

**BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL:
CUTTACK**

S.A. No. 195 (VAT) of 2014-15

(Arising out of order of the learned Addl. CST (North Zone),
in Appeal No. AA- 58(V)/ACST(Asst)/SBPR/2008-09,
disposed of on 26.07.2014)

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

M/s. Tata Refractories Ltd.,
(Presently – M/s. TRL Krosaki Refractories Ltd.)
Belpahar, Jharsuguda ... Appellant

-Versus-

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

For the Appellant : Sri Uttam Behera, Advocate
For the Respondent : Sri S.K. Pradhan, Addl. SC (CT)

Date of hearing : 05.01.2024 *** Date of order : 02.02.2024

ORDER

Dealer assails the order dated 26.07.2014 of the Addl. Commissioner of Sales Tax (North Zone) (hereinafter called as ‘First Appellate Authority’) in F A No. AA- 58(V)/ACST(Asst)/SBPR/2008-09 revising the demand raised in assessment order of the Asst. Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, ‘Assessing Authority’).

2. Briefly stated, the facts of the case are that –

M/s. Tata Refractories Ltd. (Presently – M/s. TRL Krosaki Refractories Ltd.) is a manufacturer of refractory bricks & mortar by using

raw materials such as dolomite, magnesite, chrome ore, quartzite & calcined bauxite besides coal and furnace oil for use in manufacture. The assessment relates to the period 01.04.2005 to 31.12.2006. The Assessing Authority raised 'nil' demand after adjustment of ITC u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') on the basis of Audit Visit Report (AVR).

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority revised the tax demand to ₹21,64,470.00 and allowed the appeal in part. Being aggrieved with the order of the First Appellate Authority, the Dealer prefers this appeal. Hence, this appeal.

The State files cross-objection & additional cross-objection.

3. The learned Counsel for the Dealer submits that the Audit Team constituted is not in accordance with the provision and, therefore, the audit assessment basing on AVR prepared by such Team is not sustainable in law. So, he submits that the preliminary issue touching the maintainability may be taken up at the outset reserving the right to submit on other issues in case the same is not entertained. He further submits that audit assessment is not sustainable in law and the same requires interference in appeal.

He relies on the decision of the Hon'ble Court in case of *M/s. Bharat Earth Movers Limited v. State of Odisha* (STREV No. 2 of 2023, decided on 01.09.2023).

4. On the other hand, the learned Addl. Standing Counsel (CT) for the State submits that the Dealer did not raise the issue of maintainability at the stage of assessment, i.e. at an earliest possible opportunity. So, he submits that the Dealer is precluded to raise the said issue at this stage. He further submits that the impugned order and the assessment order do not suffer from infirmity to call for any interference on this score.

He relies on the decision of the Hon'ble Court in case of *Kalka Trading Agency v. Commissioner of Commercial Taxes (W P (C) No. 1132 of 2016* decided on **02.03.2016**).

5. Heard the rival submissions, gone through the orders of the Assessing Authority and First Appellate Authority vis-a-vis the materials on record. The Dealer has challenged the impugned order on the following grounds :-

- (i) Rejection of the claim of ITC for an amount of ₹59,70,069.00 on coal consumable and capital goods is illegal and arbitrary;
- (ii) Enhancement of reversal of ITC from ₹1,56,704.00 to ₹11,65,971.00 is unlawful; and
- (iii) Levy of penalty of ₹14,42,980.00 is improper.

Besides, the Dealer has also raised preliminary issue on the point of maintainability of audit assessment challenging the constitution of Audit Team as improper in view of infraction of the provisions of Rule 43 of the OVAT Rules read with Section 42 of the OVAT Act.

The State objects such preliminary issue on the ground that the Dealer did not challenge the maintainability on the earliest available opportunity.

6. As the issue of maintainability is raised at the outset as preliminary issue, the same is taken up for adjudication.

The AVR reveals that it was conducted by Sales Tax Officer (Audit), Sambalpur Range, Sambalpur disclosing himself as Head of the Audit Team and approved by the Asst. Commissioner of Sales Tax, Sambalpur Range, Sambalpur. The AVR whispers no single word regarding the team of audit conducted to the business concern of the Dealer, which is infraction to the mandate of law.

Rule 43 of the OVAT Rules deals with the tax audit to be conducted by an audit team. Rule 43(2) of the OVAT Rules provides that the audit team referred to sub-rule (1), for audit of TIN dealers, shall

comprise two or more officer, one of whom shall not be below the rank of Sales Tax Officer and the senior most officer in rank shall function as the head of the audit team.

The Dealer relies on the decision of Hon'ble Court in case of *M/s. Bharat Earth Movers Limited* cited supra, wherein the Hon'ble Court were pleased to observe as follows :-

“12. The petitioner-dealer has raised pertinent question of law. For the elaborate discussions made above and reasons ascribed heretofore, said question of law No. (I) is answered by holding that the Audit Visit Report submitted by the Audit Team, which was not duly constituted and contrary to the requirement of provisions of Rule 43 of the OVAT Rules, is vulnerable. Therefore, the audit assessment under Section 42 based on such Audit Visit Report is vitiated and, liable to be set aside.”

The State relies on the decision of the Hon'ble Court in case of *Kalka Trading Agency* cited supra and submits that the Dealer was having opportunity to challenge the constitution of audit team at the earliest opportunity in terms of Section 98 of the OVAT Act.

7. The relevant provision of Section 98(2) of the OVAT Act is quoted below for better appreciation of the case :-

“98(1) xx xx

(2) *The service of any notice, order or communication shall not be called in question if the notice, order or communication, as the case may be, has already been acted upon by the dealer or person to whom it is issued or where such service has not been called in question at or in the earliest proceedings commenced, continued or finalised pursuant to such notice, order or communication.*”

Bare reading of Section 98(2) of the OVAT Act, it prescribes that service of any notice, order or communication shall not be questioned if the Dealer has already acted upon on it. The Dealer has challenged the order before the First Appellate Authority and before this Tribunal. The Dealer

has also challenged the maintainability of constitution of Audit Team before this Tribunal, which is a question of law. Hon'ble Court have specifically observed in the case of *M/s. Bharat Earth Movers Limited* cited supra that the audit assessment u/s. 42 of the OVAT Act based on such AVR is not sustainable. Therefore, the submission of the learned Addl. Standing Counsel (CT) does not merit for consideration and also the decision relied upon by him is not applicable to the present facts and circumstances of the case.

In view of the aforesaid decision of the Hon'ble Court, the Audit Team has not been duly constituted as per the provisions of law and, therefore, the AVR and the subsequent assessment proceeding basing on such proceeding is vitiated in law.

It is pertinent to mention here that when the appeal has been decided on preliminary issue and the same is decided in favour of the Dealer, the other issues raised by both the parties for adjudication are redundant. Hence, it is ordered.

8. Resultantly, the appeal stands allowed and the impugned orders of the First Appellate Authority and Assessing Authority are hereby quashed. Cross-objection and additional cross-objection are disposed of accordingly.

Dictated & Corrected by me

**Sd/-
(G.C. Behera)
Chairman**

**Sd/-
(G.C. Behera)
Chairman**

I agree,

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

I agree,

**Sd/-
(B. Bhoi)
Accounts Member-I**