BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 177 (VAT) of 2020

(Arising out of order of the learned Joint Commissioner of CT & GST (Appeal), Sundargarh Territorial Range, Rourkela, in Appeal No. AA V 149 of 2018-19, disposed of on 30.09.2020)

Present: **Shri G.C. Behera, Chairman**

M/s. Sahoo Hardware Store,
Shop No.11, Mohapatra Complex,
Jagda, Rourkela-769042 ... Appellant

-Versus-

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

For the Appellant : Sri S.K. Mishra, Advocate
For the Respondent : Sri N.K. Rout, Addl. SC (CT)

Date of hearing : 13.02.2024 *** Date of order : 07.03.2024

O R D E R

Dealer assails the order dated 30.09.2020 of the Joint Commissioner CT & GST (Appeal), Sundargarh Territorial Range, Rourkela (hereinafter called as 'First Appellate Authority') in F.A. No. AA V 149 of 2018-19 confirming the assessment order of the Sales Tax Officer, Rourkela II Circle, Panposh (in short, 'Assessing Authority').

2. The facts of the case, in short, are that –

M/s. Sahoo Hardware Store carries on business in hardware goods, sanitary goods and paints etc. The assessment relates to the period 31.08.2012 to 25.11.2016. The Assessing Authority raised tax and penalty of ₹14.11.890.00 u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') on the basis of a Fraud Case Report (FCR).

The 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 aggrieved with the order of the First Appellate Authority, the Dealer prefers this appeal. Hence, this appeal.

The State files cross-objection.

3. Learned Counsel for the Dealer submits that the Assessing Authority was not justified in assessing the Dealer u/s. 43 of the OVAT Act for the pre-amended period, i.e. 31.08.2012 to 30.09.2015 without completing the assessment u/s. 39, 40, 42 or 44 of the OVAT Act. He further submits that in absence of acceptance of return as self-assessed by way of formal communication, the initiation of escape assessment proceeding u/s. 43 of the OVAT Act for the pre-amended period is without statutory provision and thus, not sustainable in law. He further contends that the preliminary issue should be addressed first before going to the merit of the case. He also argues that the impugned order of the First Appellate Authority is in violation of the principles of natural justice. So, he submits that the orders of the First Appellate Authority and the Assessing Authority are liable to be set aside in the ends of justice.

He relies on the decision of the Hon'ble Court in case of ***M/s. Keshab Automobiles v. State of Odisha*** (**STREV No. 64 of 2016**, decided on 01.12.2021).

4. On the contrary, the learned Addl. Standing Counsel (CT) for the State submits that the Dealer was self-assessed u/s. 39 of the OVAT Act by way of filing returns. He submits that the Dealer did not raise the issue regarding acceptance of self-assessment return either at the time of assessment or before the First Appellate Authority. He contends that if the Dealer did not raise the issue in the earliest opportunity, he is precluded to take such ground for the first time before the second appellate authority in view of Section 98 of the OVAT Act read with Rule 102 of the OVAT

Rules. He further submits that communication/acknowledgement of the order of acceptance of self-assessed return is a matter of fact and the same cannot be objected at this belated stage before this forum. He also submits that the assessment periods include the position of both pre-amendment and post-amendment periods. So, he avers that the whole proceeding cannot be quashed in the aid of the decision of the case cited supra. Therefore, he urges that the orders of the forums below require interference in appeal to that extent only.

He relies on the decisions of the Hon'ble Court in case of ***The State of Orissa v. Lakhoo Varjang***, reported in **[1961] 12 STC 162 (Orissa)**; and Hon'ble Apex Court in case of ***K. Chelliah v. P. Muthuswami Servai***, **1993 SC 1005** in Civil Appeal No. 2423/1987.

5. Heard the rival submissions and gone through the orders of the Assessing Authority and First Appellate Authority vis-a-vis the materials on record. It transpires from the record that the assessment period relates to 31.08.2012 to 25.11.2016, which includes the pre-amendment period, i.e. 31.08.2012 to 30.09.2015, and post-amendment period, i.e. 01.10.2015 to 25.11.2016 under OVAT Act.

