BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 159 (VAT) of 2016-17

(Arising out of order of the learned Addl. CST (Appeal), South Zone, Berhampur in Appeal No. AA (VAT) 79/2014-15, disposed of on 25.05.2016)

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

M/s. Swati Marble Industries (Pvt.) Ltd.,
Plot No. 127, Sector-A, Mancheswar
Industrial Estate, Bhubaneswar ... Appellant

-Versus-

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

For the Appellant : Sri C.R. Das, Advocate
For the Respondent : Sri D. Behura, S.C. (CT)

Date of hearing : 22.02.2023 *** Date of order : 20.03.2023

O R D E R

Dealer is in appeal against dated 25.05.2016 of the Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (hereinafter called as 'First Appellate Authority') in F A No. AA (VAT) 79/2014-15 reducing the assessment order of the Deputy Commissioner of Sales Tax, Bhubaneswar III Circle, Bhubaneswar (in short, 'Assessing Authority').

2. The facts of the case in nutshell are that –

M/s. Swati Marble Industries (Pvt.) Ltd. carries on business in marbles, tiles, granites and marble structures on retail-cum-wholesale basis. The assessment period relates to 01.04.2012 to 31.05.2013. The Assessing

Authority raised tax and penalty of ₹18,56,355.00 u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') on the basis of Tax Evasion Report (TER).

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority reduced the assessment to ₹17,28,756.00 and allowed the appeal in part. Being aggrieved with the order of the First Appellate Authority, the Dealer prefers this appeal. Hence, this appeal.

The State files cross-objection against the additional grounds of appeal filed by the Dealer.

3. The learned Counsel for the Dealer submits that the orders passed by the First Appellate Authority and the Assessing Authority are otherwise illegal in law and facts involved. He further submits that without completing an assessment u/s. 39, 40, 42 or 44 of the OVAT Act, initiation of proceeding directly u/s. 43 of the said Act is not sustainable in law. Therefore, he submits that the orders of the First Appellate Authority and the Assessing Authority under the OVAT Act are liable to be set aside in the ends of justice. He relies on the decisions of the Hon'ble Court in cases of ***M/s. Keshab Automobiles v. State of Odisha*** in **STREV No. 64 of 2016** decided on 01.12.2021; ***M/s. ECMAS Resins Pvt. Ltd. and other v. State of Odisha*** in **WP(C) Nos. 7458 of 2015 & 7296 of 2013** decided on 05.08.2022; and the decision of the Hon'ble Apex Court in the case of ***National Thermal Power Company Ltd. v. Commissioner of Income-Tax***, reported in **2002-TIOL-279-SC-IT-LB.**

4. Per contra, the learned Standing Counsel (CT) for the State submits that the self-assessment of the Dealer has been accepted u/s. 39(2) of the OVAT Act. He further submits that the Dealer was aware of the acceptance of self-assessment return and did not raise the same either at the time of assessment or before the First Appellate Authority. He further

submits that if the Dealer is aware of the self-assessment and did not raise the same in its earliest opportunity, he is precluded to take such ground before the second appellate authority for the first time by way of additional grounds of appeal.

5. Having heard the rival submissions and on careful scrutiny of the record, it is a proceeding u/s. 43 of the OVAT Act. The Dealer has not taken the ground of maintainability initially and raised the same by way of additional grounds of appeal. The petition for additional grounds of appeal has already been allowed. So, the same requires no further discussion.

6. Only it is required to be seen whether the self-assessment u/s. 39 of the OVAT Act has been accepted or any other assessment u/s. 40, 42 or 44 of the OVAT Act has been completed prior to proceeding u/s. 43. It is also required to be seen whether the self-assessment has been accepted either by issuing formal communication or acknowledgment by the Department for reopening of assessment u/s. 43 of the OVAT Act.

7. The learned Standing Counsel (CT) for the State has drawn the attention of this forum to the assessment order and the first appellate order and submits that the self-assessment of the Dealer has already been accepted. He further submits that the Dealer was aware of that and so, he has not raised the same initially before the Assessing Authority and thereafter before the First Appellate Authority. He has also advanced an argument that the Dealer is precluded to raise any new ground for the first time before the second appellate authority unless the same is taken before the lower forum. He has also argued that the fact of communication or acknowledgment for acceptance of self-assessment is a point of fact and the same cannot be raised before this forum for the first time. We have already rendered our opinion on this issue, which requires no further discussion as the point of maintainability is a point of law based on facts and strikes the root of the case. This view finds support from the decision of the Hon'ble Apex Court

in the case of ***National Thermal Power Company Ltd. v. Commissioner of Income- Tax***, reported in **2002-TIOL-279-SC-IT-LB**.

8. It is apparent that reassessment u/s. 43 of the OVAT Act can only be made after the assessment is completed u/s. 39, 40, 42 or 44 of the said Act.

Hon'ble Court in the case of ***M/s. Keshab Automobiles*** cited supra have been pleased to observe in para-22 as follows :-

> "22. 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 fulfilment of other requirements of that provision as it stood prior to 1st October, 2015."

In view of the ratio laid down by the Hon'ble Court, the Department is required to communicate a formal communication or acknowledgment regarding the acceptance of the self-assessment u/s. 39 of the OVAT Act. In this case, the State has not filed any materials to show that the acceptance of the self-assessment has been communicated to the Dealer. As the proceeding u/s. 43 of the OVAT Act is not maintainable on the point of jurisdiction and the same has been decided as preliminary issue, so, it is not required to deal with other contentions raised by the Dealer before this forum on merit.

9. In view of the decision of the Hon'ble Court in case of ***M/s. Keshab Automobiles*** cited supra, the assessment proceeding u/s. 43 of the OVAT Act is without jurisdiction in absence of any assessment u/s. 39, 40, 42 or 44 of the said Act. So, the orders of the Assessing Authority and the First Appellate Authority under the OVAT Act are not sustainable in the eyes of law as the same are without jurisdiction. Hence, it is ordered.

10. Resultantly, the appeal stands allowed and the impugned order of the First Appellate Authority is set aside. The order of the Assessing Authority is hereby quashed. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

Sd/-
(G.C. Behera)
Chairman

I agree,

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

I agree,

Sd/-
(B. Bhoi)
Accounts Member-II