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

S.A.No.168(V) of 2015-16.

(Arising out of the order of Ld.Addl.CST(Appeal) South Zone, Berhampur, in First Appeal Case No.AA (VAT).32/2012-13, disposed of on dated 26.3.2015)

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

M/s. Shree Krishna Plywood,
At-Plot No.28-A, Kharavel Nagar,
Bhubaneswar ... Appellant,

- V e r s u s –

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

For the Appellant ... Mr.R.C.Samantaray,Adv.
&
Mr.N.Panda, Adv.

For the Respondent ... Mr.S.K.Pradhan,
Addl. Standing Counsel,
(CT & GST Organisation)

Date of Hearing: 8-1-2024. Date Order:2-2-2024.

O R D E R

The dealer appellant is in appeal against the order dated 26.3.2015 of the Learned Additional Commissioner of Sales Tax(Appeal), South Zone, Berhampur, (hereinafter referred to as Learned First Appellate Authority/Ld. FAA) passed in First Appeal Case No.AA AA (VAT).32/2012-13, in reducing the tax liability determined by the Learned Assessing Authority /Ld. AA U/s.43 of the Odisha Value Added Tax Act, 2004, (in short, OVAT Act) from Rs.17,81,306.00 to Rs.8,30,220.00 for the tax period from April, 2011 to June, 2012.

2. Briefly stated the fact of the case reveals that the dealer appellant which carries on business in re-sale of ply wood, sunmica, adhesive etc. was subjected to the assessment proceeding U/s.43 of the OVAT Act, on

the basis of a tax evasion report submitted against it by the Officials of Enforcement Wing, Bhubaneswar.

3. After receiving the said adverse report the Learned Assessing Authority has initiated the proceeding which culminated in passing the impugned order in creating an extra demand of Rs.17,81,306.00 which includes penalty U/s.43(2) of the OVAT Act.

4. The dealer on being aggrieved has preferred the first appeal before the Ld. FAA, who vide his order dated 26.3.2015 has allowed the appeal in part thereby reducing the impugned demand from Rs.17,81,366.00 to Rs.8.30,220.00.

5. On being further dissatisfied with the aforesaid order passed by the Ld. FAA, the dealer appellant has preferred second appeal U/s.78 of the OVAT Act before this forum challenging the impugned order to be arbitrary and illegal.

6. Per Contra, the State Respondent has filed cross objection stating therein that since the impugned order passed by the Ld. FAA is based on establishment of tax evasion, the same should not be interfered.

7. While the matter stood thus, the dealer appellant has filed an additional grounds of appeal questioning the legality and judicial propriety of the very proceeding it-self which was initiated U/s.43 of the OVAT Act, without complying the pre-condition for such initiation i.e. completion of assessment U/s.39, 40, 42, or 44 of the OVAT Act. The dealer has also contended that since there is no communication with regard to completion of assessment U/s.39 of the OVAT Act, the subsequent initiation of the instant proceeding is bad in law and therefore the impugned assessment is

liable to be quashed. In stating so, the dealer appellant has relied upon the decision of the Hon'ble High Court of Orissa, in STREV No.64 of 2016 dt.1.12.2022 in case M/s. Keshab Automobiles Vrs. State of Orissa.

8. In response, the State Respondent has submitted additional memorandum of cross objection objecting the additional grounds raised by the dealer appellant. In the same it has been contended that the self-assessment proceeding as envisaged U/s.39 of the OVAT Act, has duly been completed prior to institution of proceeding U/s.43 of the OVAT Act, which was also properly communicated to the dealer in the notice itself issued in Form VAT-307. Besides it has been contended that since the dealer appellant has never raised the issue before the lower forum and the appeal order passed by the Ld. FAA has obtained its finality, the additional grounds taken by the dealer is not maintainable.

9. Heard the contentions and submissions of both the rival parties and gone through the orders passed by the lower fora coupled with materials available on record.

