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

S.A. No.148(V) of 08-09

(Arising out of the order of the learned DCST, Cuttack-I Range, Cuttack in first appeal case No. AA-(OVAT)40/CUIE/2006-07 dated 05.09.2008)

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

M/s. Nanakram Ramsaran,
Malgodown, Cuttack,
R.C. No. TIN-21251202661. ..... Appellant.

-Vrs –

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

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

Date of Hearing : 31.07.2023 * Date of Order : 29.08.2023**

O R D E R

The dealer-assessee on filing this second appeal under Section 78 of the Odisha Value Added Tax Act (in short, 'OVAT Act') seeks to intervene by this forum against the order dated 05.09.2008 of the Deputy Commissioner of Sales Tax, Cuttack-I Range, Cuttack (in short, 'ld. FAA') passed in First Appeal Case No. AA-(OVAT)40/CUIE/2006-07 confirming the order of assessment passed under Section 43 of the OVAT Act by

the Sales Tax Officer, Cuttack-I East Circle, Cuttack in (in short, 'ld. STO') in case of M/s. Nanakram Ramsaran for the tax period from 01.07.2005 to 31.07.2006.

2. The summary of the case in brief is that the dealer-assessee under the name and style of M/s. Nanakram Ramsaran, Malgodown, Cuttack, TIN-21251202661 does business in unmanufactured and unprocessed tobacco effecting purchases from outside the State of Orissa. The learned STO on scrutiny of the returns and samples of tobacco products as collected from the business premises of the dealer-assessee could conclude that the unmanufactured and unprocessed tobacco as dealt in by the dealer-assessee is amenable to tax @4% as per Entry 123 under Part II of Schedule B of the OVAT Act. The ld. STO upon initiation of processing under Section 43 of the OVAT Act assessed the dealer-assessee to tax of ₹12,00,222.00 including penalty under Section 43(2) of the OVAT Act charging 4% over and above the returns disclosed during tax period from 1.7.2005 to 31.07.2006 discarding the contention of the dealer-assessee asserting non-exigibility of tax on such tobacco products. The first appeal as preferred by the dealer-assessee resulted in affirmation of the order of the ld. STO.

3. From amongst the issues put forth on the grounds of appeal, the substantial dispute stressed upon is wholly on levy of

tax on sale of unmanufactured and unprocessed tobacco as classified as tobacco as provided in Entry 123 under Part II of Schedule B appended to the OVAT Act. It is argued that it is not subject to levy of tax under OVAT Act until such goods subject to levy of duties of excise under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 as provided in "Explanation" to the Schedule. It is also submitted that in compliance to the clarification sought for by the Odisha Govt. from the Govt. of India for levy tax on tobacco and its ancillary products consequent upon exemption of tobacco from levy of excise duty vide their Notification No.11/2006-07, Central Excise Duties 01.03.2006 effective from 01.03.2006, it is clarified by the Central Govt. declaring that the Additional Excise Duty is levied on sugar, tobacco and textiles in lieu of sales tax as part of tax rental agreement with the States. The Additional Excise Duty is leviable on the goods described in column (3) of the First Schedule of Additional Duties of Excise Act, 1957 at the rates prescribed in column (4) of the said schedule. The effect of the said notification is that the rates specified in column (4) of the First Schedule shall become 0%. However, the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (including the First Schedule of the Act containing the list of goods on which additional excise duties is leviable) shall continue to exist as before. As submitted by the

dealer-assessee, the ld. STO has levied VAT in contravention of the provision of law for want of evidence adduced at assessment in support of payment made towards additional excise duty. It is contested that the declaration contained in the "Explanation" as referred to above provides that "The Goods 'Sugar' "Textile Fabric" and Tobacco appearing against Sl. No. 108, 113 and 116 shall not be subject to levy of tax under this Act until such goods are subject to levy of duties of excise under the Additional Duties of Excise (Goods of Special Importance) Act, 1957." Since it is a statutory mandate, the forums below have no authority to infringe upon it.

4. Apart from the above, Mr. B.P. Mohanty, ld. Advocate representing the dealer-assessee submits additional grounds of appeal before this forum at the time of hearing. It is submitted that the point of law as regards completion of assessment under Section 39 or 42 of the OVAT Act and communication thereof to the dealer-assessee precedent to initiation of proceeding under Section 43 of the OVAT Act came up as a mandatory requirement pursuant to the decision of the Hon'ble High Court of Odisha delivered in case of ***M/s. Keshab Automobiles Vs. the State of Odisha*** in STREV No.64 of 2016. The said decision was passed on 01.12.2021. This is the substantial point of law as of now to abide by. This has become available on account of charge of

circumstances or law. It is submitted by the ld. Counsel of the assessee that the Hon'ble Tribunal endows with the authority to allow the additional grounds of appeal concerning point of law striking root of the case although the same were not raised earlier in the forums below. It is also averred that the grounds of appeal filed at the time of filing second appeal contain self-assessment under Section 39 of the OVAT Act to have been accepted. The version then made was to clarify that since the statutory returns were filed in time disclosing the turnover, the action of the ld. STO at a pretty later stage alleging exigibility of tax on tobacco was uncalled for. In view of the above contention, Mr. Mohanty, ld. Advocate holds that in absence of the completion of assessment under Section 39, 40, 42 or 44 of the OVAT Act, reassessment under Section 43(1) of the OVAT Act is unsustainable in law in consonance with the decision of the Hon'ble High Court of Orissa (Supra) which has been upheld in the Hon'ble Apex Court. Accordingly, the ld. Advocate submits that the impugned orders of the forums below are liable to be annulled for the ends of justice.

