

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

S.A. No.127(V) of 2014-15

(Arising out of the order of the learned JCST, Bhubaneswar
Range, Bhubaneswar in First Appeal Case No. AA
106111211000263, disposed of on 18.03.2014)

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

M/s. Yazdani International Pvt. Ltd.,
7th Floor, Fortune Tower,
Chandrasekharapur, Bhubaneswar. Appellant.

-Vrs. -

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

For the Appellant : : Mr. A.K. Mohapatra, Id. Advocate
For the Respondent : : Mr. D. Behura, S.C.(C.T.)

Date of Hearing : 25.07.2023 * Date of Order : 24.08.2023**

O R D E R

The dealer-assessee is in appeal against the order dated 18.03.2014 of the Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar (in short, 'Id. FAA') passed in First Appeal Case No. AA 106111211000263 enhancing the demand raised at assessment passed by the Sales Tax officer, Bhubaneswar-III Circle, Bhubaneswar (in short, 'Id assessing authority) under Section 43 of the OVAT Act.

2. The facts in brief of the case are that the dealer-assessee under the name and style of M/s. Yazdani International Pvt. Ltd., 7th Floor, Fortune Tower, Chandrasekharpur, Bhubaneswar is a private limited company trading in Iron & Manganese Ores inside and outside the Odisha and it also exports outside the territory of India. The dealer-assessee was assessed under Section 43 of the OVAT Act for the tax period from 01.04.2008 to 31.03.2010 based on adverse findings contained in the Tax Evasion Report No.36 dated 2.7.2011 submitted by the Deputy Commissioner of Commercial Taxes, Vigilance, Cuttack Division, Cuttack and raised demand of ₹1,41,12,168.00 which includes penalty of ₹94,08,112.00. The first appeal as preferred by the dealer-appellant resulted in determination of demand to the tune of ₹2,16,44,170 including penalty of ₹1,74,81,300.00.

3. On being aggrieved, the appellant-dealer preferred second appeal before this forum. From among the grounds of appeal, a substantial point of law pertaining to maintainability of initiation of proceedings under Section 43 of the OVAT Act has been agitated in the additional grounds of appeal. It is submitted by the learned Counsel of the dealer-assessee that the order of re-assessment made under Section 43 of the OVAT Act is not sustainable in the eyes of law in as much as there was no assessment made under

section 39 or 42. Further, in absence of any written communication or acknowledgement as to completion of assessment under Section 39 of the said Act, the impugned assessment under Section 43 of the OVAT Act is not maintainable being without jurisdiction and without any authority of law and accordingly, the re-assessment is void.

4. The State, on the other hand, has filed additional cross objection in addition to the cross objection filed earlier in defence of the contentions taken on additional grounds of appeal. It is submitted that the returns filed by the dealer-assessee being in order are accepted as self-assessed under Section 39(1) of the OVAT Act. It is also contended by the State that the issue of maintainability as raised in the additional grounds was neither raised nor adjudicated while disposing of the first appeal. It is also urged placing reliance upon the decision in the case of ***Lakhoo Vajarang reported in (1961) 12 STC 162*** wherein Hon'ble Apex Court specifically observes that the Tribunal may allow additional evidence subject to the questions that were pending before the Tribunal. It is also submitted that the additional grounds preferred by the tax payer is not justified since it is completely new justifying the after-thought action to avoid payment of

due tax. It is submitted that in case of ***State of Orissa vs. Lakhoo Varjang 1960 SCC On Line Ori 110 : (1961) 12 STC 162***, the following observations were made by the Hon'ble Apex Court:-

“...The tribunal may allow additional evidence to be taken, subject to the limitations prescribed in Rule 61 of the Orissa Sales Tax Rules. Bu this additional evidence must be limited only to the questions that were then pending before the Tribunal...

.....The Assistant Collector's order dealt solely with the question of penalty and did not go into the question of the liability of the assessee to be assessed because that question was never raised before him. The member, sales Tax Tribunal, should not therefore have allowed additional grounds to be taken or additional evidence to be led in respect of a matter that had been concluded between the parties even at the first appellate stage. If the aggrieved party had kept the question of assessment alive by raising it at the first appellate stage and also in the second appellate stage, the member, Sales Tax tribunal would have been justified in admitting additional evidence on the same and in relying on the aforesaid decision of the Supreme Court in Gannon Dunkerley's case, for setting aside the order of assessment. No subsequent change in case law can affect an order of assessment which has become final under the provisions of the Sales Tax Act...”

