BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

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

S.A. No. 107(V) of 2016-17
(Arising out of the order of the learned Addl. Commissioner of Sales Tax (North Zone),
in Appeal No. AA-153(V)/DCST (Asst)RKL-I/2014-15 (OVAT),
disposed of on dtd.04.04.2016)

M/s. Altrade Minerals Pvt. Ltd.,
Plot No.A/6, Commercial Estate,
Civil Township, Rourkela-769004. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. R.K. Mishra, Advocate
For the Respondent ... Mr. D. Behura, S.C. &
Mr. N.K. Rout, A.S.C.

Date of hearing: 06.07.2023 *** Date of order: 05.08.2023

O R D E R

The dealer prefers this appeal challenging the order dtd.04.04.2016 passed by the learned Addl. Commissioner of Sales Tax, (North Zone) (hereinafter referred to as, ACST/first appellate authority) in Appeal No. AA-153(V)/DCST (Asst)RKS-I/2014-15 (OVAT), thereby confirming the order of assessment passed by the learned Deputy Commissioner of Sales Tax, Rourkela II Circle, Panposh (hereinafter referred to as, learned

DCST/assessing authority) u/s.43 of the Orissa Value Added Tax Act, 2004 (in short, the OVAT Act) for the tax period 01.04.2008 to 31.03.2012 raising demand of ₹2,77,09,548.00 (Tax:₹92,36,516/- and penalty of ₹1,84,73,032.00).

2. The case at hand is that, the dealer-appellant being a private limited company is registered under OVAT and CST Act in the State and engaged in export of iron ore fines. In course of its business, it purchased iron ore fines from registered dealers as exempted purchase in course of export u/s.5(3) of the CST Act against declaration form 'H' and claimed exemption of sale in course of export u/s.5(1) of the said Act to foreign purchasers. Pursuant to tax evasion report, assessment proceeding was initiated against the dealer u/s.43 of the OVAT Act and demand as mentioned above was raised against the dealer.

3. Against such tax demand, the dealer preferred first appeal before the learned first appellate authority who confirmed the demand.

4. Further, being dissatisfied with the order of the learned first appellate authority, the dealer has preferred the present second appeal as per the grounds stated in the grounds of appeal.

5. Cross objection in this case is filed by the State-respondent.

6. During course of argument, learned Counsel 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 order of reassessment are liable to be quashed for the period under challenge.

7. Per contra, the learned Standing Counsel appearing for the Revenue argued stating that the second appeal preferred by the dealer-appellant is not sustainable in the eye of law and that the learned assessing authority and first appellate authority have rightly completed the assessment basing on the statutory provisions under the Act and Rules. This apart, learned Standing Counsel also vehemently contended that in this case the assessment has been completed by the DCST, Rourkela II Circle, Panposh u/s.42 of the OVAT Act for the period from 01.04.2011 to 31.03.2013 and demand of ₹1,93,52,784.00 has been raised. To support such claim, learned Standing Counsel has relied upon the order of the learned Commissioner of Sales Tax, Odisha passed on 27.03.2015 in Revision Case No.RKL-271/2014-15.

8. Heard the contentions and submissions of both the parties in this regard. On perusal of the order dtd.27.03.2015 passed by the learned Commissioner of Sales Tax, Odisha in Revision Case No.RKL-271/2014-15, it becomes quite evident that the assessment in this case has been completed by the DCST, Rourkela II Circle, Panposh u/s.42 of the OVAT Act for the period from 01.04.2011 to 31.03.2013 in which a demand of ₹1,93,52,784.00 has been raised. When this fact cannot be denied and as such the assessment proceeding u/s.43 of the OVAT Act for this period is quite genuine.

9. With regard to the period from 01.04.2008 to 31.03.2012, the contention of the dealer-appellant can be considered, because for this period 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. So 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. There is also 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 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 for the period from 01.04.2008 to 31.03.2012 excluding the period 01.04.2011 to 31.03.2013 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.

12. In view of the above analysis, we are of the unanimous view that the order needs interference to some extent.

13. In the result, the appeal preferred by the dealer is partly allowed. As a corollary the assessment for the period 01.04.2011 to 31.03.2013 is hereby confirmed and on the other hand the assessment for the period 01.04.2008 to 31.03.2012 is hereby quashed and the case is remanded to the learned assessing authority for recomputation of tax in the light of observation made above within a period of three

months from the date of receipt of this order giving an opportunity to the dealer on being heard. Cross objection is disposed of accordingly.

Dictated & corrected by me

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

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

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(B. Bhoi)
Accounts Member-II