

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

S.A. No.304(V) of 14-15

(Arising out of the order of the learned JCST,
Bolangir Range, Bolangir in Appeal Case No. AA-
03(NUA) of 204-15 disposed of on 15.10.2014)

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

M/s. Deepak Hotel, At-Nuapada,
Po/Dist-Nuapada. Appellant.

-Versus -

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

For the Appellant : : Mr. M.K. Agarwal, Advocate
For the Respondent : : Mr. N.K. Rout, Addl. S.C.(C.T.)

Date of Hearing : 04.10.2023 * Date of Order: 03.11.2023**

O R D E R

The dealer is in appeal against the order dated 15.10.2014 of the Joint Commissioner of Sales Tax, Bolangir Range, Bolangir (In brevity, referred to as ld.FAA) passed in First Appeal Case No.AA-03(NUA) of 2014-15 remanding the assessment passed under Section 44 of the OVAT Act by the Assistant Commissioner of Sales Tax, Nuapada Circle, Khariar Road (in short, 'ld. assessing authority').

2. The gist of the case is that M/s Deepak Hotel, Nuapada is a proprietary concern doing business in serving lunch and dinner to the customers. The dealer-assessee is learnt to have been registered under the OVAT Act having TIN-21396300419. The Vigilance Wing of the Koraput Division, Jeypore comprising of the Sales Tax Officer and other staff on a surprise visit to the hotel premises on 10.04.2013 could arrive by way of a statement recorded from the brother of the proprietor that the hotel having commenced business since 01.10.2009 would have daily average sale of meals of ₹8,000.00 during 2009-10, ₹10,000.00 during 2010-11, ₹12,000.00 during 2011-12 and ₹20,000.00 during 2012-13 till 10.04.2013. Based on a presumptive yardstick as to business days in each year from 14.10.2009 to 10.04.2013, the Visiting Personnel derived sale turnover at ₹1,39,00,000.00 on adoption of the aforesaid daily average sale. It is alleged that the dealer-respondent despite being liable to pay tax since 14.10.2009 has not got itself registered under the OVAT Act. Accordingly, the Inspecting Team constituted a Fraud Case Report bearing No.30/2013 dated 30.06.2013 and recommended demand of ₹38,97,400.00 consisting of tax and penalty under Section 44 of the OVAT Act. Basing on the above recommendation contained in the Fraud Case Report, the learned assessing authority assessed the dealer-respondent to tax and penalty of ₹31,99,000.00 ex-parte for the period from 14.10.2009 to

10.01.2013 excluding the period from 11.01.2013 to 14.10.2013 that sought to be assessed under Section 43(1) of the OVAT Act with the dealer having been registered under the OVAT Act w.e.f. 11.01.2013. Since the first appeal filed urging non-maintainability of the proceeding yielded no justiciable result, the dealer-appellant approached this forum for relief. Hence, this second appeal.

3. The dealer-appellant has filed grounds of appeal disputing sustainability of initiation of proceeding under Section 44 of the OVAT Act. Mr. M.K. Agarwal, learned Advocate who represents the dealer-appellant has submitted a written note on 04.10.2023 citing certain case laws. It is argued that determination of tax liability by the self-same authority w.e.f. 14.10.2009 with the learned assessing authority himself having granted TIN-21396300419 providing tax liability w.e.f. 11.01.2013 is illegal and anti-law. The dealer-respondent challenges the legality of the Fraud Case Report submitted by the Sales Tax Officer, Vigilance, Koraput Division, Jeypore on the pertinent ground that the statement recorded from the brother of the proprietor by the Inspecting officials lacks authenticity. In saying so, it is pleaded that the statement has been electronically typed and printed out ironically subsisting thereby that the Vigilance squad had visited the hotel premises on 14.04.2013 carrying a set of Computer and Printer to record the statement on spot. This apart, the typed statement is without the

seal and signature of the competent visiting authority who has recorded the statement on solemn affirmation.

It is further contended that the learned assessing authority has assessed the dealer-appellant ex-parte without advancement of any reasonable opportunity of being heard. It is therefore a sheer violation of the principles of natural justice as observed by the Hon'ble High Court of Odisha in case of **Bhusan Power and Steel Ltd Vs. State of Orissa and another** reported in 47 VST at page 416. The Hon'ble Court observe that "*it is a settled law that if any person is likely to be affected by the use of any material against him that is to be brought to notice for rebuttal.*" Similarly, in this context, another decision of the Hon'ble Court passed in W.P.(C) No.624 of 2014 in case of **Deo Ispat Alloys Limited Vs. Commissioner of Commercial Taxes** has been relied upon wherein it is observed that the learned assessing officer should confront the report submitted by the inspecting officials along with each of the entries in the documents seized by the visiting officials.

