

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

S.A. No.294(V) of 2013-14

(Arising out of the order of the learned JCST, Jajpur
Range, Jajpur Road in first appeal case No. AA-235
KJ 12-13 disposed of on 06.08.2013)

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

M/s. BRM Mines & Minerals,
At-Salarapenth, Po-Mahadeijoda,
Dist-Keonjhar, TIN-21071402580. Appellant.

-Versus -

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

For the Appellant : : Mr. R.K. Mishra, Advocate
For the Respondent : : Mr. S.K. Pradhan, A.S.C.(C.T.)

Date of Hearing : 07.08.2023 * Date of Order: 05.09.2023**

O R D E R

The dealer-assessee is in appeal against the order dated
06.08.2013 of the Joint Commissioner of Sales Tax, Jajpur Range,
Jajpur Road (in short, 'ld. FAA') passed in First Appeal Case No.
AA-235 KJ 12-13 pertaining the assessment under Section 42 of
the Odisha Value Added Tax Act (in short, 'OVAT Act') passed by
the Assistant Commissioner of Sales Tax, Keonjhar Circle,
Keonjhar (in short, 'ld. STO') rendering reduction in demand to

₹12,64,145.00 in defiance of the stands as assailed for in the first appeal.

2. The summary of the case is that M/s. BRM Mines and Minerals, a partnership carries on business in crushing of iron lumps procured inside the State of Odisha in size iron ore and iron ore fines and sell thereof inside and outside the State of Odisha besides exporting the same outside the territory of India. Assessment under Section 42 of the OVAT Act for the tax period 01.04.2005 to 31.03.2010 (2005-06 to 2009-10) was completed based on findings made available in the audit Visit report (AVR). The said assessment resulted in demand of ₹16,29,102.00 including penalty of ₹10,86,068.00. The first appeal as preferred by the dealer assessee turned out to be in reduction of demand to ₹12,64,145.00.

3. The dealer-appellant being aggrieved against the order of the ld. FAA approached this forum for relief endorsing grounds of appeal and additional grounds of appeal. Mr. R.K. Mishra, ld. Advocate representing the dealer-assessee submits his elaborate contentions of which, the substance of his stands is looked after. He contends that the assessment under Section 43 of the OVAT Act for the tax period from 01.04.2006 to 31.03.2007 (2006-07) was passed on 31.01.2011 raising demand of ₹83,20,869.00 including penalty of ₹55,47,246.00. Likewise, assessment under

Section 43 of the OVAT Act was passed for the tax period 01.04.2007 to 31.03.2008 (2007-08) on 31.01.2011 raising demand of ₹3,14,96,535.00 including penalty of ₹2,09,97,690.00. Such being the facts in position, as argued by the ld. Advocate, the ld. assessing authority basing on the findings contained the Audit Visit Report(AVR) initiated proceeding under Section 42 of the OVAT Act and assessed the dealer-assessee to tax of ₹16,29,102.00 including penalty of ₹10,86,068.00 for the tax period from 01.04.2005 to 31.03.2010 on 25.01.2012. It is therefore contended by the ld. Advocate that there were two separate assessments both in 43 and 42 of the Act for the self same tax periods emerged which would amount to double taxation. The ld. Advocate of the dealer-assessee relies support of the decision of the Hon'ble High Court of Odisha in case of ***Balaji Tobacco Store vs. The Sales Tax Officer, Cuttack-I East Circle, Cuttack reported in W.P.(C) No.31251 of 2011*** passed on 18.03.2015 wherein it is observed that audit assessment under Section 42 of the OVAT Act cannot be made after completion of the assessment of escaped turnover under Section 43 of the Act read with Rule 50 of the OVAT Rules for the self-same tax period(s). As to the contention of the State viewing 43 assessments for both the year 2006-07 and 2007-08 becoming inoperative consequent upon re-assessments completed based on remand orders, the ld.

Advocate defends that the impugned orders of re-assessment are under challenge before the first appellate authority. This case is pending for adjudication by the ld. FAA.

