BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 90 (VAT) of 2015-16

(Arising out of order of the learned JCST, Balasore Range, Balasore in First Appeal No. AA – 63/BA-2013-14 (VAT), disposed of on 21.01.2015)

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

M/s. Agro Enterprises,
Sauravi Complex, Near Bus Stand,
Sahadevkhunta, Balasore ... Appellant

-Versus-

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

For the Appellant : Sri B.P. Mohanty, Advocate
For the Respondent : Sri M.L. Agarwal, S.C. (CT)

Date of hearing : 21.11.2022 *** Date of order : 02.12.2022

O R D E R

The Dealer is in appeal against the order dated 21.01.2015 of the Joint Commissioner of Sales Tax, Balasore Range, Balasore (hereinafter called as 'First Appellate Authority') in F A No. AA – 63/BA-2013-14 (VAT) confirming the assessment order of the Sales Tax Officer, Balasore Circle, Balasore (in short, 'Assessing Authority').

2. The case of the Dealer, in short, is that –

M/s. Agro Enterprises is a distributor/wholesaler of controlled and non-controlled chemical fertilizers and pesticides. The assessment period

relates to 01.04.2011 to 31.03.2013. The STO (Vigilance) had submitted a Tax Evasion Report (TER) regarding suppression of purchase turnover at ₹2,32,73,488.00. During visit, the STO (Vigilance) recovered a diary containing various transactions of different fertilizers with different vehicles from 07.01.2012 to 09.08.2012. The Dealer has taken a plea of the provisions of fertilizers policy and nutrient based subsidy scheme and freight subsidy scheme with 80% subsidy against the sale of fertilizer by the company. The Assessing Authority recorded a finding that the manufacturer had not accounted for the sale to evade payment of sales tax.

The Assessing Authority in assessment raised tax demand of ₹34,91,022.00 u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') on the basis of TER.

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority confirmed the assessment and dismissed the appeal. Being further aggrieved with the order of the First Appellate Authority, the Dealer prefers this appeal. Hence, this appeal.

The State files cross-objection supporting the orders of the fora below to be just and proper.

3. The learned Counsel for the Dealer submits that the orders of assessment and the first appellate order are unjust and improper. He further submits that without assessing the Dealer u/s. 39, 40, 42 or 44, the impugned order of assessment passed u/s. 43 of the OVAT Act is without jurisdiction and without any authority of law and as such, the impugned demand is not maintainable or sustainable in the eyes of law. He further submits that the Assessing Authority has to form his objective opinion and cannot totally abdicate or surrender his discretion to the report of the enforcement by mechanically reopening the assessment u/s. 43 as has been done in the

present case. So, he submits that orders of the Assessing Authority and First Appellate Authority are not feasible or maintainable in the eyes of law and as such, the same are liable to be quashed in the interest of justice. He relies on the decisions of the Hon'ble Court in the case of ***M/s. Keshab Automobiles v. State of Odisha*** in **STREV No. 64 of 2016** decided on 01.12.2021 and in the case of ***Indure Ltd. v. Commissioner of Sales Tax & others***, reported in **[2006] 148 VST 61 (Orissa)**.

4. Per contra, learned Standing Counsel (CT) for the State supports the orders of the fora below and submits that the self-assessment of the Dealer has been accepted u/s. 39(2) of the OVAT Act. He further submits that there is no need of communication of acceptance of self-assessment as per the decision of the Hon'ble Orissa High Court in the case of ***Nilachal Ispat Nigam Ltd.*** in **W.P. (C) No. 22343 of 2015**. So, he submits that the orders of the fora below require no interference in appeal.

5. 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 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.

6. In view of the decision of the Hon'ble Court in ***M/s. Keshaba 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 Assessing Authority and the First Appellate Authority are not sustainable in the eyes of law as the same are without jurisdiction. Hence, it is ordered.

7. Resultantly, the appeal stands allowed and the orders of the Assessing Authority and the First Appellate Authority are hereby set aside. As a necessary corollary thereof, the assessment order is hereby quashed. The 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/-
(M. Harichandan)
Accounts Member-I