BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

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

S.A. No. 207 (V) of 2014-15

(Arising out of order of the learned Addl. Commissioner of Sales Tax (North Zone),
in Appeal No. AA-SNG-127/13-14 (OVAT),
disposed of on dated 22.09.2014)

M/s. Sarda Re-Rollers Pvt. Ltd.,
At:- Beldihi, Kalunga,
Brahmani Tarang,
Sundargarh. ... Appellant

-Versus-

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

S.A. No. 259 (V) of 2014-15

(Arising out of order of the learned Addl. Commissioner of Sales Tax (North Zone),
in Appeal No. AA-SNG-127/13-14 (OVAT),
disposed of on dated 22.09.2014)

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

-Versus-

M/s. Sarda Re-Rollers Pvt. Ltd.,
At:- Beldihi, Kalunga,
Brahmani Tarang,
Sundargarh. ... Respondent

For the Dealer : Mr. S.N. Patel, Advocate
For the State : Mr. D. Behura, S.C. &
Mr. S.K. Pradhan, A.S.C.

Date of hearing:15.05.2023 *** Date of order: 24.05.2023

O R D E R

Both these appeals are disposed of by this composite order as the same involve common question of fact and law and in between the same parties and for the same assessment period i.e. 01.04.2010 to 31.03.2011.

2. S.A. No.207(V) of 2014-15 is preferred by the dealer, whereas S.A. No.259(V) of 2014-15 is preferred by the State. Both the parties challenge the order dtd.22.09.2014 passed by the learned Addl. Commissioner of Sales Tax (North Zone) (hereinafter referred to as, first appellate authority) in Appeal No. AA-SNG-127/13-14 (OVAT), thereby allowing the appeal in part and reducing the demand to ₹82,31,811.00 against the assessment order dtd.11.06.2012 passed by the learned Deputy Commissioner of Sales Tax, Rourkela II Circle, Panposh (hereinafter referred to as, learned STO) u/s.43 of the Orissa Value Added Tax Act, 2004 (in short, the OVAT Act)

for the tax periods from 01.04.2010 to 31.03.2011 raising demand of ₹7,48,34,640.00 including penalty of ₹4,98,89,760.00.

3. The case at hand is that, the appellant in this case is a private limited company engaged in manufacture of re-rolled products and M.S. ingots. The finished products were sold in interstate trade and commerce. Pursuant to fraud case report received from Deputy Commissioner of commercial Taxes, Vigilance, Sambalpur assessment proceeding was initiated against the dealer-company u/s.43 of the OVAT Act and the demand as mentioned above was raised.

4. Against such tax demand, the dealer preferred first appeal before the learned first appellate authority who allowed the appeal in part and reduced the demand as mentioned above.

5. Being dissatisfied with the order of the learned first appellate authority, both the dealer and the State have preferred these second appeals before this forum as per the grounds stated in the grounds of appeal.

6. Cross objections are filed in these cases by both the dealer and the State being the respondents.

7. The learned Counsel appearing for the dealer-assessee contended that the orders passed by the learned forums below are illegal and arbitrary. 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 is liable to be quashed for the period under challenge.

8. Per contra, the learned Standing Counsel appearing for the Revenue argued that the learned first appellate authority has disposed of the appeal which is based on the provisions of law and factual position. Learned Standing Counsel also argued that the assessment order clearly reveals that prior to proceeding u/s.43 of the OVAT Act the periodical returns filed by the dealer u/s.39 of the OVAT Act were accepted as self-assessed and as such the demand raised is genuine.

9. Heard the contentions and submissions of both the parties in this regard. The sole contention of the dealer-appellant is that the assessment order is not maintainable. It was vehemently urged by the learned Counsel for the dealer-assessee that the initiation of proceeding u/s.43 of the OVAT Act is 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 of Orissa in case of **M/s. Keshab Automobiles v. State of Odisha (STREV No.64 of 2016 decided on 01.12.2021)** 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 proceeding becomes nullity and is liable to be dropped.

10. 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 ….".

11. 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 appellant 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).

12. 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.

13. In the result, the appeal preferred by the dealer-assessee is allowed and the appeal preferred by the State is disallowed. As a corollary the impugned orders of the forums below are hereby quashed. The cross objections are 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/-
(M. Harichandan)
Accounts Member-I