4. The State has submitted cross objection as well as the additional cross objection denoting the order of the forum below to be just and proper. It is submitted that the remand orders of assessment for both the periods have been passed by the learned assessing authority on 14.02.2023 as per the observations contained therein. Therefore, the said 43 proceedings became stale and inoperative. So it cannot be held that assessment under Section 42 of the OVAT Act has been passed after assessment under Section 43 of the Act.

5. Gone through the rival submissions. The orders of the forums below pertaining to the assessments/first appeals passed under Section 43 and 42 of the OVAT Act were minutely perused vis-a-vis the contentions of both the parties. It is not denying a fact that two assessments relating to the period 01.04.2006 to 31.03.2007 (2006-07) and 01.04.2007 to 31.03.2008 (2007-08) were completed under Section 43 of the OVAT Act on 31.01.2011 by the assessing authority. It is also a fact that in pursuance of the Audit Visit Report (AVR) as submitted under Section 41(4) of the OVAT Act, the self same assessing authority passed order of assessment under Section 42 of the OVAT Act on 25.01.2012 for

the tax periods 01.04.2005 to 31.03.2010. In consequence, it emerges that the period from 01.4.2006 to 31.03.2008 covered in two 43 assessments that completed on 31.01.2011 has been included in the assessment passed under Section 42 of the OVAT Act on 25.01.2012. It implies that the same turnover for the self same period is tantamount to double taxation.

6. The version of the State arguing the re-assessment for both the periods to have been completed by the assessing authority on 14.02.2023 basing on remand orders of the First appellate authority is not the correct assertion. For, the original assessments under Section 43 of the OVAT Act were completed on 30.01.2011 prior to completion of assessment under section 42 of the Act. Moreover, the impugned re-assessment orders of the learned assessing authority passed on 14.02.2023 are under challenge by the dealer assessee.

7. Whereas the learned Advocate of the dealer assessee places reliance on the decision of the Hon'ble High Court of Odisha passed in case **of M/s Balaji tobacco Store Vs. The Sales Tax Office, Cuttack I East Circle, Cuttack** (supra). The Hon'ble Court in Para 15, 19 and 22 of the aforesaid decision observes as under:-

“Para 15-: in view of the above settled legal position, Section 43 cannot be read into Section 42 by the State when the Legislature in its wisdom excluded Section 43 from the

provisions of Section 42 of the OVAT Act. Consequentially, no assessment under Section 42 can be made after completion of the assessment under Section 43 for the self-same tax period.”

“Para 19-: Xxxx xxxx xxxx xxxx

Therefore, in case of an assessee, if the Revenue authorities decide not to exercise the power conferred under Section 41(2) of the OVAT Act read with Rule 41(2) of the OVAT Rules to make audit assessment for particular tax period and choose to proceed to complete the assessment under Section 43 of the OVAT Act, it is thereafter not permissible to assess the petitioner under Section 42 of the OVAT Act.”

“Para 22-: For the reasons stated above, we are of the considered view that audit assessment under Section 42 cannot be made after completion of the assessment of escaped turnover under Section 43 of the OVAT Act read with Rule 50 of the OVAT Rules for the self-same tax period(s).”

In view of the above dictum, the order dated 06.08.2013 passed by the ld.FAA under Section 42 of the OVAT Act for the tax period 01.04.2005 to 31.03.2010 is set aside. However, the learned assessing authority is at liberty to assess the dealer appellant under Section 42 of the OVAT Act excluding the period from 01.04.2006 to 31.03.2008 for which the dealer appellant has already been assessed under Section 43 of the OVAT Act.

8. It is ordered as under:-

The appeal filed by the dealer assessee is partly allowed. The order of the ld.FAA is set aside. The impugned case is remanded to the learned assessing authority to reassess the

dealer under section 42 of the OVAT Act excluding the period from 01.04.2006 to 31.03.2008 within a period of three months from the date of receipt of this order observing statutory formalities as per law. Cross objection/additional objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

I agree,

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

Sd/-
(G.C. Behera)
Chairman

I agree,

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