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

S.A. No.22(V) of 2006-07

(Arising out of the order of the learned ACST, Puri Range, Bhubaneswar in first appeal case No.106110611000005/06-07, disposed of on 04.11.2006)

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

M/s. Konark Enterprisers,
10, Janpath, Near Convent Square,
Bhubaneswar ..... Appellant.

-Vrs. –

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

For the Appellant : : Mr. D. Mohanty, ld. Advocate
For the Respondent : : Mr. D. Behura, S.C.(C.T.)

Date of Hearing : 09.03.2023 * Date of Order : 15.03.2023**

O R D E R

The dealer-assessee is in appeal against the order dated 04.11.2006 of the Assistant Commissioner of Sales Tax(Appeal), Puri Range, Bhubaneswar (hereinafter called as 'ld. FAA') in first appeal case No.106110611000005/06-07 confirming the order of assessment passed by the Sales Tax officer, Bhubaneswar II Circle, Bhubaneswar, (in short, 'learned assessing authority) u/s 43 of the OVAT Act.

2. It is felt worthwhile to provide a brief fact of the case that M/s. Konark Enterprisers, 10, Janpath, Bhubaneswar having TIN No.21671106303 carries on business in Electronic goods and Dish Antenna system. The dealer-assessee was assessed U/s.43 of the OVAT Act for the tax period from 01.04.2005 to 31.12.2005 raising demand of Rs.44,67,218.00 which includes penalty of Rs.29,78,145.00. The ld. FAA confirmed the order of assessment in the first appeal as preferred by the dealer-assessee.

3. On being aggrieved, the dealer-assessee preferred this second appeal before this forum adducing the grounds of appeal and additional grounds which are summarized below:

i. That, Mr. D. Mohanty, ld. Advocate appearing on behalf of the dealer-assessee challenges the validity of initiation of proceeding U/s.43 of the OVAT Act, relating to the period 01.04.2005 to 31.12.2005 passed by the learned assessing authority on dated 04.03.2006, in absence of completion of assessment U/s. 39 and communication thereof to the dealer-assessee.

ii. It is submitted that it is undisputed fact that the order of assessment was passed on 04.03.2006, which states that M/s. Konark Enterprisers having TIN No. 21671106303 was originally assessed U/s.39 of the OVAT Act, for the tax period 01.04.2005 to 31.12.2005. However, no date has been mentioned when the dealer-assessee M/s. Konark Enterprisers was originally assessed. Further, there was no communication by the learned

assessing authority to the dealer-assessee regarding completion of any assessment of the dealer-assessee U/s.39 or 40 of the OVAT Act.

iii. That, the learned Advocate on behalf of the dealer-assessee relied on the judgment of the Hon'ble High Court of Odisha in case of M/s. Keshab Automobiles Vs. State of Odisha, (STREV No.64 of 2016 decided on 01.12.2021) which held that in absence of completion of assessment U/s.39, 40, 42 or 44 of the OVAT Act and communication thereof to the dealer-assessee, reassessment U/s. 43(1) of the OVAT Act is not sustainable in law.

iv. Further, it is submitted that verdict of the Hon'ble High Court of Odisha pronounced in case of M/s. Keshab Automobiles Vrs. State of Odisha has been upheld in the Hon'ble Supreme Court of India.

v. Under the above backdrop, it is argued that in absence of any undisputed facts of completion of assessment U/s.39 or 40 or communication thereof to the dealer-assessee. The present assessment and the first appeal order are liable to be quashed.

4. The State represented by Mr. Agrawal, learned Counsel argues by submitting additional memo of cross objection to the effect that the assessment u/s 39 is a precondition on which the dealer appellant filed returns and communication from the Revenue is not required on the score to initiate proceedings u/s 43 of the OVAT Act.

