BEFORE THE DIVISION BENCH, ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No.59(V) of 2012-13

(Arising out of the order of the learned DCST, Cuttack-I Range, Cuttack in first appeal case No.AA(OVAT)62/CUICT/2010-11 disposed of on dtd.28.04.2012)

Present: **Shri S.K. Rout, 2nd Judicial Member**
&
Shri B. Bhoi, Accounts Member-II

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

-Vrs. –

M/s. Gupta Distributors, Dolamundai, Cuttack. ..... Respondent.

For the Appellant : : Mr. D. Behura, S.C.(C.T.)
: Mr. S.K. Pradhan, ld. A.S.C.(C.T.)
For the Respondent : : Mr. B.P. Mohanty, ld. Advocate.

Date of Hearing : 07.07.2023 * Date of Order :26.07.2023**

O R D E R

The Hon'ble High Court of Orissa in their decision delivered in STREV No.13 of 2014 dated 06.12.2022 in case of M/s Gupta Distributor, Cuttack Vrs. the State of Orissa directed this Tribunal to adjudicate the second appeal passed in S.A. No.59(V) 2012-13 afresh in keeping with the observations contained therein as enunciated hereunder:-

"10. The Court finds that there is no determination on factual basis whether the ITC issued by the companies to the

Petitioner for achieving the business targets were not credit notes as defined in Section 23 read with Section 22 of the OVAT Act. In the absence of such determination, this Court is unable to appreciate whether the Tribunal was justified in its conclusion. Since these issues purely turn on facts, it was necessary for the Tribunal to have embarked on a factual enquiry before arriving at the conclusion which has been challenged in the present revision petition.

11. Accordingly, the question framed is answered by holding that the Tribunal should revisit the entire issue in the light of the available materials and any further documents that may be placed by the parties before it upon remand. The impugned order of the Tribunal is accordingly set aside and the matter, i.e., S.A. No.59 (V)/2012-13 (State of Orissa v. M/s. Gupta Distributors) is restored to the file of the Tribunal to be now proceeded with in accordance with law. The matter will be listed before the Tribunal for directions on 30th January, 2023 on which date, the Dealer/Petitioner will be present through either an authorized representative or an Advocate and the Department by its Standing Counsel. The Tribunal is requested to dispose of the matter afresh after hearing the parties in accordance with law as expeditiously as possible

and preferably within a period of six months thereafter. The LCR be returned forthwith to the Trbunal"

2. Under the above facts of the case, in response to the notice served upon, Mr. B. P. Mohanty, learned Counsel representing the dealer assessee and Mr. D. Behura, learned Counsel appearing for the State appeared on 07.07.2023. Heard the submissions put forth by both the parties. Mr. Mohanty, learned Counsel appearing for the dealer assessee sought for time for submission of a written submission. This was allowed. A written submission has been filed on 10.07.2023.

3. In order to appreciate the issues involved in the instant case, we find it imperative to provide a brief background of the case. The dealer assessee under the name and style of M/s Gupta Distributor, Dolamundai, Cuttack is engaged in trading of Electronics & Electrical Home Appliances like Refrigerator, Air Conditioners, Washing Machine, Television, Micro Wave Woven, Music System, Cell Phone, Grinder, Voltage Stabilizer, Emergency Light etc. Holding the returns being accepted as self assessed under Section 39(2) of the OVAT Act and basing on the Tax Evasion Report No.52 dated 09.07.2010 submitted by the Deputy Commissioner of Sales Tax, Enforcement Range, Bhubaneswar, assessment proceeding under Section 43(1) of the OVAT Act was initiated for the tax period 01.04.2009 to 31.01.2010 and raised

demand of ₹5,07,581.00. The first appeal as preferred by the dealer assessee against such demand culminated in Nil demand.

4. The Revenue assails the order of the ld.FAA as illegal and approached this forum filing second appeal in S.A. No.59 (V) 2012-13. The order of the first appellate authority was set aside in the second appeal restoring the order of reassessment of the learned assessing authority passed under Section 43(1) of the OVAT Act.

5. The dealer assessee being aggrieved against the order passed in S.A. No.59 (V) 2012-13 filed revision petition under section 80 of the OVAT Act before the Hon'ble High Court of Odisha. The Hon'ble Court while disposing the STREV No.13 of 2014(supra) has been pleased to direct this Tribunal to revisit the entire issue in the light of the available materials and any further documents that may be placed by the parties before it in accordance with law. The relevant observations of the Hon'ble Court have been quoted hereinabove.

6. The learned Counsel representing the dealer assessee submitted a written submission contending, inter alia, to the effect that the order of re-assessment dated 15.11.2010 has been passed for the period 01.04.2009 to 31.01.2010 under section 43 of the OVAT Act without making compliance of sub-section (1) of section 43 of the OVAT Act or in other words, no order of assessment has been passed under section 39 or 42 of the OVAT Act before

initiation of proceeding under section 43 (1) of the OVAT Act and also, no said order of re-assessment was ever communicated to the respondent and accordingly, the impugned order of re-assessment is liable to be annulled inasmuch as the Hon'ble Orissa High court in the case of **Kesab Automobiles Versus the State of Odisha in STREV No.64 of 2016** by judgment dated 01.12.2021 came to hold that without any assessment made under section 39 or 42 of the OVAT Act, no assessment under section 43 is permissible and the said judgment has been upheld by the Hon'ble Supreme Court and now, the said decision is the law of the land and as such, the impugned order of re-assessment is liable to be annulled.

