BEFORE THE JUDICIAL MEMBER-II:
ODISHA SALES TAX TRIBUNAL: CUTTACK.

P r e s e n t: **Shri S.K. Rout,**
2nd Judicial Member

S.A. No. 84(V) of 2018
(Arising out of the order of the learned JCCT,
Puri Range, Puri in First Appeal Case No. 106111711000014
disposed of on dtd.23.11.2017)

M/s. Shibani Food Products Pvt Ltd.,
Nayagarh Road, Rajsunakhala,
Khurdha, Odisha. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. B.P.Rout, Advocate
For the Respondent ... Mr. S.K.Pradhan, A.S.C.

Date of hearing: **15.03.2023** *** Date of order:**31.03.2023**

O R D E R

The dealer prefers this appeal challenging the order dated 23.11.2017 passed by the learned Joint Commissioner of Sales Tax, Puri Range, Puri (in short, JCST/FAA) in first appeal case No.106111711000014, thereby allowing the appeal in part and reducing the tax demand to Rs.3,73,771.00 against the order of assessment passed by the learned Deputy Commissioner of Sales Tax, Jatni Circle, Jatni (in short, DCST/AO) under Section 43 of the OVAT Act for the tax period from 01.04.2013 to 31.03.2016 raising a demand of Rs.6,93,315.00 comprising VAT of Rs.6,89,126.30, balanced tax due of Rs.2,31,104.95 and penalty of Rs.4,62,209.00.

2. The case at hand is that the dealer appellant in the instant case is a private limited company under the Companies Act, 1956 who is engaged in milling of pulses, wheat and paddy. Out of such milling, it receives dal, atta, maida, suji, rice, broken rice and bran. Apart from this milling activities, the appellant company has been doing wholesale business of sugar, dal, peas, edible oil, salt and chuda. Pursuant to tax case report No.2 /2015-16 dated 31.03.2016 and tax evasion case report No.07 dated 30.06.2016, the learned assessing officer initiated assessment proceeding under Section 43 of the OVAT Act and raised the demand as mentioned above.

3. `Against such tax demand, the dealer preferred first appeal before the learned JCST, Puri Range, Puri (FAA) who allowed the appeal in part and reduced the demand to Rs.15,50,031.00.

4. Being dis-satisfied with the order of the learned first appellate authority, the dealer has preferred the present second appeal as per the grounds stated in the grounds of appeal.

5. Cross objection in this case is filed on behalf of the State respondent.

6. The learned Counsel appearing for the dealer assessee contended that the orders passed by the learned forum below are illegal and arbitrary. No assessment u/s.39, 42 or 44 was made before initiation of proceeding u/s.43 of the OVAT Act. Since the concept of deemed assessment of the return has been introduced for the first time since 1st October, 2015, the impugned order of reassessment is liable to be quashed.

7. Per contra, the learned Standing Counsel appearing for the Revenue argued that the learned first appellate authority has disposed of the appeal basing on the provisions of law and factual position. Lastly, the learned Standing Counsel contended that the instant case is not covered by the recent judgment of the Hon'ble High

Court of Odisha decided in the case of M/s.Keshab Automobiles Vrs. State of Odisha.

8. Heard the contentions and submissions of both the parties in this regard. The sole contention of the dealer-appellant is that the assessment order is not maintainable. It was vehemently urged by the learned Counsel for the dealer-assessee that the initiation of proceeding u/s.43 of the OVAT Act was illegal and bad in law in absence of formation of independent opinion by the assessing authority as required u/s.43(1) of the Act. The escaped turnover assessment could not have been initiated u/s.43 of the OVAT Act when the dealer-assessee was not self-assessed u/s.39 of the Act. Further contention of the dealer-assessee is that the initiation of such proceeding by the assessing authority u/s.43 of the OVAT Act without complying the requirement of law and in contravention to the principles laid down by the Hon'ble High Court of Orissa in case of M/s. Keshab Automobiles v. State of Odisha (STREV No.64 of 2016 decided on 01.12.2021) is bad in law. He vehemently urged that there is nothing on record to show that the dealer-assessee was self-assessed u/s.39 of the OVAT Act after filing the return and it was communicated in writing about such self-assessment. So when the initiation of proceeding u/s.43 of the OVAT Act is bad in law, the entire proceeding becomes nullity and is liable to be dropped.

9. After a careful scrutiny of the provisions contained u/s.43 of the OVAT Act, one thing becomes clear that only after assessment of dealer u/s.39, 40, 42 or 44 for any tax period, the assessing authority, on the basis of any information in his possession, is of the opinion that the whole or any part of the turnover of the dealer in respect of such tax period or tax periods has escaped assessment, or been under assessed, or been assessed at a rate lower than the rate at which it is assessable, then giving the dealer a reasonable opportunity of hearing and after making such enquiry, assess the dealer to the best of his judgment. Similar issue also came up before the Hon'ble High Court in case of M/s. Keshab Automobiles (supra) wherein the Hon'ble Court

interpreting the provisions contained u/s.43 of the OVAT Act, in paras 13 to 16 of the judgment observed that "the dealer is to be assessed under Sections 39, 40, 42 and 44 for any tax period". The words "where after a dealer is assessed" at the beginning of Section 43(1) prior to 1st October, 2015 pre-supposes that there has to be a initial assessment which should have been formally accepted for the periods in question i.e. before 1st October, 2015 before the Department could form an opinion regarding escaped assessment or under assessment ….".

So the position prior to 1st October, 2015 is clear. Unless there was an assessment of the dealer u/s.39, 40, 42 or 44 for any tax period, the question of reopening the assessment u/s.43(1) of the OVAT Act did not arise. The Hon'ble Court in para-22 of the judgment has categorically observed that if the self-assessments u/s.39 of the OVAT Act for the tax periods prior to 01.10.2015 are not accepted either by a formal communication or an acknowledgment by the Department, then such assessment cannot be sought to be reopened u/s.43(1) of the OVAT Act. In the instant case, the impugned tax relates to pre-amended provisions of Section 43 of the OVAT Act i.e. prior to 01.10.2015. This apart the returns filed by the appellant were also not accepted either by a formal communication or an acknowledgement issued by the Department.

10. In view of the law expounded by the Hon'ble High Court in case of M/s. Keshab Automobiles (supra) and subsequently confirmed by the Hon'ble Apex Court, the proceeding u/s.43 of the OVAT Act has been initiated by the assessing authority without complying with the requirement of law and without giving any finding that the dealer-assessee was formally communicated about the acceptance of self-assessed return, the proceeding itself is not maintainable.

11. In view of the above analysis, the appeal preferred by the dealer is partly allowed. As a corollary, the order of assessment for the period from 01.04.2013 to 30.09.2015 is hereby quashed and

the order of assessment for the period from 01.10.2015 to 31.03.2016 is set aside. The case is remanded back to the learned assessing officer with a direction to recompute tax afresh for the period from 01.10.2015 to 31.03.2016 as per the observations made above within three months of receipt of this order and giving an opportunity to the dealer of being heard. Cross objection is disposed of accordingly.

Dictated & corrected by me,

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

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