5. Heard the contentions and submissions of both the parties in this regard. The order of assessment and the order of the ld. FAA coupled with the materials on record are gone through. It is case of maintainability of the impugned case whether in absence of any communication of assessment either u/s 39, 40, 42 or 44 of the OVAT Act to the dealer-appellant, the assessment passed u/s 43 of the OVAT Act is sustainable. In this connection, it is apt to hold that the learned assessing authority while initiating the 43 proceeding has recorded in the order of assessment stating that the dealer M/s. Konark Enterprises bearing TIN-21671106303 which deals in electronic goods and dish antenna system was originally assessed u/s 39 of the OVAT Act for the tax period w.e.f. 01.04.2005 to 31.12.2005. 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 in his turn has without going into the maintainability of the case has accepted the order of assessment unilaterally relying that the dealer-assessee was originally assessed U/s. 39 of the OVAT Act. The contention of the State pressed through Mr. Agrawal, learned Counsel holding the assessment U/s. 39 is a precondition on which the dealer-appellant filed returns and communication from the revenue is not required on the score to initiate proceeding U/s 43 of the OVAT Act is not tenable in view of the decision of the Hon'ble High Court of Odisha pronounced in case

of M/s. Keshab Automobiles Vs. State of Odisha as referred in Para 3 above which 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"

In the instant case, it is observed that the learned assessing authority has failed to comply the pre-requirements for initiation of proceeding U/s 43 of the OVAT Act as mandated in the afore-mentioned decisions of the Hon'ble Courts. The State has not filed any materials showing any communication or acknowledgement pertaining to acceptance of the self assessment U/s 39 of the OVAT Act. Accordingly, the assessment passed U/s 43 of the OVAT Act in the instant case is without jurisdiction in absence of any assessment

U/s 39, 40, 42 or 44 of the said Act. So the orders of the learned assessing authority and the ld. FAA are not sustainable in the eyes of law as the same are without jurisdiction. Hence, it is ordered.

9. Resultantly, the appeal stands allowed and the orders 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 and corrected by me.

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(S.K. Rout)

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i. That, Mr. D. Mohanty, ld. Advocate appearing on behalf of the dealer-assessee challenges the validity of initiation of proceeding U/s.43 of the OVAT Act, relating to the period 01.04.2005 to 31.12.2005 passed by the learned assessing authority on dated 04.03.2006, in absence of completion of assessment U/s. 39 and communication thereof to the dealer-assessee.

ii. It is submitted that it is undisputed fact that the order of assessment was passed on 04.03.2006, which states that M/s. Konark Enterprisers having TIN No. 21671106303 was originally assessed U/s.39 of the OVAT Act, for the tax period 01.04.2005 to 31.12.2005. However, no date has been mentioned when the dealer-assessee M/s. Konark Enterprisers was originally assessed. Further, there was no communication by the learned

assessing authority to the dealer-assessee regarding completion of any assessment of the dealer-assessee U/s.39 or 40 of the OVAT Act.

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5. Heard the contentions and submissions of both the parties in this regard. The order of assessment and the order of the ld. FAA coupled with the materials on record are gone through. It is case of maintainability of the impugned case whether in absence of any communication of assessment either u/s 39, 40, 42 or 44 of the OVAT Act to the dealer-appellant, the assessment passed u/s 43 of the OVAT Act is sustainable. In this connection, it is apt to hold that the learned assessing authority while initiating the 43 proceeding has recorded in the order of assessment stating that the dealer M/s. Konark Enterprises bearing TIN-21671106303 which deals in electronic goods and dish antenna system was originally assessed u/s 39 of the OVAT Act for the tax period w.e.f. 01.04.2005 to 31.12.2005. 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 in his turn has without going into the maintainability of the case has accepted the order of assessment unilaterally relying that the dealer-assessee was originally assessed U/s. 39 of the OVAT Act. The contention of the State pressed through Mr. Agrawal, learned Counsel holding the assessment U/s. 39 is a precondition on which the dealer-appellant filed returns and communication from the revenue is not required on the score to initiate proceeding U/s 43 of the OVAT Act is not tenable in view of the decision of the Hon'ble High Court of Odisha pronounced in case

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In the instant case, it is observed that the learned assessing authority has failed to comply the pre-requirements for initiation of proceeding U/s 43 of the OVAT Act as mandated in the afore-mentioned decisions of the Hon'ble Courts. The State has not filed any materials showing any communication or acknowledgement pertaining to acceptance of the self assessment U/s 39 of the OVAT Act. Accordingly, the assessment passed U/s 43 of the OVAT Act in the instant case is without jurisdiction in absence of any assessment

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2nd Judicial Member