BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 399 (VAT) of 2015-16

(Arising out of order of the learned Addl. CST (Revenue),
in Appeal No. AA- 106101510000227/BH-II/2015-16,
disposed of on 15.02.2016)

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

M/s. Praxair India Pvt. Ltd.,
At- IOCL Refinery Project Campus,
Paradeep, Jagatsinghpur ... Appellant

-Versus-

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

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

Date of hearing : 06.02.2024 *** Date of order : 15.02.2024

O R D E R

Dealer assails the order dated 15.02.2016 of the Addl. Commissioner of Sales Tax (Revenue) (hereinafter called as 'First Appellate Authority') in F A No. AA- 106101510000227/BH-II/2015-16 confirming the assessment order of the Deputy Commissioner of Sales Tax, Jagatsinghpur Circle, Paradeep (in short, 'Assessing Authority').

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

M/s. Praxair India Pvt. Ltd. is engaged in manufacturing of industrial gases such as nitrogen, oxygen, hydrogen and argon gas for sale

and also trading in hileum, argon, carbon dioxide, nitrogen, oxygen gas in course of business. The assessment relates to the period 01.01.2014 to 30.09.2014. The Assessing Authority raised tax demand of ₹13,97,23,860.00 u/s. 43 of the Oidsha Value Added Tax Act, 2004 (in short, 'OVAT Act') on the basis of Tax Evasion Report (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 aggrieved with the order of the First Appellate Authority, the Dealer prefers this appeal. Hence, this appeal.

The State files cross-objection & additional cross-objection.

3. Learned Counsel for the Dealer files additional grounds of appeal and submits that the order of assessment passed by the Assessing Authority u/s. 43 of the OVAT Act is not maintainable in absence of any assessment u/s. 39, 40, 42 or 44 of the OVAT Act. He further submits that the acceptance of self-assessment was not communicated to the Dealer and as such, reopening the proceeding u/s. 43 of the OVAT Act is not sustainable in law. He further contends that the preliminary issue should be addressed first before going to the merit of the case. So, he submits that the orders of the Assessing Authority and the First Appellate 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) which has been affirmed by the Hon'ble Apex Court vide order dated 13.07.2022 in **SLP (Civil) No. 9912 of 2022** in case of ***Deputy Commissioner of Sales Tax v. Rathi Steel & Power and batch***; and Hon'ble Apex Court in case of ***National Thermal Power Company Limited v.***

Commissioner of Income-Tax, reported in **1996 (12) TMI 7 – Supreme Court**.

4. On the contrary, the learned Addl. Standing Counsel (CT) for the State submits that the Dealer had already self-assessed u/s. 39 of the OVAT Act for the period under appeal. He did not raise the issue before the Assessing Authority or First Appellate Authority. 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 relies on the decision of the Hon'ble Court in case of ***The State of Orissa v. Lakhoo Varjang***, reported in **[1961] 12 STC 162 (Orissa)**.

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. The Dealer raised the preliminary issue of maintainability of proceeding u/s. 43 of the OVAT Act in absence of any assessment u/s. 39, 40, 42 or 44 of the said Act.

The State relies on the decision in case of ***Lakhoo Varjang*** cited supra, wherein the Hon'ble Court were pleased to observe as follows :-

> "4. ... 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..."

On the other hand, learned Counsel for the Dealer relies on the decision of the Hon'ble Apex Court in case of ***National Thermal Power Company Limited*** cited supra, wherein the Hon'ble Apex Court have been pleased to observe that :-

> " ...Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.
>
> The refrained question, therefore, is answered in the affirmative, i.e. the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee..."

In view of the decision in case of ***Lakhoo Varjang*** cited supra, Hon'ble Court nowhere restricts the Tribunal to allow additional ground, but the same must be limited only to the questions that were then pending before the Tribunal. Similarly, in case of ***National Thermal Power Company Limited*** cited supra, the Hon'ble Apex Court categorically observed that the Tribunal has the discretion to allow new ground where the Tribunal is only required to consider a question of law arising from the facts which are on the record in the assessment proceeding. In the instant case, it is required to be answered whether a proceeding u/s. 43 of the OVAT Act can be initiated in absence of any proceeding u/s. 39, 40, 42 or 44 of the said Act or in absence of any communication of acceptance of self-assessment. The fact does not disclose that any communication of acceptance of self-assessment has been made to the Dealer and which strike the root of the case on the point of maintainability. So, keeping in view the decisions cited supra, the Dealer can take the additional ground even at this stage as the point of law.

It is settled law that a proceeding u/s. 43 of the OVAT Act is not maintainable unless any proceeding u/s. 39, 40, 42 or 44 of the said Act has been completed, self-assessment return has been accepted and communicated to the Dealer. The Dealer has taken the same before the First

Appellate Authority. It is also settled that the point of law can be taken at any stage even before this forum. Maintainability of 43 proceeding in absence of acceptance of self-assessed return is a point of law and same can be challenged in any forum. Moreover, the law is well settled when the same has been decided by the Hon'ble High Court of Orissa and affirmed by the Hon'ble Apex Court. After such settled law, the Dealer can take the same issue before this forum even for the first time without raising earlier. So, the submission of the learned Addl. Standing Counsel (CT) cannot be accepted.

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. As the proceeding u/s. 43 of the OVAT Act is not maintainable on the point of jurisdiction and the same has been decided as preliminary issue, so, it is not required to deal with other issues of the Dealer on merit.

6. In view of the decision of the Hon'ble Court in case of ***M/s. Keshab Automobiles*** 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 under the OVAT Act 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 impugned order of the First Appellate Authority is hereby set aside. The order of the Assessing Authority is quashed. Cross-objection and additional cross-objection are 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/-
(B. Bhoi)
Accounts Member-I