

**BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL:
CUTTACK**

S.A. No. 108 (VAT) of 2018

(Arising out of order of the learned JCST, Jajpur Range,
Jajpur Road, in Appeal No. AA 705 KJB 16-17 (OVAT),
disposed of on 31.10.2017)

Present: **Shri G.C. Behera, Chairman**

M/s. Thriveni Earthmovers Pvt. Ltd.,
Unchabali, Bamebari, Joda,
Dist. Keonjhar ... Appellant

-Versus-

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

For the Appellant : Sri N.K. Dash, Advocate
For the Respondent : Sri D. Behura, S.C. (CT)

Date of hearing : 21.08.2023 *** Date of order : 22.08.2023

ORDER

Dealer assails the order dated 31.10.2017 of the Joint Commissioner of Sales Tax, Jajpur Range, Jajpur Road, (hereinafter called as 'First Appellate Authority') in F.A. No. AA 705 KJB 16-17 (OVAT) confirming the assessment order of the Deputy Commissioner of Sales Tax, Barbil Circle, Barbil (in short, 'Assessing Authority').

2. The facts of the case, in short, are that –

M/s. Thriveni Earthmovers Pvt. Ltd. carries on business in raising and extraction of iron ore from different mining lessees, screening, downsizing of the same, transporting and execution of works contract under

CSR and other Govt. agencies. The assessment period relates to 01.04.2008 to 31.03.2013. The Assessing Authority raised tax and penalty of ₹60,45,351.00 u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') on the basis of Tax Evasion Report (TER).

The dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority confirmed the tax demand and dismissed the appeal. Being aggrieved with the order of the First Appellate Authority, the Dealer prefers this appeal. Hence, this appeal.

The State files cross-objection supporting the order of the First Appellate Authority to be just and proper.

3. Learned Counsel for the Dealer files additional grounds of appeal and submits that the Assessing Authority was erred in law in assessing the Dealer u/s. 43 of the OVAT Act without completing the assessment u/s. 39, 40, 42 or 44 of the OVAT Act. He further submits that the acceptance of self-assessment was not communicated to the Dealer and as such, reopening the proceeding u/s. 43 of the OVAT Act on the basis of TER is not sustainable in law. He relies on the decision of the Hon'ble Court in case of *M/s. Keshab Automobiles v. State of Odisha*, reported in **2021-TIOL-2289-HC-ORISSA-VAT**. So, he submits that the orders of the Assessing Authority and the First Appellate Authority are liable to be set aside in the ends of justice.

4. On the other hand, the learned Standing Counsel (CT) for the State submits that the Dealer did not raise the issue regarding acceptance of self-assessment return either at the time of assessment or before the First Appellate Authority. He further submits that if the Dealer did not raise the issue in the earliest opportunity, he is precluded to take such ground before the second appellate authority for the first time by way of additional grounds

of appeal. He further submits that communication/acknowledgement of the order of acceptance of self-assessed return is a matter of fact and the same cannot be objected at this belated stage before this forum.

5. Having regard to the submissions and on careful scrutiny of the record, it is apparent that reassessment u/s. 43 of the OVAT Act can only be made after the assessment is completed u/s. 39, 40, 42 or 44 of the said Act.

Hon'ble Court in the case of *M/s. Keshab Automobiles* cited supra have been pleased to observe in para-22 as follows :-

“22. 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 fulfilment of other requirements of that provision as it stood prior to 1st October, 2015.”

In view of the ratio laid down by the Hon'ble Court, the Department is required to communicate a formal communication or acknowledgment regarding the acceptance of the self-assessment u/s. 39 of the OVAT Act. In this case, the State has not filed any materials to show that the acceptance of the self-assessment has been communicated to the Dealer.

Admittedly, the Dealer has challenged the maintainability of proceeding u/s. 43 of the OVAT Act on the ground of non-communication of acceptance of self-assessed return at the stage of second appeal by way of additional grounds of appeal. In the meantime, law has been settled by the Hon'ble Court in case of *M/s. Keshab Automobiles* cited supra regarding maintainability of proceeding u/s. 43 of the OVAT Act in absence of communication of order of acceptance of self-assessed return and the same has been confirmed by the Hon'ble Apex Court. On such ground, the Dealer

has taken the additional ground and the same has already been accepted. So, the Dealer cannot be precluded to raise the fact of non-communication of acceptance of self-assessed return as it touches the very root of the case. Therefore, the contention of the State on this score does not merit consideration.

As the proceeding u/s. 43 of the OVAT Act is not maintainable on the point of jurisdiction and the same has been decided as preliminary issue, so, it is not required to deal with other contentions raised by the Dealer before this forum on merit.

6. In view of the decision of the Hon'ble Court in case of *M/s. Keshab Automobiles* 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 Assessing Authority and the First Appellate Authority under the OVAT Act are not sustainable in the eyes of law as the same are without jurisdiction. Hence, it is ordered.

7. Resultantly, the appeal stands allowed and the impugned order of the First Appellate Authority is hereby set aside. The order of the Assessing Authority is quashed. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

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

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(G.C. Behera)
Chairman**