BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

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

S.A. No. 158(V) of 2019

(Arising out of the order of the learned Addl. Commissioner of Sales Tax (Appeal), Rourkela in 1st Appeal No. AA 29 (V) RL-II/2018-19, disposed of on dtd.18.09.2018)

M/s. Goutam Agrico,
Mandiakudar, Kansbahal,
Sundargarh. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. R.S. Das, Advocate
For the Respondent ... Mr. N.K. Rout, A.S.C.

Date of hearing: 27.02.2024 *** Date of order: 14.03.2024

O R D E R

The dealer prefers this appeal challenging the order dtd.18.09.2018 passed by the learned Addl. Commissioner of Sales Tax (Appeal), Rourkela (hereinafter referred to as, ACST/first appellate authority), thereby setting aside the impugned order of assessment passed by the learned Deputy Commissioner of Sales Tax, Rourkela II Circle, Panposh (hereinafter referred to as, learned DCST/assessing authority) u/s.43 of the Orissa Value Added Tax Act, 2004 (in short, the

OVAT Act) raising demand of ₹16,76,56,557.00 including tax of ₹5,58,85,519.00 and penalty of ₹11,17,71,038.00 for the tax period 01.04.2008 to 31.03.2011.

2. The case at hand is that, the dealer in the instant case M/s. Goutam Agrico deals in manufacturing and sale of agricultural equipments like tawa, kadai, belcha, etc. Pursuant to tax evasion report No.30/2011-12 submitted by DCCT, Vigilance, Sambalpur, learned assessing authority initiated reassessment proceeding u/s.43 of the OVAT Act and raised the demand as mentioned above.

3. Against such tax demand, the dealer preferred first appeal before the learned first appellate authority who set aside the order of assessment and remanded back the case to the learned assessing authority for reassessment.

4. 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. In the grounds of appeal, the dealer has taken the plea that the assessment proceeding made u/s.43 of the OVAT Act is illegal and arbitrary as prior to such no assessment has been made u/s.39, 40, 42 or 44 of the OVAT Act.

6. Cross objection in this case is filed by the State-respondent.

7. Learned Counsel for the dealer-appellant vehemently contended stating that prior to reassessment u/s.43 of the OVAT Act there was no assessment u/s.39, 40, 42 or 44 of the Act nor any communication was made to the dealer with regard to the completion of assessment under the

said section. Since the concept of deemed assessment of the return has been introduced for the first time since 1st October, 2015, the impugned order of reassessment is liable to be quashed for the period under challenge. The dealer relies the decision of **M/s. Keshab Automobiles v. State of Odisha (STREV No.64 of 2016 decided on 01.12.2021)**.

Per contra, learned Addl. Standing Counsel for the Revenue argued stating that on the basis of the tax evasion report, learned assessing authority reassessed the dealer u/s.43 of the OVAT Act for the tax period under challenge and the dealer had already been self-assessed u/s.39 of the OVAT Act and the assessment order is passed as per the provision of law. This apart, learned Addl. Standing Counsel for the Revenue vehemently argued stating that the dealer had not raised the issue at the time of reassessment proceeding initiated u/s.43 of the OVAT Act and as such the dealer has raised new points in course of filing of second appeal which is found to be afterthought. But on this score, noteworthy to mention that during filing of this second appeal, the dealer has taken this ground for which the contention raised by the Revenue holds not good. This plea being treated as a point of law, the same can be taken and the dealer has raised this plea by the time when such appeal was filed and it is permissible as per law.

8. Heard the contentions and submissions of both the parties in this regard. The sole contention of the dealer-assessee is that the assessment order is not maintainable. So we have to adjudicate upon the point of maintainability being treated the same as preliminary issue without delving into the

merit of the case. 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 Orissa in the case of **M/s. Keshab Automobiles v. State of Odisha** (supra) 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 proceedings becomes nullity and is liable to be dropped.

9. 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).

10. 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.

11. This apart, after have a glance to the order of the learned first appellate authority at page-27 of paragraph-20, it becomes quite evident that the learned first appellate authority has clearly opined that the assessment cannot be initiated u/s.43 of the OVAT Act without completing assessment u/s.39, 40 or 42 of the Act. This apart, it is also opined by the learned first appellate authority that in the instant case the assessment has been initiated and completed u/s.43 of the OVAT Act without completing the pre-mandatory assessment in the respective sections for which the impugned order of assessment is bad in law.

12. In view of the above analysis and placing reliance to the verdict of the Hon'ble Court, we are of the unanimous

view that the claim of the appellant deserves a merited acceptance.

13. In the result, the appeal preferred by the dealer is allowed and the orders of the fora below are hereby quashed. 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/-
(B. Bhoi)
Accounts Member-I