

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

S.A. No. 261(V) of 2015-16

(Arising out of the order of the learned JCCT, Jajpur Range,
Jajpur Road, in First Appeal case No. AA-555KJ 2014-15(OVAT)
disposed of on 11.08.2015)

**P r e s e n t: Shri G.C.Behera, Sri. S.K.Rout & Shri M.Harichandan,
Chairman Judicial Member-II Accounts Member-I**

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

... Appellant

- V e r s u s -

M/s. B.K. International,
Hospital Road, Thana Chowk,
Keonjhar.

... Respondent

For the Appellant

... Mr. M.L. Agarwal, S.C.

For the Respondent

... Mr. S.C. Sahoo, Advocate.

Date of hearing: **02.02.2023**

* * *

Date of Order: **14.02.2023**

ORDER

State prefers this appeal challenging the order dated 11.08.2015 passed by the learned Deputy Commissioner of Sales Tax, Jajpur Range, Jajpur Road (in short, DCST/FAA) in first appeal case No.AA.555KJ/2014-15 (OVAT), thereby allowing the appeal in part and reducing the demand to Rs.2,51,318.00 from Rs.40,28,979.00 against the order of assessment passed by the learned Sales Tax Officer, Keonjhar Circle, Keonjhar (in short, STO/AO) on dated 20.01.2015 under Section 43 of the OVAT Act for the tax period from 01.04.2010 to 30.06.2013 raising the demand of Rs.40,28.979.00.

2. The case at hand is that the dealer being an individual concern has been granted RC under OVAT , CST and OET Act who deals in trading of sanitary fittings such as Jaguar bath, fittings, ERA sanitary ware, C-

Zar bath fittings, sintex tanks, supreme SWR pipes, Mahindra pumps guard Geuseretc plastic pipes and kitchen appliances on wholesale cum retail basis. Pursuant to the tax evasion report from the DCST, Vigilance, Balasore division, Balasore, learned STO initiated proceeding under Section 43 of the OVAT Act by issuing statutory notice in Form VAT-307 and enhanced the returned gross turnover by Rs.99,92,671.00 and determined the gross turnover and taxable turnover at Rs.4,52,53,904.00 and Rs.4,25,98,221.00 respectively. The output tax was determined at Rs.39,98,676.00 again which input tax credit to the extent of Rs.25,02,693.00 has been adjusted and the output tax net of input tax credit was accordingly worked out to Rs.14,95,983.00. As the dealer has paid a sum of Rs.1,52,990.00 towards admitted tax at the time of filing of periodical returns, balance tax was assessed at Rs.13,42,993.00. Penalty was also imposed by the learned assessing officer to Rs.26,85,986.00 (twice the tax assessed) under Section 43(2) of the OVAT Act. Thus, the tax along with penalty due to be paid by the appellant was calculated at Rs.40,28,979.00 and demand notice in Form VAT-313 was issued to the appellant.

3. Against such tax demand, the dealer preferred first appeal before the learned DCST, Jajpur Range, Jajpur Road who reduced the tax demand to Rs.2,51,318.00 from Rs.40,28,979.00 as raised by the learned STO.

4. Being dis-satisfied with the order of the learned first appellate authority, State has preferred the present second appeal as per the grounds stated in the grounds of appeal.

5. Cross objection is filed in this by the dealer respondent.

6. Learned Standing Counsel for the Revenue argued that the orders of the fora below are genuine which need no interference.

7. Per contra, during course of argument learned Counsel for the dealer submitted that the order of assessment u/s.43 of the OVAT Act for the period 01.04.2010 to 30.06.2013 without completion of any assessment u/s.39, 40, 42 or 44 is misconceived, without authority, without jurisdiction for which the same is bad in law. The learned Counsel also submitted that the

order of assessment is unsustainable as per the settled ratio of the decision rendered by the Hon'ble High Court of Orissa in the case of M/s. Keshab Automobiles v. State of Orissa passed in STREV no.64/2016.

