

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

S.A. No. 58(V) of 2015-16

(Arising out of the order of the learned Addl.CST(Appeal), North Zone, Odisha, Sambalpur First Appeal No. AA-486/14-15, disposed of on 05.06.2014)

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

M/s. A.N. Guha & Co.,
At- Nayapara, Po/Dist-Sambalpur.
TIN-21151702654.

..... Appellant

-Vrs. -

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

..... Respondent.

For the Appellant :

: Mr. S. Ray, Sr. Advocate

: Mr. K.K. Sahoo, Id. Advocate

For the Respondent :

: Mr. D. Behura, S.C.(C.T.)

Date of Hearing : 13.06.2023 * Date of Order : 30.06.2023**

O R D E R

The dealer is in appeal against the order dated 05.06.2014 of the learned Additional Commissioner of Sales Tax (Appeal), North zone, Odisha, Sambalpur (in short, 'Id. FAA') passed in First Appeal Case No. AA-486/14-15 confirming the order of assessment passed by the learned Deputy Commissioner of Sales Tax, Sambalpur-I Circle. Sambalpur (in short, 'Id. assessing authority') passed under section 43 of the Odisha Value Added Tax Act, 1999 (in short, 'OVAT Act').

2. Briefly stated the facts of the case reveal that M/s. A.N. Guha & Co. At- Nayapara, Po/Dist-Sambalpur is engaged in manufacture of

handmade biri making use of raw materials mainly tobacco, kendu leaves, thread, assence consumables like charcoal and packing materials. The dealer-assessee was assessed under section 43 of the OVAT Act basing on the audit objection and raised demand of ₹18,04,896.00 which includes penalty of ₹12,03,064.00 for the tax period from 01.07.2005 to 31.06.2007. The first appeal as preferred by the dealer-assessee resulted in confirming the order of assessment.

3. The dealer-assessee became again aggrieved against the order of the Id. FAA and preferred second appeal at this forum endorsing grounds of appeal and placed copies of decisions delivered in the Hon'ble High Court of Odisha and the Hon'ble Apex Court to fortify his stand. The Id. Counsel appearing on behalf of the dealer-assessee vehemently objects to the maintainability of initiation of proceedings under section 43 of the OVAT Act in absence of self-assessment under section 39 of the OVAT Act apart from other grounds of appeal. Mr. S.Ray, Id. Sr. Advocate representing the dealer-assessee asserts that the decision delivered by the Hon'ble High Court of Odisha vide STREV No.64 of 2016 dated 01.12.2021 in case of ***M/s Keshab Automobiles vs. State of Odisha*** is undoubtedly applicable to this case. It is held by the Hon'ble High Court of Odisha that if the self-assessment under Section 39 of the OVAT Act for tax periods prior to 1st October, 2015 are not 'accepted' by a formal communication or an acknowledgement by the Department, then such assessment cannot be sought to be re-opened U/s. 43 of the OVAT Act and subject to fulfillment of other requirements of that provision as it stood prior to 1st October, 2015. For all the

aforementioned reasons, the reopening of the assessment sought to be made in the present case under Section 43(1) of the OVAT Act is held to be bad in law. It is also submitted that the said decision of the Hon'ble High Court of Odisha has been affirmed by Hon'ble Apex Court in their order dated 13.07.2021 in SLP (Civil) No.9912 of 2022 in case of **Deputy Commissioner of Sales Tax Vs. M/s Rathi Steel & Power Ltd Etc, and batch.**

Under the above backdrop, it is argued that in absence of any undisputed facts of completion of assessment U/s.39 of the OVAT Act and communication thereof to the dealer-assessee, the assessment order and the first appeal order passed under the OVAT Act is liable to be quashed.

4. The State files cross objection supporting the orders of the Id.FAA and the Assessing Authority.

5. Heard the contentions and submissions of both the parties in this regard. The order of assessment and the order of the Id. FAA coupled with the materials on record are gone through. 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 reopened 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”

In the present case, it is revealed that the assessment framed under the OVAT Act relate to the tax period from 01.07.2005 to 31.06.2007 which entirely covers the pre-amendment period. The learned assessing authority is learnt to have not adhered to the requirement of preconditions 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 A.G. audit objections. 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 maintainability of the case and has confirmed the order of assessment. In view of the above principles of law, we are constraint to infer that the assessment made in the impugned case is not maintainable in law and as such, the same is liable to be quashed.

6. Resultantly, The appeal stands allowed and the order of the learned assessing authority and the ld. FAA are hereby set-aside. As a necessary corollary thereof, the assessment order is hereby quashed. The cross objection is disposed of accordingly.

Dictated & corrected by me.

Sd/-
Bibekananda Bhoi)
Accounts Member-II

I agree,

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

I agree,

Sd/-
(G.C. Behera)
Chairman

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