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

S.A. No.24(V) of 2018

(Arising out of the order of the learned Adl.CST, South Zone, Berhampur in first appeal case No.AA(VAT)-01/2017-18 dtd.30.11.2017)

Present: **Shri G. C. Behera, Chairman &**
Shri B. Bhoi, Accounts Member-II

M/s. Berhampur Cold Storage(P) Ltd,
Gandhi Nagar, 1st Lane, Berhampur,
Ganjam. ..... Appellant.

-Vrs. –

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

For the Appellant : : Mr. B.B. Panda, ld. Advocate
For the Respondent : : Mr. D. Behura, S.C.(C.T.)

Date of Hearing : 24.01.2023 * Date of Order : 23.02.2023**

O R D E R

The dealer-assessee is in appeal against the order dated 30.11.2017 of the Additional Commissioner of Sales Tax, South Zone, Berhampur (hereinafter called as 'ld. FAA') in first appeal case No. AA(VAT)-01/2017-18 confirming the order of assessment passed by the Joint Commissioner of Sales Tax, Ganjam Range, Berhampur (in short, 'ld. STO').

2. The case of the dealer-assessee, in short, is that-

M/s. Berhampur Cold Storage (P) Ltd, Gandhi Nagar, Berhampur, Ganjam carries on business in rice, paddy, potato, mahua flower,

tamarind and maize etc. on wholesale as well as retail basis. The dealer-assessee was assessed U/s.43 of the OVAT Act for the assessment period from 01.04.2005 to 31.03.2006 basing on the Tax Evasion Report submitted by the STO, Vigilance, Berhampur Division, Berhampur on 16.01.2007 raising demand of Rs.11,14,689.00 which includes penalty of Rs.7,43,126.00. Being aggrieved with the order of assessment, the dealer-assessee preferred appeal before the ld. FAA.

3. The ld. FAA disposed of the appeal reducing the demand to Rs.8,03,452.00 including penalty of Rs.5,35,634.00. Being further aggrieved with the orders of the ld.FAA, the dealer filed appeal before the Hon'ble Sales Tax Tribunal against the first appeal order. The Hon'ble Sales Tax Tribunal set-aside the case and remanded the matter for fresh adjudication. Accordingly, the ld. STO completed the re-assessment accepting the returns filed by the dealer-assessee for the tax period under appeal as self-assessed U/s.39(2) of the OVAT Act and the same was confirmed by the Ld.FAA in the first appeal .

4. The dealer-assessee being not satisfied with the above order of the Ld. FAA has again preferred appeal before this forum holding that the order of assessment passed by the ld. assessing authority U/s.43 of the OVAT Act is not just and proper. It is submitted that this case was set-aside by the Division Bench of this Tribunal in S.A. No.68(VAT) of 2008-09 dtd.02.04.2014 with direction that without completing of the assessment U/s.39 of the OVAT Act, completion of assessment U/s.43 of the OVAT Act is without jurisdiction. This aspect of the order of the Tribunal has not been rightly adjudicated.

The State files cross-objection supporting the orders of the foras below as just and proper.

5. We went through the averments of the ld. Counsel appearing on behalf of the dealer-appellant. Also, the orders of re-assessment, orders of first appeal, grounds of appeal and the materials available on record are perused.

6. The ld. assessing authority was directed to re-assess the case in consonance with the observation made in the S.A. No.168(VAT) of 2008-09 & S.A. No.33(VAT) of 2009-10 dated 02.04.2014. The observation of the Tribunal *inter-alia* reads as follows:

"Now coming to the point of disputes as agitated by the dealer-appellant, so far on the first point is concerned, it has been urged that without completing the assessment U/s.39 of the OVAT Act, completion of assessment U/s.43 of the Act is bad in law and it has also been challenged on the jurisdiction of the Sales Tax Officer to assess the appellant who is a TIN dealer when the Commissioner of Sales Tax has delegated the power to the Asst. Commissioner of Sales Tax of a Range to take up the assessment. On these point, from the orders of fora below it is not clear as to whether the dealer has already been assessed U/s. 39 of the Act or not. Further, during the material period it is to be ascertained who is eligible to assess a TIN dealer. In such a situation and in the absence of any material facts, in our considered view, the case requires to be examined afresh by the learned ACST and to take further action accordingly. Further, on the point of discrepancies in various items and determination of suppressed value the dealer

appellant alleges that neither the learned STO nor the learned ACST has properly determined the suppressed quantity as well as value of the goods. Under such a situation, we are of the view that this aspect also needs to be examined afresh by the learned ACST with reference to the books of accounts maintained by the dealer-appellant and to complete the re-assessment accordingly."

7. On perusal of the first appeal order as well as the order of re-assessment, it is brought out that the ld. Assessing authority without going into the aspect of maintainability of the case has simply averred that the connected records revealed that that dealer has filed regular returns for the tax period 01.04.2005 to 31.03.2006 U/s.38 of the OVAT Act disclosing the gross purchase turnover of Rs.7,47,00,107.78 and gross sale turnover of Rs.3,97,15,117.00. No discrepancy was noticed in the returns filed by the dealer. Hence, the self assessed returns filed by the dealer under OVAT Act for the period were accepted in terms of Sec 39(2) of the OVAT Act. The ld. FAA has also not looked into this aspect of maintainability of reopening of the assessment and confirmed the order of the ld. Assessing authority.

8. Having heard the rival submissions and on careful scrutiny of the record, 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 fulfillment 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 material to show that the acceptance of the self-assessment has been communicated to the dealer.

In view of the decision of the Hon'ble Court in ***M/s. Keshab Automobiles v. State of Odisha*** 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 ld. STO and ld. FAA are not sustainable in the eyes of law as the same are without jurisdiction. Hence it is ordered.

9. Resultantly, the appeal stands allowed and the orders of the ld. STO and 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/-
(Bibekananda Bhoi)
Accounts Member-II

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

I agree,

Sd/-
(G.C. Behera)
Chairman