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. 159(V) of 2018
(Arising out of the order of the learned Joint Commissioner of Sales Tax (Appeal), Ganjam Range, Berhampur, in First Appeal Case No. AA-AAV.93/2013-14, disposed of on dtd.16.03.2018)

M/s. Parvati Traders,
1st Military Line, Berhampur,
Dist.- Ganjam. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. Ranjit Padhi &
Mr. R.K. Kar, Advocate
For the Respondent ... Mr. S.K. Pradhan, A.S.C.

Date of hearing: 04.09.2023 *** Date of order: 03.10.2023

O R D E R

The dealer prefers this appeal challenging the order dtd.16.03.2018 passed by the learned Joint Commissioner of Sales Tax (Appeal), Ganjam Range, Berhampur (hereinafter referred to as, JCST/first appellate authority) in First Appeal Case No. AA-AAV.93/2013-14, thereby enhancing the tax demand to ₹1,14,834.00 against the order of assessment passed by the learned Sales Tax Officer, Ganjam I Circle,

Berhampur (hereinafter referred to as, learned STO/assessing authority) u/s.43 of the Orissa Value Added Tax Act, 2004 (in short, the OVAT Act) for the tax period from 01.04.2011 to 31.01.2013 raising demand of ₹56,268.00 including penalty of ₹37,511.88 u/s.43(2) of the OVAT Act.

2. The case at hand is that, the dealer-appellant in the instant case deals in ceramic tiles and sanitary fittings. It (appellant) effects both intrastate and interstate purchases of goods for sale inside the State of Odisha on wholesale and retail sales basis. Pursuant to fraud case report bearing No.12/2012-13 assessment proceeding u/s.43 of the OVAT Act was initiated against the dealer and the demand as mentioned above was raised.

3. Against such tax demand, the dealer preferred first appeal before the learned first appellate authority who enhanced the demand to ₹1,14,834.00.

4. Further being dissatisfied 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 by the State-respondent.

6. During pendency of this appeal, the dealer-appellant raised the plea of maintainability of proceeding stating that in absence of completion of assessment u/s.39, 40, 42 or 44 of the OVAT Act for the tax period 01.04.2011 to 31.03.2013, the reassessment u/s.43 of the OVAT Act as made by the learned assessing authority for such tax period is without jurisdiction and not sustainable in law on the facts

and circumstances of the case. Furthermore, it is stated by the learned Counsel that 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 orders of reassessment are liable to be quashed for the period under challenge.

7. Per contra, learned Standing Counsel appearing for the Revenue vehemently contended that the additional grounds raised by the dealer-respondent cannot be accepted at a belated stage as the issue raised by the dealer-respondent in its additional cross objection was neither raised nor adjudicated while disposing of the appeal under the OVAT Act. Further submission raised on behalf of the learned Standing Counsel is that the pure question of law affecting the tax liability of the dealer-respondent can be raised at any stage and not question of fact or mixed question of fact and law which are not related to the tax liability can be raised. Learned Standing Counsel also cited section 98 of the OVAT Act r/w. Rule 102 of the OVAT Rules and also relied upon the decision decided in the case of ***State of Orissa v. Lakhoo Varjang 1960 SCC OnLine Ori 110: (1961) 12 STC 162*** in which 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. But 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 …"

So in view of the above judgment and as per section 98 of the OVAT Act r/w. Rule 102 of the OVAT Rules the additional ground that assessment u/s.43 of the OVAT Act without completing assessment either u/s.39, 40, 42 or 44 of the OVAT Act being bad in the eyes of law is not maintainable.

8. In case of ***M/s. National Thermal Power Co. Ltd, Vrs. Commissioner of Income Tax (1997) 7*** Supreme Court Cases 489, the Hon'ble Apex Court have been pleased to observe that :-

"The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under section 254

only to decide the grounds which arise from the order of the Commissioner of Income-Tax (Appeal). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier".

9. Similarly in case of ***Kiran Singh & Others Vrs. Chaman Paswan and Others 1954 AIR 340***, the Hon'ble Supreme Court have been pleased to observe that:

"*it is a fundamental approach well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever or wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial or whether it is in respect of subject matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties.*

10. In view of the above settled principle of law, I am of the opinion that the additional ground raised by the dealer respondent can be accepted at this stage since the same involves the question of law.

11. Heard the contentions and submissions of both the parties in this regard. The sole contention of the dealer-assessee is that the assessment orders are 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.

12. 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 an 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 dealer-assessee were also not accepted either by a formal communication or an acknowledgement issued by the Department. The similar matter has also been decided by the Full Bench of OSTT in various cases such as M/s. Swati Marbles v. State of Odisha, S.A. No.209(V) of 2013-14 (Full Bench dtd.06.06.2022), State of Odisha v. M/s. Jaiswal Plastic Tubes Ltd., S.A. No.90(V) of 2010-11 (Full Bench dtd.06.06.2022), M/s. Jalaram Tobacco Industry v. State of Odisha, S.A. No.35(V) of 2015-16 (Full Bench dtd.16.08.2022), M/s. Eastern Foods Pvt. Ltd. v. State of Odisha, S.A. No.396

(VAT) of 2015-16 (Full Bench dtd.23.08.2022) and M/s. Shree Jagannath Lamination and Frames v. State of Odisha, S.A. No.25(VAT) of 2015-16 (Full Bench dtd.15.10.2022).

13. 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. In view of the above analysis, to our view, the orders of the fora below need interference to the extent as indicated above. So in view of the above analysis and placing reliance to the verdicts of the Hon'ble Courts, I am of the view that the claim of the appellant deserves a merited acceptance.

14. By the adjudication of this issue, it should be made clear that I do not sit in any appeal of the dealer or the State on the issue of self assessment and payment made against admitted tax. So, I do not express any opinion on its merit. To my considered view, I observe that the parties are bound by the law settled by the Hon'ble High Court of Orissa decided in the case of **M/s. Shree Bharat Motors Ltd. and others vrs. Sales Tax Officer, Bhubaneswar I Circle, Bhubaneswar and others (W.P.(C) No.13736 of 2017 and batch)** decided on 15.03.2023 followed by the verdicts of the Hon'ble Apex Court in case of **Jindal Stainless Ltd. vrs. Reliance Industries**.

15. In the result, the appeal preferred by the dealer is allowed and the impugned reassessment order passed u/s.43

of the OVAT Act and the appellate order are hereby set aside to the extent of escaped assessment. I would like to observe that the finding of the Tribunal no-way affects the payment of admitted tax, if any. The payment of admitted tax shall be guided by the dictum of the Hon'ble Court rendered in the case of **M/s. Shree Bharat Motors Ltd. (supra)**. Cross objection is disposed of accordingly.

Dictated & corrected by me,

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

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