BEFORE THE DIVISION BENCH-I, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 152 (VAT) of 2019
&
S.A. No. 179 (VAT) of 2019

(Arising out of order of the learned Addl. CST (Appeal), North Zone, Sambalpur in Appeal No. AA 92(V)/18-19, disposed of on 30.05.2019)

Present: **Shri G.C. Behera, Chairman**
&
Shri B. Bhoi, Accounts Member-II

S.A. No. 152 (VAT) of 2019

M/s. Hariom Traders,
At/PO- Junagarh, Dist. Kalahandi ... Appellant

-Versus-

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

S.A. No. 179 (VAT) of 2019

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

-Versus-

M/s. Hariom Traders,
At/PO- Junagarh, Dist. Kalahandi ... Respondent

For the Dealer : Sri B.P. Mohanty, Advocate
For the State : Sri D. Behura, S.C. (CT)

Date of hearing : 30.01.2023 *** Date of order : 09.02.2023

O R D E R

Both the Dealer and the State have come up in appeal against the impugned order involving common question of facts and law. Therefore, they are heard analogously and disposed of by this composite order for the sake of convenience.

S.A. No. 152 (VAT) of 2019 :

2. Dealer assails the order dated 30.05.2019 of the Addl. Commissioner of Sales Tax (Appeal), North Zone, Sambalpur (hereinafter called as 'First Appellate Authority') in F A No. AA 92(V)/18-19 reducing the assessment order of the Deputy Commissioner of Sales Tax, Kalahandi Circle, Bhawanipatna (in short, 'Assessing Authority').

S.A. No. 179 (VAT) of 2019 :

3. State is also in appeal against the same order dated 30.05.2019 of the First Appellate Authority reducing the assessment order of the Assessing Authority.

4. Briefly stated, the facts of the cases are that –

M/s. Hariom Traders carries on business in selling of wall tiles, floor tiles, steps, pan, wash basin, khappar, roofing tiles and granites etc. on retail as well as wholesale basis. The period of assessment relates to 01.04.2013 to 30.06.2017. The Assessing Authority raised tax demand of ₹1,79,84,292.00 including penalty u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') basing on the Tax Evasion Report (TER).

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority reduced the tax demand to ₹86,64,104.00 and partly allowed the appeal. Being aggrieved with the order of the First Appellate Authority, both the Dealer and the State prefer these appeals. Hence, these appeals.

5. State and the Dealer file cross-objections against each other case.

6. The learned Counsel for the Dealer submits that the order of the First Appellate Authority and the Assessing Authority are otherwise bad in law and contrary to the law and facts involved. He further submits that the Assessing Authority and First Appellate Authority accepted the TER on hypothetical ground and imposed tax, interest and penalty without any basis. He has taken the maintainability of proceedings u/s. 43 of the OVAT Act in absence of the proceeding u/s. 39, 40, 42 or 44 of the OVAT Act in the additional grounds of appeal. So, he submits that the orders of the First Appellate Authority and the Assessing Authority are liable to be quashed. He relies on the decision of the Hon'ble Court in the case of ***M/s. Keshab Automobiles v. State of Odisha*** (**STREV No. 64 of 2016** decided on 01.12.2021).

7. On the contrary, learned Standing Counsel (CT) for the State submits that the Dealer had not taken the ground of maintainability of the proceeding u/s. 43 of the OVAT Act at the time of assessment nor at the time of first appeal. He further submits that a party who had not taken a ground in the assessment or in the first appeal, he cannot take the same at the stage of second appeal for the first time. He further submits that the First Appellate Authority went wrong in making estimation of suppression by considering the transaction of a single month, i.e. June, 2016. He further submits that the assessment periods include the position of both pre-amendment and post-amendment periods. So, he submits that the whole proceeding cannot be quashed in the aid of the decision of the case cited supra. So, he submits that the order of the First Appellate Authority requires interference in appeal and the order of the Assessing Authority is required to be restored.

8. Having heard the rival submissions of the parties and on going through the orders of the both the Assessing Authority and the First Appellate Authority vis-a-vis the materials on record, it transpires that the

assessment periods relate to 01.04.2013 to 30.06.2017, which includes the pre-amendment period, i.e. 01.04.2013 to 30.09.2015, and post-amendment period, i.e. 01.10.2015 to 30.06.2017.

As regards the assessment for pre-amendment period, i.e. 01.04.2013 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 ***M/s. 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, we are of the unanimous view that the assessment prior to 1st October, 2015 (01.04.2013 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.

9. As regards the assessment relating to the post-amendment period, i.e. 01.10.2015 to 30.06.2017, 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, we are of the considered view that the assessment relating to the post-amendment period, i.e. 01.10.2015 to 30.06.2017, 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.

10. 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, we 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 our opinion on its merit. The Dealer is at liberty to raise all the material evidence in support of its defence before the Assessing Authority.

11. As the appeal of the Dealer, i.e. S.A. No. 152 (VAT) of 2019 was taken up on technical ground, i.e. maintainability in absence of the proceeding u/s. 39, 40, 42 or 44 of the OVAT Act, and the first appellate order is liable to be set aside, so, the appeal of the State, i.e. S.A. No. 179 (VAT) of 2019, is redundant and the same needs no further adjudication.

12. Resultantly, the appeal of the Dealer, i.e. S.A. No. 152 (VAT) of 2019, is allowed and the impugned order of the First Appellate Authority stands set aside. The assessment for the period 01.04.2013 to 30.09.2015 is hereby quashed. But, the assessment for the post amendment period, i.e. 01.10.2015 to 30.06.2017, is hereby remitted to the Assessing Authority for disposal afresh as per law keeping in view the observations made supra. The

appeal of the State, i.e. S.A. No.179 (VAT) of 2019, is dismissed. The reassessment should be completed within three months from the date of this order. Cross-objections are disposed of accordingly.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(B. Bhoi)
Accounts Member-II