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

S.A. No.69 (V) of 2016-17

(Arising out of the order of the learned JCST, Jajpur Range, Jajpur Road First Appeal Nos. AA-416 CUIII 13-14, disposed of on 09.02.2016)

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

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

-Vrs.–

M/s. Sahoo Distributors Pvt. Ltd.
AT/Po- Chhatia Dist- Jajpur. …… Respondent.

For the Appellant : Mr. D. Behura, ld. S.C. (C.T.)
: Mr. N.K. Rout, ld. A.S.C.(C.T.)
For the Respondent : Mr. S.C. Sahoo, ld. Advocate

Date of Hearing : 30.06.2023 * Date of Order : 30.06.2023**

O R D E R

The State is in appeal against the order dated 09.02.2016 of the Joint Commissioner of Sales Tax, Jajpur Range, Jajpur Road (in short, 'ld.FAA') passed in the First Appeal Case No. AA-416 CUIII 13-14 in reducing the demand to ₹21,274.00 as against the demand of ₹25,72,245.00 raised at

assessment passed by the Sales Tax Officer, Assessment Unit, Jaraka (in short, 'ld.STO') under Section 43 of the OVAT Act.

2. The facts, in nutshell, of the case are that M/s. Sahoo Distributors Pvt. Ltd., Jajpur carries on business in Atta, Cigarettes, Soap, Cosmetics, chocolates, Agarbati, Match box, Panmasala etc. in wholesale and retail basis effecting purchases both from inside and outside the State of Odisha. Proceedings u/S.43 of the OVAT Act has been initiated by the ld. STO for the tax period 01.04.2010 to 31.03.2012 basing on the Fraud Case Report bearing No.02 dated 30.05.2012 and raised demand of ₹25,72,245.00 which includes penalty of ₹17,14,830.00 imposed u/S. 43(2) of the OVAT Act. The dealer-assessee being aggrieved preferred the first appeal. The ld. FAA while conceding to the issue of maintainability as agitated by the learned Counsel has reduced the demand to ₹21,274.00.

3. The State being not satisfied with the first appeal order preferred second appeal before this forum adducing grounds of appeal that there is no such requirement of communication to initiate assessment proceeding under Section 39 of the OVAT Act. It is submitted that as per Section 48 of the OVAT Act, communication of order to the dealer is made in case of

arithmetical mistake only; otherwise it is to be considered as self-assessed and accepted. Nothing is left for court to surmise. Basing on surmise, verdict appears to be unjust and illegal. It is also submitted that after confrontation of the escaped turnover and suppression established, the question of forming opinion is not essential. The order of the ld. FAA appears to be biased and as such, the State urges restoration of order of the ld. STO setting aside the first appellate order.

4. There is no cross objection filed by the dealer-respondent.

5. Heard the rival submissions. The order of assessment and the order of the ld. FAA coupled with the materials on record are gone through. 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 or 44 for any tax period. Decision of the Hon'ble High Court of Odisha vide STREV No.64 of 2016 dated 01.12.2021 pronounced

in case of ***M/s. Keshab Automobiles Vs. State of Odisha*** 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 which reads as follows:-

> "We have gone through the impugned order(s) passed by the High Court. The High Court has passed the impugned order(s) on the interpretation of the relevant provisions, more particularly Section 43 of the Odisha Value Added Tax Act, 2004, which was prevailing prior to the amendment. We are in complete agreement with the view taken by the High Court. No interference of this Court is called for in exercise of powers under Articles 136 of the Constitution of India. Hence, the Special Leave Petitions stand dismissed"

In the present case, it is revealed that the assessment framed under the OVAT Act relate to the tax period from 01.04.2010 to 31.03.2012 which entirely covers the pre-amendment period. The learned assessing authority is learnt to have not adhered to the requirement of preconditions as required under section 39 of the OVAT Act for initiation of proceedings under section 43 of the OVAT Act. She has reopened the assessment simply on the basis of a Tax Evasion Report (in short, TER). There is no evidence available on record as to communication of the assessment made U/s.39 of the OVAT Act to the dealer-assessee. The ld.FAA has rightly observed that the ld. STO himself has admitted to the effect that there was no assessment made on or after 30.3.2009. In absence of any kind of assessment made prior to issue of notice, formation of opinion is not tenable under section 43(1) of the OVAT Act. The ld.FAA has thus inclined to accept the issue of maintainability as urged upon and held the impugned assessment as not sustainable in the eyes of law. But, to our dismay, the ld.FAA has accepted the suppression of sales as alleged by the inspecting officer and determined the tax liability of the dealer-assessee on this account at ₹21,174.00 in sharp

contrary to his decision on non-sustainability of the impugned 43 proceedings as discussed supra. We are, therefore, constraint to set aside the order of the ld.FAA to the extent of fixing tax liability based on the findings made in the Fraud Case Report.

6. We, therefore, order as under:-

The appeal filed by the State is dismissed. The order of the ld.FAA is set aside to the extent as discussed in the foregoing para. As a necessary corollary thereof, the assessment order is hereby quashed.

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