BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

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

S.A. No. 224 (VAT) of 2011-12
(Arising out of order of the learned Deputy Commissioner of Sales Tax (Appeal), Puri Range, Puri, in First Appeal Case No. AA/51/VAT/PU-I/10-11, disposed of on dated 24.09.2011)

M/s. Hotel Naren Palace,
At:- Chakratirtha Road,
Puri. ... Appellant

-Versus-

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

For the Appellant : Mr. B.R. Panda, Advocate
For the Respondent : Mr. N.K. Rout, A.S.C.

Date of hearing: 17.10.2023 *** Date of order: 15.11.2023

O R D E R

The dealer prefers this appeal challenging the order dtd.24.09.2011 passed by the learned Deputy Commissioner of Sales Tax (Appeal), Puri Range, Puri (hereinafter referred to as, DCST/first appellate authority) in First Appeal Case No. AA/51/VAT/PU-I/10-11, thereby allowing the appeal in part and reducing the tax demand to ₹10,75,122.00 against the order of assessment passed by the learned Asst.

Commissioner of Sales Tax, Puri Circle, Puri (hereinafter referred to as, learned ACST/assessing authority) u/s.43 of the Orissa Value Added Tax Act, 2004 (in short, the OVAT Act) raising demand of ₹12,87,057.00 for the tax period 20.12.2007 to 31.03.2010.

2. The case at hand is that, the dealer-appellant M/s. Hotel Naren Palace having TIN-21631120681 is a hotelier registered under the Orissa VAT Act w.e.f. 20.12.2007. The hotel consists of 22 nos. of A.C. rooms and a restaurant at the basement where food items are served to both the boarders and non-boarders. Pursuant to tax evasion report received from the ACCT, Vigilance Division, Bhubaneswar vide case report No.5/06.03.2010, assessment proceeding u/s.43 of the OVAT Act was initiated and the demand as mentioned above was raised against the dealer.

3. Against such tax demand, the dealer preferred first appeal before the learned first appellate authority who allowed the appeal in part and reduced the demand as mentioned above.

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 the course of argument, learned counsel appearing for the dealer-appellant stated that the grounds taken in the memorandum of appeal are not pressed, whereas he emphasized to adjudicate upon the additional grounds

taken by the dealer. The additional ground taken by the dealer is that in absence of any assessment u/s.39, 42 or 44 of the OVAT Act the reassessment u/s.43 of the said Act is bad in law and contrary to the statute in view of the verdict of the Hon'ble High Court of Orissa decided in the case of **M/s. Keshab Automobiles v. State of Odisha (STREV No.64 of 2016 decided on 01.12.2021)**.

7. Per contra, learned Addl. Standing Counsel appearing for the Revenue vehemently contended that the additional grounds taken by the dealer cannot be accepted at this stage. 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, we are of the unanimous view that the claim of the appellant deserves a merited acceptance.

14. In the result, the appeal preferred by the dealer is allowed and the orders of the fora below are hereby quashed. The cross objection is disposed of accordingly.

Dictated & corrected by me

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

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

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(S.R. Mishra)
Accounts Member-II