5. Per contra, Mr. D. Behura, ld. Counsel representing the State supports the orders of the forums below. Cross objection as well as the additional cross objection has been filed contending that the additional grounds of appeal was never brought forth in the forums below earlier. Rather, the dealer-assessee itself

admitted to have the self-assessment accepted under Section 39 of the OVAT Act. The State relied on the decision meted out in (1961) 12 STC 162 in case of the ***State of Orissa Vs. Lakhoo Vajrang*** stating that the Tribunal may allow additional evidence to be taken subject to the limitations prescribed in Rule 61 of the Orissa Sales Tax Rules. But this additional evidence must be limited only to the questions that were then pending before the Tribunal. It is further contended that the additional grounds taken by the appellant may not be taken into consideration in view of Rule 102 of the OVAT Rules which has prescribed for restricting to adduce fresh evidence before the Tribunal.

6. The rival submissions are heard. The orders of the forums below are gone through at length together with the grounds of appeal, additional grounds of appeal, cross objection and additional cross objection. The order of the assessment passed under Section 43 of the OVAT Act is minutely looked into. From facts emerging from going through the order of assessment, it is noticed that there was no assessment executed under Section 39 or 42 of the OVAT Act. The ld. STO found reason to believe that tobacco is exigible to tax @4% and as such, he holds that the dealer-assessee having business in tobacco products was liable to pay tax @4% on the turnover disclosed during the tax periods under appeal. The dealer-assessee could have been provided an

opportunity of being heard. Instead, the ld.STO issued notice in VAT 307 terming it as escapement of taxable turnover. The ethos of section 39(2) and 42(1) of the OVAT Act whereupon proceeding under Section 43 of the OVAT Act could survive has not been observed by the ld. STO. Under this eventuality, the assessment framed under Section 43 of the OVAT Act in the present case besides being vulnerable is not sustainable in law. The order of the ld. FAA may thereby also invite the same fate as of the assessment order.

7. The cross objection along with the additional cross objection filed by the State holding the additional grounds of appeal to be inadmissible and unsustainable in the wake the same having not raised in the forums below is looked into. It is opined beyond doubt that the Tribunal has discretion to allow new or additional grounds of appeal when available on account of change of circumstances or law. The decision of the Hon'ble High Court of Odisha in case of ***M/s. Keshab Automobiles Vs. State of Orissa (Supra)*** was brought out to public on 01.12.2021 a pretty long after the instant second appeal was filed. As the settled law is now made available for enforcement, the Tribunal is incumbent upon by law to act on it. The version of the dealer-assessee as to acceptance of the self-assessment under Section 39 of the OVAT Act in the grounds of appeal, it is in fact a misconception. The

dealer-assessee's contention was to convey the ld. STO to the effect that since the returns for the impugned tax periods have been filed in time incorporating the turnover, no inference of tax evasion ought to have been contemplated. The self-assessed assessment was not communicated to the dealer assessee as accepted either. However, as of the present law in prevalence, 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*** (Supra) 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.

8. In the instant case, it is revealed that the assessment framed under the OVAT Act relate to the tax period from 01.07.2005 to 31.07.2006 which entirely cover the pre-amended periods. The learned Assessing Authority is learnt to have not complied the pre-conditions as required under section 39(1) of the OVAT Act for initiation of proceedings under section 43(1) of the OVAT Act. There is no evidence available on record as to communication of the assessment made under Section 39 of the OVAT Act to the dealer-assessee. The first appeal order is silent on requirement of assessment under Section 39 (2) of the OVAT Act prior to initiation of 43 proceeding. Accordingly, the instant proceeding framed under Section 43(1) of the OVAT Act being rendered infirmity on account of non-adherence of the mandatory provision of section 39(2) of the OVAT Act is not sustainable in law and as such, the same is liable to be quashed. Under this eventuality, all other points raised the in the grounds of appeal are rendered redundant.

In view of the decision of the Hon'ble Court in ***M/s. Keshab Automobiles v. State of Odisha*** cited supra, the assessment proceeding U/s.43 of the OVAT Act is without jurisdiction in absence of any assessment U/s.39, 40, 42 or 44 of the said Act. So the orders of the ld. STO and ld. FAA are not

sustainable in the eyes of law as the same are without jurisdiction. Hence it is ordered.

6. Resultantly, the appeal is allowed and the orders of the ld. STO and 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)
2nd Judicial Member