The learned Advocate appearing on behalf of the dealer-appellant advocates that the inspecting officials visited the hotel premises on 10.04.2013. They have not recovered any documentary evidences in regard to the daily average sale relatable to the financial years 2009-10, 2010-11, 2011-12 and 2012-13. They have determined the daily average sale on presumption. It is

submitted that mere presumption cannot be the basis for any assessment as observed by the Hon'ble High Court of Odisha in case of ***Gopal Rao Vs. State of Orissa reported in (1993)88 STC 488 (Orissa)***.

With the above submission, the learned Advocate seeks interference of this forum for quashing the order of assessment passed basing on the Fraud Case Report which is devoid of legal sanctity.

4. Per contra, the State has filed cross objection and a written submission on 16.10.2023 advocating that the dealer-appellant has not pointed out any illegality in the order of the Id.FAA in remanding the case for enquiry by the learned assessing authority. It is therefore submitted that the grounds of appeal together with the written submission filed by the dealer-appellant may not be taken into consideration.

5. Rival submissions are heard. The orders of the forums below, ground of appeal, cross objection, written notes filed by both the parties and the materials available on records are gone through at length. On perusal, it transpires that the Vigilance Wing of Koraput Division, Jeypore visited the instant hotel premises on 10.04.2013 and caused counting of the sale proceeds of the day. The sale proceed was ₹ 19,900.00. They recovered some slips issued on sale of meals of the day. The Inspecting personnel recorded a

statement from Sri Deepak Kumar Nayak, brother of the proprietor of the hotel. On going through the statement, it is unraveled that the statement is an electronically typed one. As it appears, the statement has been typed prior to visit of the hotel or thereafter and got it signed by Sri Deepak Kumar Nayak. Interestingly, the statement does not bear the seal and signature of the Inspecting Team who has recorded the statement. However, as is apparent from the statement, the hotel has started business during October,2009. The exact date of start of the business could not recalled by Sri Nayak. There were no documentary evidences recovered by the Inspecting personnel as to the sale transactions said to have taken place during the financial years 2009-10, 2010-11, 2011-12 and 2012-13. The start of business has been assumed as 01.10.2009. The Inspecting personnel appear to have forged the Fraud Case Report determining the daily average sale of meals of the past years basing on the sale proceed of ₹19,900.00 found in the hotel on 10.04.2013. It is sheer unbecoming and lacking legal footing. Moreover, the statement itself is not authentic, as it is purposefully electronically typed out and got it signed by the brother of the proprietor. Tax liability cannot be determined on guess work or on mere assumption. The decision of the Hon'ble High Court of Odisha in case of **J. Gopal Rao Vs. State of Orissa(supra)** is relevant in the present case and is quoted hereunder:-

“The prime question is where there can be backward and forward projection of materials detected which are relevant to a particular assessment for the purpose of making assessment for some other year. However, if the assessing officer wants to do so, some material has to be brought on record to justify just, projection. Mere presumption cannot be the basis for any assessment. The date when material was recovered is not relevant. What is material is the nature of evidence or material discovered during inspection. If materials discovered relate to any particular assessment year, those cannot be utilized for making assessment for other years, unless their relevance to any other period is established by the assessing officer. Similar view was expressed by the Allahabad High Court in Babu Ram Vishnoi Vs. Commissioner of Sales Tax (1972) 29 STC 392 and Hukum Chand Mahendra Kumar Vs. Commissioner of Sales Tax (1972) 29 STC 394.”

Under the above premises, it is inferred that the impugned Fraud Case Report besides being infructuous and more so having been constituted on presumptive derivations suffers from legal infirmity. It is not at all sustainable in the eyes of law. The assessment framed under Section 44 of the OVAT Act is corollary to the recommendation contained in the Fraud Case Report. Accordingly, the demand raised thereunder by the learned assessing authority without application of mind and the order of the Id.FAA are liable to be quashed. The averment of the State in the present fact and circumstances of the case is not acceptable whereas the contention taken by the dealer-appellant deserves consideration.

6. It is therefore ordered that the second appeal filed by the dealer-appellant is allowed. The order of the 1d.FAA is set aside. The order of assessment passed under Section 44 of the OVAT Act by the learned assessing authority is hereby quashed. Cross objection is accordingly disposed of.

Dictated and corrected by me.

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

I agree,

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

Sd/-
(G. C. Behera)
Chairman

I agree,

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