section 98 of the OVAT Act is to avoid unjust enrichment on the part of the dealer on account of a technical defects invalidating the proceeding for determination and quantification of tax liability. It is also submitted that there has been communication of service of notice in form VAT 307 on 18.02.2016. it is therefore, held that there has been assessment made under Section 39 of the OVAT Act before initiation proceeding under Section 43 of the OVAT Act. Apart from the above, the State submits that in the instant case the State is the appellant and as such, the respondent may not be allowed to file Additional Grounds of cross objection as per Rule 102 of OVAT Rules, 2005. Also the submission of the dealer respondent regarding adducing fresh evidence as stated by the dealer respondent is unjustified as the issue of self-assessment has been

mentioned in the assessment order date 20.08.2016 and the dealer-respondent had never raised the issue regarding self-assessment under section 39 of OVAT Act, 2004 before the First Appellate Authority. Raising of such new grounds at second appeal is not justified, since it is completely new justifying the afterthought action of the assessee to avoid payment of tax. In citing the decision rendered in case of ***State of Orissa Vs. Lakhoo Varjang 1960 SCC Online Ori 110:(1961) 12 STC 162***, the State argues that the additional evidence must be limited only to the questions that were then pending before the Tribunal. In view of the above, the State pleads that the additional memo of cross objection filed by the dealer-respondent may not be taken into consideration.

4. The rival contentions are gone through. The orders of the forums below, grounds of appeal and written submissions filed by both the parties are gone through at length. Before we go into the grounds of appeal filed by the State on merit, we find it essential to look into the additional memo of cross objection filed by the dealer-respondent that speaks of the aspect of maintainability of the proceedings. Consequent upon outcome of the decision of the Hon'ble High Court of Odisha in case of ***Keshab Automobiles Vs. State of Odisha*** (supra) on 01.12.2021, the modality of

acceptance of self-assessed returns has been conceptualized in consequence of amendment to Section 39(2) of the OVAT Act introducing the concept of 'deemed' self-assessment only with effect from 1st October, 2015. It is held therein that if the self-assessment under Section 39 of the OVAT Act for the tax periods prior to 1st October,2015 are not 'accepted' either by a formal communication or an acknowledgement by the Department, then such assessment cannot be sought to be reopened under Section 43(1) of the OVAT Act and further subject to the fulfillment of other requirements of that provisions as it stood prior to 1st October, 2015. The above decision of the Hon'ble Court has been upheld by the Hon'ble Apex Court in SLP (C) No.9823-9824/2022 dated 13.7.2022.

5. Under the backdrop of the above facts, it is made clear that the additional memo of cross objection submitted before this forum became available on account of change of circumstances or law. The Tribunal has discretion to consider the question of law arising in assessment proceedings although not raised earlier. The Hon'ble High Court of Odisha in case of ***State of Orissa and Others Vs. D.K. Construction and others*** reported in (2017) 100 VST 24 (Orissa) holds that it is trite in law that question of law can be raised at any stage.

The argument of the State as to service of notice in Form VAT 307 upon the dealer before initiation of 43 proceeding is not acceptable in asmuch as that the statutory notice in form VAT 307 is issued to the dealer who has been assessed under Section 39, 40, 42 or 44 of the OVAT Act prior to taking up reassessment proceedings under Section 43 of the OVAT Act. Assumption of communication of self assessment to the dealer-assessee upon issuance of Form VAT 307 is not justified.

6. Under the above premises, it is made clear that in absence of assessment under Section 39, 40, 42 or 44 of the OVAT Act, re-assessment under Section 43 of the OVAT Act would be not sustainable in law being devoid of jurisdiction.

7. In the present case, it is revealed that the assessment framed under the OVAT Act relates to the tax period from 01.04.2009 to 30.06.2012 which entirely covers the pre-amendment period. The learned Assessing Authority is learnt to have not complied the pre-conditions as required under section 39(1) of the OVAT Act for initiation of proceedings under section 43(1) of the OVAT Act. He has reopened the assessment simply on the basis of the Fraud Case Report. There is no evidence available on record as to communication of the assessment made under Section 39 of the OVAT Act. In view of the above principles of law,

we are constraint to infer that the assessment as well as the first appeal orders made in the impugned case is not sustainable in law and as such, the same are liable to be quashed.

8. Resultantly, the appeal filed by the State is dismissed. The order of the ld.FAA is set aside. As a corollary thereof, the assessment order is hereby quashed.

Dictated & corrected by me.

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member