The point of maintainability can be raised for the period 31.08.2012 to 30.09.2015, but the same cannot be raised for the rest post-amendment period, i.e. 01.10.2015 to 25.11.2016 as the same shall be deemed assessment. The State further urges that the Dealer is precluded to raise the point of maintainability even for the pre-amended period as the Dealer has not challenged the same in the earliest opportunity by taking the aid of Section 98 of the OVAT Act read with Rule 102 of the OVAT Rules. Section 98(2) of the OVAT Act provides that the service of any notice, order or communication shall not be called in question, if the notice, order or communication, as the case may be, has already been acted upon by the Dealer or person to whom it is issued, or where such service has not been called upon in question at or in the earliest proceeding commenced,

continued or finalised pursuant to such notice, order or communication. He relied on the decisions of the Hon'ble Courts in cases of ***Lakhoo Varjang and K. Chelliah*** cited supra.

It is well settled in law that a proceeding u/s. 43 of the OVAT Act cannot be initiated in absence of proceeding u/s. 39, 40, 42 or 44 or the OVAT Act. The point of maintainability of proceeding u/s. 43 of the OVAT Act in absence of any prior assessment is a question of law and touches the root of the matter, which requires preliminary adjudication, so, the same is taken up at the outset as preliminary issue.

As regards the assessment for pre-amendment period under the OVAT Act, i.e. 31.08.2012 to 30.09.2015, it is no more *res integra* that it pre-supposes that there has to be an initial assessment which should have been accepted for the period in question, i.e. before 1st October, 2015, before the Department could form an opinion regarding escaped assessment or under assessment or the Dealer taking the benefit of a lower rate or being wrongly allowed deduction from his turnover or ITC to which is not eligible. On such circumstances, in the case of ***Keshab Automobiles*** cited supra, Hon'ble Court have been pleased to observe 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 acknowledgment 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 provisions as it stood prior to 1st October, 2015."

The Department fails to produce any material regarding acceptance/acknowledgment of self-assessed return u/s. 39 of the OVAT Act or any assessment of the Dealer u/s. 40, 42 or 44 of the said Act prior to 1st October, 2015.

In view of the above principles of law, I am of the considered view that the assessment prior to 1st October, 2015 (31.08.2012 to

30.09.2015) u/s. 43 of the OVAT Act is not maintainable in law and as such, the same is liable to be quashed.

6. As regards the assessment relating to the post-amendment period, i.e. 01.10.2015 to 25.11.2016, Hon'ble Court in the above cited case have been pleased to observe categorically as follows :-

> "14. However, under Section 43(1) of the OVAT Act, after its amendment with effect from 1st October, 2015 the Assessing Authority can form an opinion about the whole or part of the turnover of the dealer escaping assessment or being under assessed "on the basis of any information in his possession". In other words, it is not necessary after 1st October, 2015 for the Assessee's initial return having to be 'accepted' before Section 43(1) could be invoked."

In view of the ratio laid down above by the Hon'ble Court, I am of the considered opinion that the assessment relating to the post-amendment period, i.e. 01.10.2015 to 25.11.2016, the escaped assessment u/s. 43(1) of the OVAT Act can be invoked and the same cannot be said to be invalid as claimed by the Dealer.

7. Now coming to the dispute relating to the assessment for the post-amendment period, it is settled law that the same requires segregation and assessment afresh. At this stage, I feel it proper to remit the matter to the Assessing Authority for segregation of the assessment for the post amendment period and compute the tax liability in accordance with law without expressing my opinion on its merit. The Dealer is at liberty to raise all the material evidences in support of its defence before the Assessing Authority.

Further adjudication on merit of the matter is redundant as nothing is left to decide after adjudication of preliminary issue on the point of maintainability. Hence, it is ordered.

8. Resultantly, the appeal under the OVAT is allowed in part. The impugned order of the First Appellate Authority under the OVAT Act is hereby set aside. The assessment under the OVAT Act for the pre-

amendment period 31.08.2012 to 30.09.2015 is hereby quashed. But, the assessment under the OVAT Act for the post amendment period, i.e. 01.10.2015 to 25.11.2016, is hereby remitted to the Assessing Authority for reassessment as per law keeping in view the observations made supra. The reassessment under the OVAT Act (post amendment period) should be completed within three months from the date of receipt of this order. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

Sd/-
(G.C. Behera)
Chairman