BEFORE THE JUDICIAL MEMBER-II:
ODISHA SALES TAX TRIBUNAL: CUTTACK.

P r e s e n t: **Shri S.K. Rout,**
2nd Judicial Member

S.A. No. 240(V) of 2019
(Arising out of the order of the learned Joint Commissioner of Sales Tax (Appeal), Balasore Range, Balsore, in First Appeal Case No. AA-18/BA-2017-18 (VAT), disposed of on dtd.11.03.2019)

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

- V e r s u s -

M/s. Esen Modern Rice Mill Pvt. Ltd., At/P.O.- Nayabazar, Jaleswar, Dist.- Balesore. ... Respondent

For the Appellant ... Mr. N.K. Rout, A.S.C.
For the Respondent ... Mr. B.P. Mohanty, Advocate

Date of hearing: 19.08.2023 *** Date of order: 14.09.2023

O R D E R

The State prefers this appeal challenging the order dtd.11.03.2019 passed by the learned Joint Commissioner of Sales Tax (Appeal), Balasore Range, Balsore (hereinafter referred to as, JCST/first appellate authority) in First Appeal Case No. First Appeal Case No. AA-18/BA-2017-18 (VAT), thereby allowing the appeal and reducing the demand to nil against the order of assessment passed by the learned Sales

Tax Officer, Balasore Circle, Balasore (hereinafter referred to as, STO/assessing authority) on dtd.28.02.2013 u/s.43 of the Orissa Value Added Tax Act, 2004 (in short, the OVAT Act) for the tax period 01.04.2008 to 31.03.2012 raising demand of ₹18,35,235.00 including penalty.

2. The case at hand is that, the dealer-assessee in the instant case is a registered dealer having TIN-21261507769 and in the name and style of M/s. Essen Modern Rice Mill Pvt. Ltd. is engaged in manufacturing and sale of rice, rice bran and broken rice. The company is mainly engaged for custom milling of the paddy for different cooperative society, civil supply and other Governmental agency as per guideline and authorization of Government. The assessment u/s.42 of the OVAT Act had already been completed. But pursuant to receipt of a fraud case report (in short, FCR) submitted by the STO, Vigilance, Balasore Division, Balasore the case was reopened u/s.43 of the OVAT Act. Then notice in form VAT-307 was issued including subsequent intimations, but the dealer-assessee did not appear nor produce the books of account. So, the learned assessing authority completed the assessment exparte on the basis of fraud case report and raised the demand as mentioned above.

3. Against such tax demand, the dealer preferred first appeal before the learned first appellate authority who allowed the appeal and reduced the demand to nil figure.

4. Being dissatisfied with the order of the learned first appellate authority, the State 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 dealer-respondent.

6. During course of argument, learned Addl. Standing Counsel for the Revenue vehemently contended stating that the order passed by the learned first appellate authority is whimsical, arbitrary, erroneous and non-application of judicious mind. On examination of books of account and contents of the documents and after confrontation, the Vigilance authorities established the suppression of turnover of goods as noted in the report. Basing on the establishment of purchase and sales of goods, the STO, Vigilance submitted tax evasion report to the assessing authority alleging sale suppression of rice, broken rice and bran valued at ₹1,52,93,616.00. Since the dealer did not appear before the assessing authority for confrontation of the tax evasion report in spite of allowing number of opportunities, the assessing authority passed order exparte u/s.43 of the OVAT Act for the tax period 01.04.2008 to 31.03.2012 by accepting the report submitted by the STO, Vigilance which resulted the impugned demand. The first appellate authority without re-examining the books of account, documents, evidence and without any necessary enquiry reduced the demand to nil which is against the principle of law.

7. Per contra, learned Counsel for the dealer-assessee argued stating that the learned first appellate authority has rightly quashed the demand which is just and proper. This

apart, learned Counsel for the dealer-assessee contended that the assessment proceeding done u/s.43 of the OVAT Act is not maintainable as no assessment u/s.39, 42 or 44 was made before initiation of proceeding u/s.43 of the OVAT Act. 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 are liable to be quashed for the period under challenge in view of the decision of 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)**. After have a glance to the order of the learned first appellate authority, it becomes quite evident from the second paragraph of page-4 that the dealer-assessee has already been assessed u/s.42 of the OVAT Act for the period from 01.04.2005 to 31.05.2009. Such aspect is also not denied by the dealer-assessee during the course of hearing of the appeal. This apart, it reveals from the case record that the reassessment u/s.43 of the OVAT Act in the present case was made for the period from 01.04.2008 to 31.03.2012.

8. So, now it is to be adjudicated upon whether initiation of proceeding u/s.43 of the OVAT Act for the said period is genuine or not. On this score 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).

9. 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, I am of the view that the claim of the appellant deserves a merited acceptance.

10. In view of the above analysis, to my considered view, the orders of the fora below need interference to the extent as indicated above. The reassessment proceeding u/s.43 of the OVAT Act for the period from 01.06.2009 to 31.03.2012 is not maintainable as per the decision of the Hon'ble High Court of

Orissa decided in the case M/s. Keshab Automobiles v. State of Odisha (supra).

11. In the result, the appeal preferred by the State is partly allowed. The assessment u/s.42 of the OVAT Act for the period from 01.04.2005 to 31.05.2009 is set aside and the reassessment u/s.43 of the OVAT Act for the period from 01.04.2008 to 31.03.2012 is hereby quashed. The case is remitted fact to the assessing officer for recomputation of tax for the period from 01.04.2005 to 31.05.2009 in the light of observation made above within a period of three months of receipt of this order after giving reasonable opportunity to the dealer-assessee of being heard. Cross objection is disposed of accordingly.

Dictated & corrected by me,

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

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