It is also contested that the additional grounds taken by the appellant may not be taken into consideration in view of Rule 102 of the OVAT Act which has prescribed for restrictions to adduce fresh evidence before this Tribunal.

5. Heard the contentions and submissions of both the parties in this regard. The order of assessment and the order of the ld. FAA coupled with the materials on record are gone through. Since the issue raised in the additional grounds of appeal involves substantial point of law of sustainability of the initiation of proceedings which strikes the root of the case, we, rather feel it pertinent to look into this substantial issue before we dwell upon concentrating on other issues on merits. The contentions taken by the State together with the case laws relied upon are of little assistance. For, this forum has discretion to consider the question of law arising in assessment proceeding although not raised earlier. The additional grounds submitted by the learned Counsel of the dealer-assessee became available on account of change of circumstances or law. The statute speaks of the base law upon which, initiation of any proceeding hinges. If a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible. Thus, the Tribunal has discretion to consider fresh grounds on law as well on facts. On the other hand, the contention made by the learned

Counsel representing the dealer assessee is substantive and thus, is acceptable.

It is apt to mention here that Section 39(2) of the OVAT Act has been amended introducing the concept of 'deemed' self assessment only with effect from 1st October, 2015. It is significant that prior to its amendment with effect from 1st October, 2015 the trigger for invoking section 43(1) of the OVAT Act required a dealer to be assessed under sections 39,40,42 and 44 for any tax period. The decision delivered by the Hon'ble of High Court of Odisha in case of ***M/s Keshab Automobiles vs. State of Odisha*** in STREV No.64 of 2016 is relevant in the present case which in Para 22 of the said decision is quoted as under:-

“From the above discussion, the picture that emerges is that if the self-assessment under Section 39 of the OVAT Act for 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 re-opened under Section 43(1) of the OVAT Act and further subject to the fulfillment of other requirements of that provision as it stood prior to 1st October, 2015.”

6. The aforesaid decision of the Hon'ble High Court of Odisha has been upheld by the Hon'ble Supreme Court of India in SLP (C) No.9823-9824/2022 dated 13.7.2022 which reads as follows:-

“We have gone through the impugned order(s) passed by the High Court. The High Court has passed the impugned

order(s) on the interpretation of the relevant provisions, more particularly Section 43 of the Odisha Value Added Tax Act, 2004, which was prevailing prior to the amendment. We are in complete agreement with the view taken by the High Court. No interference of this Court is called for in exercise of powers under Articles 136 of the Constitution of India. Hence, the Special Leave Petitions stand dismissed”

7. In the instant case, it is revealed that the assessment framed under the OVAT Act relate to the tax period from 01.04.2008 to 31.03.2010 which entirely cover the pre-amended periods. 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. The learned Assessing Authority has reopened the assessment simply on the basis of the Tax Evasion Report formally citing in the order of assessment to the effect that the self assessment under Section 39 of the OVAT Act was completed earlier by way of scrutiny of returns as there were no arithmetical errors. There is no evidence available on record as to communication of the assessment made under Section 39 of the OVAT Act to the dealer-assessee. The first appeal order is silent on requirement of assessment under Section 39 (2) of the OVAT Act prior to initiation of 43 proceeding. Accordingly, the instant proceeding framed under Section 43(1) of the OVAT Act being rendered infirmity on account of non-adherence of

the mandatory provision of section 39(2) of the OVAT Act is not sustainable in law and as such, the same is liable to be quashed. Under this eventuality, all other points raised in the grounds of appeal are rendered redundant.

8. Resultantly, the appeal stands allowed and the orders of the learned assessing authority and the ld. FAA are hereby set-aside. As a necessary corollary thereof, the assessment order is hereby quashed. The cross-objection is disposed of accordingly.

Dictated and corrected by me.

Sd/-
(Bibekananada Bhoi)
Accounts Member-II

I agree,

Sd/-
(Bibekananada Bhoi)
Accounts Member-II

Sd/-
(G.C. Behera)
Chairman

I agree,

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