As to the reversal of ITC to the tune of ₹39,02,681.00 as assessed, the ld. Counsel of the dealer-assessee contends that the credit notes received from the different principal companies against different schemes for achieving business targets do not depict tax credit thereon. Further, the said credit notes were not issued for any adjustment of input tax credit. Therefore, as the ld. Counsel asserts, the ld. assessing authority misapplied the provision of law contained in Sub Section (8-a) of Section 20 of the OVAT Act. Accordingly, levy of VAT @12.5% on credit notes is without jurisdiction and without any authority of law.

The ld. Counsel of the dealer-assessee rebuts reversal of ITC on stabilizer which was given away free of cost on sale of Samsung AC machine. It is argued that stabilizer was purchased on payment VAT. It is held that there was no ITC claimed on this score. The same finds place in the sale-promotional account.

As regards shortage of two pieces of LG washing machines as alleged as sale suppression, it is pleaded that the said goods were in fact sold away on the vary day of inspection by the Investigating Team and sale bills thereof as raised were produced before the Team. The ld.FAA has, therefore, disowned the allegation of suppression leveled in the assessment order.

The ld. Counsel on behalf of the dealer-assessee submits that there was huge purchases of variety of goods on payment of VAT. There was no Net VAT generated, as the Input VAT was always on higher side as compared to Output VAT. The allegation of non-payment of output VAT since April, 2005 is unfounded without any documentary evidence alleging concealment of payment of tax.

7. We carefully went through the contention of both the parties. The order of this Tribunal passed in S.A. No.59 (V) of 2012-13, order of the Hon'ble High Court of Orissa passed in STREV No.13 of 2014 and orders of the forums below. Before we dwell upon merits of the case as agitated by the ld. Counsel of the

dealer-assessee, we consider it essential to look into the aspect of maintainability of initiation proceedings framed under Section 43(1) of the OVAT Act. For, the Hon'ble High Court of Orissa in STREV No.13 of 2014(Supra) has directed to dispose of the matter afresh in accordance with law as expeditiously as possible. The law is settled. We are to go by the law presently in vogue. The root of the present case under the above facts and the circumstances is that whether the proceedings drawn under section 43(1) of the OVAT Act and the consequential demand stand up to the compliance of the pre-requirements/pre-conditions precedent to initiation proceedings has been accomplished or not. The statute speaks of the base law upon which initiation of any proceeding hinges. If a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible.

8. Section 39(2) of the OVAT Act has been amended introducing the concept of 'deemed' self assessment only with effect from 1st October, 2015. It is significant that prior to its amendment with effect from 1st October, 2015 the trigger for invoking section 43(1) of the OVAT Act required a dealer to be assessed under sections 39,40,42 and 44 for any tax period. Decision of the Hon'ble High Court of Odisha pronounced in case

of ***M/s. Keshab Automobiles Vs. State of Odisha*** in Para 22 of the said verdict lays down as under.:-

> "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 fulfillment of other requirements of that provision as it stood prior to 1st October, 2015."

The aforesaid decision of the Hon'ble High Court of Odisha has been upheld by the Hon'ble Supreme Court of India in SLP (C) No.9823-9824/2022 dated 13.7.2022 which reads as follows:-

> "We have gone through the impugned order(s) passed by the High Court. The High Court has passed the impugned order(s) on the interpretation of the relevant provisions, more particularly Section 43 of the Odisha Value Added Tax Act, 2004, which was prevailing prior to the amendment. We are in complete agreement with the view taken by the High Court. No interference of this Court is called for in exercise of powers under Articles 136 of the Constitution of India. Hence, the Special Leave Petitions stand dismissed"

9. In the present case, it is revealed that the assessment framed under the OVAT Act relate to the tax period from 01.04.2009 to 31.01.2010 which entirely covers the pre-amendment period. The learned assessing authority is learnt to have not adhered to the requirement of pre-conditions as required

under section 39 of the OVAT Act for initiation of proceedings under section 43 of the OVAT Act. He has reopened the assessment simply on the basis of the Tax Evasion Report. There is no evidence available on record as to communication of the assessment made U/s.39 of the OVAT Act to the dealer-assessee. The ld.FAA has also ignored the aspect of maintainability of the case. In view of the above principles of law, we are constraint to infer that the assessment made in the impugned case is not sustainable in law and as such, the same is liable to be quashed. Hence, it is ordered.

10. Resultantly, the second appeal filed by the State is hereby dismissed and the orders of the ld. STO and ld. FAA are hereby set-aside. As a necessary corollary thereof, the assessment order is hereby quashed.

Dictated and corrected by me.

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

I agree,

Sd/-
(S.K Rout)
Judicial Member-II