10. In view of the contradictory stand taken by both the parties, it is felt proper to decide on priority basis the question posed before us regarding maintainability of the said proceeding raised in the additional grounds of appeal by the dealer at belated stage.

11. In this context, reliance is placed on the judgement of Hon'ble Supreme Court of India, in case of National Thermal Power Co. Ltd, Vrs. Commissioner of Income Tax, (1997) 7 Supreme Court Cases 489 in which the Hon'ble Apex Court have been pleased to observe as follows :-

"The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner of Income-Tax (Appeal). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier".

12. Similarly, in case of Kiran Singh and Others Vrs. Chaman Paswan and Others, (1954 AIR-340, wherein Hon'ble Supreme Court of India have been pleased to observe as follows:-

"*it is a fundamental approach well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever or wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial or whether it is in respect of subject matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties.*

13 In view of the aforesaid decision, it is thus, a settled principle of law that a question as to the jurisdiction can be raised at any stage. If, a

dealer-assessee, for whatever reasons, failed to challenge the validity of the proceeding for want of jurisdiction, being a pure question of law, cannot be precluded from raising it, even after participating in the assessment proceeding. Since such a question is related to jurisdiction and as to the validity of an action under the Act, the dealer assessee, despite its participation at the initial stage, is certainly not ineligible to agitate or precluded from challenging the same at any later point of time. So, in our considered view the additional grounds taken by the dealer can be considered despite the fact that the same were not earlier raised.

14. Now coming to the factual aspects of the case, the dealer appellant has agitated that prior to initiation of proceeding U/s.43 of the OVAT Act, the pre-condition in respect of completion of assessment U/s.39 of the OVAT Act was not complied with by the Ld. AA. On perusal of Lower Case Record it is revealed that although the Ld. AA has mentioned about the completion of self assessment as per Section 39 of the OVAT Act in his order passed on dated 26.10.2012, nothing has been mentioned about the same in his order dtd.25.7.2012 in the order sheet while initiating the proceeding U/s.43 of the OVAT Act. Besides, the date of completion of self assessment proceeding U/s.39 of the OVAT Act is found missing in the statutory notice issued in Form VAT-307 dt.25.7.2012. The Respondent State has also failed to demonstrate the fact of completion of the proceeding U/s.39 of the OVAT Act in its true prospective and the communication made in this regard.

15. The Hon'ble High Court of Orissa in case of M/s. Kesab Automobiles, as cited supra in Para 22 of the judgement have been pleased to observe as follows:-

> *"From the above discussion, the picture that emerges is that if the self assessment U/s.39 of the OVAT Act for the tax period 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 fulfilment of other requirements of that provisions as it stood prior to 1st October, 2015".*

16. The aforesaid decision of the Hon'ble High Court of Orissa, has also been affirmed by the Hon'ble Supreme Court of India, in their decision on 13th July, 2022 in S.L.P. (Civil) No9912 of 2020 in case of Deputy Commissioner of Sales Tax Vrs. Rathi Steel and Power Ltd., and batch.

17. In view of the aforesaid decisions, we find that since the self assessment proceeding has not been completed in its right prospective, the present proceeding initiated U/s.43 of the OVAT Act is liable to be vitiated before the eyes of law. As it has been held that the action of the Ld. AA in instituting the proceeding U/s.43 of the OVAT Act to be invalid, the other grounds raised by the dealer appellant are considered to be redundant and not discussed by the Tribunal.

18. Hence, it is ordered.

19. Thus, the appeal preferred by the dealer appellant is allowed in full and as a necessary corollary the impugned orders passed by the

lower fora are quashed. The cross objection and additional cross objection filed by the State Respondent are accordingly disposed of.

Dictated and corrected by me

Sd/-
(S.R.Mishra)
Accounts Member-II.

Sd/-
(S.R.Mishra)
Accounts Member-II.

I agree,

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

I agree,

Sd/-

(S.K.Rout)
2nd Judicial Member.