BEFORE THE JUDICIAL MEMBER-II:
ODISHA SALES TAX TRIBUNAL: CUTTACK.

P r e s e n t: **Shri S.K. Rout,**
2nd Judicial Member

S.A. No. 214(V) of 2018

(Arising out of the order of the learned Joint Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur, in First Appeal Case No. AA 268/SAII/VAT/2014-15, disposed of on dtd.26.10.2017)

M/s. Radha Keshav Rice Mill (P) Ltd.,
At:- Larpank, P.O.- Remed,
Dist.- Sambalpur. ... Appellant

- V e r s u s -

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

S.A. No. 336(V) of 2017-18

(Arising out of the order of the learned Joint Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur, in First Appeal Case No. AA 268/SAII/VAT/2014-15, disposed of on dtd.26.10.2017)

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

- V e r s u s -

M/s. Radha Keshav Rice Mill (P) Ltd.,
At:- Larpank, P.O.- Remed,
Dist.- Sambalpur. ... Respondent

For the Dealer ... Mr. R.C. Poddar &
Mr. R.K. Agarwal, Advocate
For the State ... Mr. D. Behura, S.C.

Date of hearing: 31.05.2023 *** Date of order: 03.06.2023

O R D E R

Both these appeals are disposed of by this composite order as the same involve common question of fact and law in between the same parties and for the same assessment period and the challenge is to the same order.

2. S.A. No.214(V) of 2018 is preferred by the dealer-assessee, whereas S.A. No.336(V) of 2017-18 is preferred by the State challenging the order dated 26.10.2017 passed by the learned Joint Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur (hereinafter referred to as, JCST/first appellate authority) in First Appeal Case No. AA 268/SAII/VAT/2014-15, thereby allowing the appeal in part and reducing the tax demand to ₹62,517.00 against the order of assessment dtd.23.07.2014 passed by the learned Deputy Commissioner of Sales Tax, Sambalpur II Circle, Sambalpur (hereinafter referred to as, DCST/LAO) u/s.43 of the Orissa Value Added Tax Act, 2004 (in short, the OVAT Act) relating to the tax period from 01.04.2013 to 23.10.2013 raising demand of ₹7,55,109.

3. The case at hand is that, the dealer-assessee in the instant case is a rice miller and engaged in custom milling of paddy and supplies rice to OSCSC Ltd. The rice bran and broken rice obtained from custom milling is sold in the in the open market. Pursuant to fraud case report submitted by the Vigilance Wing, Sambalpur, assessment proceeding was

initiated against the dealer u/s.43 of the OVAT Act and the demands as mentioned above was raised.

4. Against such tax demand, the dealer preferred first appeals before the learned Joint Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur who allowed the appeal in part and reduced the tax demand as mentioned above.

5. Further, being dissatisfied with the order of the learned first appellate authority, both the dealer-assessee and the State have preferred these present second appeals before this Tribunal as per the grounds stated in the grounds of appeal.

6. Cross objections are filed in these cases both by the dealer and the State being the respondents.

7. The learned counsel appearing for the dealer-assessee contended that the orders passed by the learned forums below are illegal and arbitrary. No assessment u/s.39, 42 or 44 was made before initiation of proceeding u/s.43 of the OVAT Act. Since the concept of deemed assessment of the return has been introduced for the first time since 1st October, 2015, the impugned orders of reassessment are liable to be quashed for the period under challenge.

8. Per contra, the learned Standing Counsel for the State-appellant contended that prior to initiation of proceeding u/s.43 of the OVAT Act the dealer was self-assessed u/s.39 of the Act, so the proceeding initiated u/s.43 of the OVAT Act against the dealer is genuine and as such the case of **M/s. Keshab Automobiles v. State of Odisha (STREV No.64 of 2016 decided on 01.12.2021)** will not be applicable to this case. This apart, learned Standing Counsel for the State-

appellant contended that the plea as taken by the dealer-assessee that communication of acceptance of return was not raised earlier by the dealer in the first appeal for which this plea cannot be taken at this stage which is barred as per sec.98(2) of the OVAT Act.

9. Heard the contentions and submissions of both the parties in this regard. The sole contention of the dealer-appellant is that the assessment orders are not maintainable. It was vehemently urged by the learned Counsel for the dealer-assessee that the initiation of proceeding u/s.43 of the OVAT Act was illegal and bad in law in absence of formation of independent opinion by the assessing authority as required u/s.43(1) of the Act. The escaped turnover assessment could not have been initiated u/s.43 of the OVAT Act when the dealer-assessee was not self-assessed u/s.39 of the Act. Further contention of the dealer-assessee is that the initiation of such proceeding by the assessing authority u/s.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 v. 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 u/s.39 of the OVAT Act after filing the return and it was communicated in writing about such self-assessment. So when the initiation of proceeding u/s.43 of the OVAT Act is bad in law, the entire proceeding becomes nullity and is liable to be dropped.

10. After a careful scrutiny of the provisions contained u/s.43 of the OVAT Act, one thing becomes clear that only after assessment of dealer u/s.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 u/s.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 October, 2015 before the Department could form an opinion regarding escaped assessment or under assessment ….".

So the position prior to 1st October, 2015 is clear. Unless there was an assessment of the dealer u/s.39, 40, 42 or 44 for any tax period, the question of reopening the assessment u/s.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 u/s.39 of the OVAT Act for the tax periods prior to 01.10.2015 are not accepted either

by a formal communication or an acknowledgment by the Department, then such assessment cannot be sought to be reopened u/s.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 acknowledgement 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 v. State of Odisha, S.A. No.209(V) of 2013-14 (Full Bench dtd.06.06.2022), State of Odisha v. M/s. Jaiswal Plastic Tubes Ltd., S.A. No.90(V) of 2010-11 (Full Bench dtd.06.06.2022), M/s. Jalaram Tobacco Industry v. State of Odisha, S.A. No.35(V) of 2015-16 (Full Bench dtd.16.08.2022), M/s. Eastern Foods Pvt. Ltd. v. State of Odisha, S.A. No.396 (VAT) of 2015-16 (Full Bench dtd.23.08.2022) and M/s. Shree Jagannath Lamination and Frames v. State of Odisha, S.A. No.25(VAT) of 2015-16 (Full Bench dtd.15.10.2022).

11. In view of the law expounded by the Hon'ble High Court in case of **M/s. Keshab Automobiles (supra)** and subsequently confirmed by the Hon'ble Apex Court, the proceeding u/s.43 of the OVAT Act has been initiated by the assessing authority without complying with the requirement of law and without giving any finding that the dealer-assessee was formally communicated about the acceptance of self-assessed return, the proceeding itself is not maintainable. So, in view of the above analysis and placing reliance to the verdict of the Hon'ble Courts, I am of the view that the claim of the appellant deserves a merited acceptance.

12. In the result, the appeal preferred by the dealer is allowed. On the other hand, the appeal preferred by the State is disallowed. As a corollary the orders of the forums below are hereby quashed. The cross objection is disposed of accordingly.

Dictated & corrected by me,

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

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