8. Heard the contentions and submissions of both the parties in this regard. The sole contention of the dealer appellant is that the assessment order of sales tax officer, Keonjhar Circle, Keonjhar for the period 01.04.2010 to 30.06.2013 is not maintainable. It was vehemently urged by the learned Counsel for the dealer assessee that the initiation of proceeding under Section 43 of the OVAT Act was illegal and bad in law in the absence of formation of any independent opinion by the assessing authority as required under Section 43(1) of the Act. The escaped turnover assessment could **not** have been initiated under Section 43 of the OVAT Act when the dealer assessee was not self assessed under Section 39 of the Act. Further contention of the dealer assessee is that the initiation of such proceeding by the assessing authority under Section 43 of the OVAT Act without complying the requirement of law and in contravention to the principles laid down by the Hon'ble High Court of Orissa in case of M/s.Keshab Automobiles Vrs. State of Odisha (STREV No.64 of 2016 decided on 01.12.2021) is bad in law. He vehemently urged that there is nothing on record to show that the dealer assessee was self assessed under Section 39 of the OVAT Act after filing the return and it was communicated in writing about such self assessment. So when the very initiation of proceeding under Section 43 of the OVAT Act is bad in law, the entire proceeding becomes a nullity and is liable to be dropped.

After a careful scrutiny of the provisions contained under Section 43 of the OVAT Act, one thing becomes clear that only after assessment of dealer under Section 39,40,42 or 44 for any tax period, the assessing authority, on the basis of any information in his possession, is of the opinion that the whole or any part of the turnover of the dealer in respect of such tax period or tax periods has escaped assessment, or been under assessed, or been assessed at a rate lower than the rate at which it is assessable, then giving the dealer a reasonable opportunity of hearing and after making such enquiry, assess the dealer to the best of his judgment. Similar issue also came up before

the Hon'ble High Court in case of M/s.Keshab Automobiles (supra) wherein the Hon'ble Court interpreting the provisions contained under Section 43 of the OVAT Act, in paras 13 to 16 of the judgment observed that "the dealer is to be assessed under Sections 39,40,42 and 44 for any tax period. The words "where after a dealer is assessed' at the beginning of Section 43(1) prior to 1st. October, 2015 pre-supposes that there has to be an initial assessment which should have been formally accepted for the periods in question i.e. before 1st. Oct, 2015 before the Department could form an opinion regarding escaped assessment or under assessment....."

So, the position prior to 1st. Oct. 2015 is clear. Unless there was an assessment of the dealer under Section 39,40,42 or 44 for any tax period, the question of reopening the assessment under Section 43(1) of the OVAT Act did not arise. The Hon'ble Court in para-22 of the judgment has categorically observed that if the self assessments under Section 39 of the OVAT Act for the tax periods prior to 01.10.2015 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. In the instant case, the impugned tax relates to pre-amended provisions of Section 43 of the OVAT Act i.e. prior to 01.10.2015. This apart, the returns filed by the appellant were also not accepted either by a formal communication or an acknowledgment issued by the Department. The similar matter has also been decided by the Full Bench of OSTT in various cases such as: M/s.Swati Marbles Vrs. State of Odisha, S.A.No.209(V) of 2013-14 Order of Hon'ble Full Bench, OSTT dated 06.06.202, State of Odisha Vrs. M/s.Jaiswal Plastic Tubes Ltd. S.A.No.90(V) of 2010-11, Order of Hon'ble Full Bench, OSTT, dated 06.06.2022, M/s.Jalaram Tobacco Industry Vrs. State of Odisha S.A. NO.35(V) of 2015-16, Order of Hon'ble Full Bench, OSTT dated 16.08.2022, M/s.Eastern Foods Pvt. Ltd. Vrs. State of Odisha S.A.No.396 (VAT) of 2015-16, Order of Hon'ble Full Bench dtd.23.08.2022 and M/s. Shree Jagannath Lamination and Farmes Vrs. State of Odisha, S.A.No.25 (VAT) of 2015-16, Order of Hon'ble Full Bench , OSTT dated 15.10.2022.

10. So in view of the above analysis, the impugned notice for reassessment issued to the dealer is to be treated as without any authority. In view of the above discussion, we arrived at a conclusion that the order of assessing authority and the first appellate authority are not sustainable in the eyes of law and the same warrant interference in this appeal. Hence, ordered.

11. The appeal preferred by the State is dismissed and the impugned orders of the forum below are hereby quashed. The cross objection is disposed of accordingly.

Dictated and Corrected by me,

Sd/-
(Shri S.K.Rout)
Judicial Member-II

Sd/-
(Shri S.K.Rout)
Judicial Member-II

I agree,

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

I agree,

Sd/-
(Shri M. Harichandan)
Accounts Member-I