BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 25 (VAT) of 2015-16

(Arising out of order of the learned JCST, Bhubaneswar Range, Bhubaneswar in First Appeal No. AA- 106221322000093/ BH-IV/2013-14, disposed of on 28.11.2014)

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

M/s. Shree Jagannath Lamination and Frames,
Plot No.71, Ganga Nagar, Bhubaneswar ... Appellant

-Versus-

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

For the Appellant : Sri K.R. Mohapatra, Advocate
For the Respondent : Sri D. Behura, S.C. (CT)

Date of hearing : 29.09.2022 *** Date of order : 15.10.2022

O R D E R

The Dealer assails the order of the Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar (hereinafter called as 'First Appellate Authority') passed on 28.11.2014 in F A No. AA - 106221322000093/BH-IV/2013-14 reducing the assessment order of the Sales Tax Officer, Bhubaneswar-IV Circle, Bhubaneswar (in short, 'Assessing Authority).

2. Briefly stated, the case of the Dealer is that –

M/s. Shree Jagannath Lamination and Frames is engaged in making frame photo binding and laminated photo in course of execution of works contract and trading thereof. The assessment periods relate to August'09 and 01.03.2010 to 01.04.2012. The Assessing Authority raised

tax and penalty of ₹39,89,466.00 u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') basing on the Tax Evasion Report (TER) submitted by the STO, Enforcement Range, Bhubaneswar.

Dealer preferred first appeal against the order of the Assessing Authority. The First Appellate Authority allowed the appeal in part and reduced the demand to a sum of ₹35,66,127.00. Being aggrieved with the order of the First Appellate Authority, the Dealer prefers this appeal. Hence, this appeal.

The State files cross-objection supporting the orders of the fora below.

3. Learned Counsel for the Dealer contends that the orders of the First Appellate Authority and the Assessing Authority are contrary to law and facts involved. He further submits that the learned First Appellate Authority and the Assessing Authority passed the orders on mere surmises and conjectures and ignoring the materials/documents available on record. He further submits that the Dealer was not given any reasonable opportunity of being heard which violates the natural justice. He further contends that the Assessing Authority and the First Appellate Authority have not considered the provision of Rule 6(e) of the OVAT Rules for allowance of labour and service charges in respect of the works executed. In the additional grounds of appeal, he also raised that in absence of any written communication or acknowledgment as to completion of assessment u/s. 39, 40, 42 and 44 of the OVAT Act, the assessment u/s. 43 of the said Act made by the Assessing Authority is not sustainable in the eyes of law.

He also relies on the decision of the Hon'ble Apex Court in the case of ***National Thermal Power Co. Ltd. v. Commissioner of Income Tax,*** **reported in (1997) 7 SCC 489**; the decision of Hon'ble Delhi High Court in the case of ***Pr. Commissioner of Income Tax-18 v. Silver Line,*** **reported in (2016) 383 ITR 455 (Delhi)**; the decision of the Hon'ble Orissa High Court in the case of ***M/s. Keshab Automobiles v. State of Odisha in*** **STREV No.**

64 of 2016 decided on 01.12.2021; and the orders of this Tribunal in other similar cases.

4. On the other hand, learned Standing Counsel (CT) for the revenue vehemently objects the contentions of the learned Counsel of the Dealer and supports the finding of the fora below to be just and proper in the facts and circumstances of the case. He further submits that the Dealer had not raised any ground regarding maintainability of the assessment proceeding before the Assessing Authority or First Appellate Authority. He further submits that the orders of the Assessing Authority and the First Appellate Authority clearly show that the Dealer had submitted the self-assessment return u/s. 39 of the OVAT Act and the Assessing Authority has considered the same in the assessment proceeding, which can be treated as written acknowledgement to the Dealer.

So, he takes the plea that the Dealer is precluded to raise the same before this Tribunal for the first time in appeal. He further submits that the decisions of ***M/s. Keshab Automobiles*** (supra) is not applicable to the present facts and circumstances of the case as the orders of the Assessing Authority and the First Appellate Authority show that self-assessment has been made in this case u/s. 39 of the OVAT Act. He further submits that the learned First Appellate Authority and the Assessing Authority have passed reasoned orders, which warrant no interference in appeal.

5. On hearing the rival submissions and on careful scrutiny of the materials available on record, it is not in dispute that the Dealer was engaged in execution of works contract in making frame photo binding and lamination of photo and also trading of the goods. It is also not in dispute that the State has not filed any document regarding acknowledgment of acceptance of return as self-assessed.

6. On the materials available on record, we formulate the following points for determination in appeal :-

(i) Whether in absence of any written communication or acknowledgment as to completion of assessment u/s. 39, 40,

42 or 44 of the OVAT Act, reassessment u/s. 43 of the said Act made by the Assessing Authority is sustainable in law?

(ii) Whether in the facts and circumstances of the case the Assessing Authority and the First Appellate Authority are justified in assessing the tax liability on the basis of the books of account towards execution of works contract in contravention to the provision of Section 11(2)(c) of the OVAT Act r/w Rule 6(e) of the OVAT Rules?

7. As the maintainability of the assessment proceeding is under challenge, the core issue i.e. issue No. (i) is taken up at the outset for adjudication.

The learned Standing Counsel (CT) for the State has drawn the attention of this Tribunal to the order of the Assessing Authority regarding acceptance of return filed for the tax periods u/s. 39 of the OVAT Act and submits that thus, the reassessment proceeding u/s. 43 of the OVAT Act in the present case is valid.

On perusal of the assessment order, the Assessing Authority has specifically mentioned that the self-assessed return of the Dealer u/s. 39 was accepted. On further perusal of the assessment order or the material available on record does not disclose that the acceptance of return was actually communicated to the Dealer.

8. Hon'ble Court in the case of ***M/s. Keshab Automobiles*** cited supra have been pleased to observe in para-22 as follows :-

> "22. 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 fulfilment of other requirements of that provision as it stood prior to 1st October, 2015."

In view of the ratio laid down by the Hon'ble Court, the Department is required to communicate a formal communication or acknowledgment regarding the acceptance of the self-assessment u/s. 39 of

the OVAT Act. In this case, the State has not filed any materials to show that the acceptance of the self-assessment has been communicated to the Dealer.

So, in view of the decision cited supra, the reopening of the assessment sought to be made u/s. 43(1) of the OVAT Act is held to be bad in law. Therefore, the issue No. (i) is answered in negative, i.e. in favour of the Dealer and against the State. Accordingly, it is held that in absence of the completion of assessment u/s. 39, 40, 42 or 44, reassessment u/s. 43(1) of the OVAT Act is not sustainable in the eyes of law.

9. As the point of maintainability of the assessment order has been decided against the Department and it touches the root of the case, further adjudication of issue No. (ii) is not required in the facts and circumstances of the case.

10. On the foregoing discussions, we arrive at a conclusion that the order of the Assessing Authority and the First Appellate Authority are not sustainable in the eyes of law and the same warrant interference in this appeal. Hence, it is ordered.

11. Resultantly, the appeal is allowed and the orders of the fora below are set aside. Cross-objection is 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/-
(M. Harichandan)
Accounts Member-I