BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 1 (VAT) of 2020

(Arising out of order of the learned JCST (Appeal), Territorial Range, Cuttack II, Cuttack (Camp at Bhubaneswar), in Appeal No. AA-106221722000177/OVAT/BH-IV, disposed of on 14.09.2017)

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

M/s. Rameswar Agro Industries Pvt. Ltd.,
Plot No. 52, Industrial Estate Bhagabanpur,
Patrapada, Bhubaneswar-751 019 ... Appellant

-Versus-

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

For the Appellant : Sri A.K. Roy, Advocate
For the Respondent : Sri N.K. Rout, Addl. SC (CT)

Date of hearing : 03.11.2023 *** Date of order : 08.11.2023

O R D E R

Dealer assails order dated 22.10.2019 of the Joint Commissioner of Sales Tax (Appeal), Territorial Range, Cuttack II, Cuttack (Camp at Bhubaneswar), (hereinafter called as 'First Appellate Authority') in F.A. No. AA-106221722000177/OVAT/BH-IV reducing the demand raised in assessment order of the Sales Tax Officer, Bhubaneswar-IV Circle, Bhubaneswar (in short, 'Assessing Authority').

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

M/s. Rameswar Agro Industries Pvt. Ltd. is engaged in manufacturing and trading of Chaki Atta and choked, rice, broken rice and

bran. The assessment period relates to 01.04.2013 to 31.07.2015. The Assessing Authority raised tax and penalty of ₹35,37,424.00 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 reduced the tax demand to ₹29,20,728.00 and allowed the appeal in part. 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 submits that the Assessing Authority was not justified 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 receipt of TER is not sustainable in law. He also argues that the determination of escaped turnover merely basing on Vigilance Report is not justified since the Dealer has explained that the stock taking was made on a single day and huge stock was lying in the godown for which accurate stock could not be ascertained on random checking. He further contends that the preliminary issue should be addressed first before going to the merit of the case.

He relies on the decision of the Hon'ble Court in case of ***M/s. Keshab Automobiles v. State of Odisha*** (**STREV No. 64 of 2016**, decided on 01.12.2021). 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 was self-assessed u/s. 39 of the OVAT Act by way of filing returns. He only took the ground of maintainability before the First Appellate Authority, but did not raise the issue in the earliest opportunity, i.e. Assessing Authority. He submits that the First Appellate Authority has already considered the said ground. 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.

He relies on the decision of the Hon'ble Apex Court in case of ***K. Chelliah v. P. Muthuswami Servai***, 1993 SC 1005 in **Civil Appeal No. 2423/1987**.

5. Heard the rival submissions and gone through the orders of the Assessing Authority and First Appellate Authority vis-a-vis the materials on record. The Dealer raised the preliminary issue of maintainability of proceeding u/s. 43 of the OVAT Act in absence of any assessment u/s. 39, 40, 42 or 44 of the said Act.

The State claims that the First Appellate Authority has already considered the preliminary issue of maintainability and the Dealer has not raised the same at the earliest opportunity before the Assessing Authority. On perusal of the impugned order of the First Appellate Authority, it reveals that the First Appellate Authority whispers no single word regarding preliminary issue of maintainability raised by the Dealer. So, the submission of the State on this score is an error on record and the same merits no consideration.

Admittedly, the Dealer has not taken the point of maintainability before the Assessing Authority. But, he has raised the same before the First Appellate Authority by way of additional grounds of appeal. It is settled law

that a proceeding u/s. 43 of the OVAT Act is not maintainable unless any proceeding u/s. 39, 40, 42 or 44 of the said Act has been completed, self-assessment return has been accepted and communicated to the Dealer. The Dealer has taken the same before the First Appellate Authority. It is also settled that the point of law can be taken at any stage even before this forum. Maintainability of 43 proceeding in absence of acceptance of self-assessed return is a point of law and same can be challenged in any forum. Moreover, the law is well settled when the same has been decided by the Hon'ble High Court of Orissa and affirmed by the Hon'ble Apex Court. After such settled law, the Dealer can take the same issue before this forum even for the first time without raising earlier. So, the submission of the learned Addl. Standing Counsel (CT) cannot be accepted. Therefore, the decision relied on *supra* by the State is not applicable to the present facts and circumstances of the case.

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. 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