

No.50 dtd.06.12.2012 submitted by STO, Vigilance Bhubaneswar Division, Bhubaneswar with the allegation of suppressed turnover to the tune of Rs.1,07,43,104.00. On the basis of aforesaid tax evasion report, the assessing authority in its exparte assessment order dtd.04.09.2003 held the dealer liable to pay balance tax due of Rs.14,21,876.00 with penalty of Rs.278,43,752.00, thereby a total demand raised at Rs.42,65,628.00.

3. Being aggrieved, the dealer carried the matter before the first appellate authority. The learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur as first appellate authority in turn did not interfere with the order of assessing authority in the appeal before him and thus confirmed the demand as raised by the assessing authority.

On the backdrop above, the dealer being unsuccessful before the both fora below knocked the door of this Tribunal challenging the maintainability of the escaped assessment u/s.43 of the OVAT Act in the case in hand in particular and sustainability of the confirming order of assessing authority so far as the determination of suppression and tax liability as raised.

4. It is contended by the dealer that, the very initiation of the proceeding u/s.43 of the OVAT Act in the case in hand is not sustainable as the impugned order is not preceded by assessment under any of the provision u/s.39, 40 or 42 of the OVAT Act as required under law. It is also alleged that, the suppression as determined by both the fora below is erroneous as well as the penalty as imposed is not sustainable, since proper opportunity of being heard was not extended to the dealer in the assessment.

In the Cross Objection State has supported the findings of the first appellate authority as just and proper.

5. From the rival contentions, the questions struck for decision in this appeal are,

- (i) whether the very initiation of the assessment u/s.43 of the OVAT Act in the case in hand is not sustainable in law; and
- (ii) whether the suppression detected and determined by the fora below is just and proper and based on facts and law;

6. In the argument, learned Counsel for the dealer vehemently harped on the question of maintainability of the proceeding with the plea that, the escaped assessment u/s.43 of the OVAT Act should have been initiated only when there was any kind of assessment u/s.39, 40 or 42 of the OVAT Act which is not done in this case. As a result, when the escaped assessment has no legs to stand then it cannot withstand in law. To appreciate the question of law, the relevant provision u/s.43 of the OVAT Act is reproduced below:

“(1) Where, after a dealer is assessed under Section 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-

- (a) escaped assessment, or
- (b) been under-assessed, or
- (c) been assessed at a rate lower than the rate at which it is assessable;

or that the dealer has been allowed-

- (i) wrongly any deduction from his turnover, or
- (ii) input tax credit, to which he is not eligible.

the assessing authority may serve a notice on the dealer in such form and manner as may be prescribed and after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he deems necessary, proceed to assess to the beset of his judgment the amount of tax due from the dealer.”

The provision as it mandates for initiation of an escaped assessment, there must have been proceeding for any kind of assessment u/s.39, 40 or 42 of the OVAT Act.

7. Learned Standing Counsel appearing for the Revenue argued that, the orders of the learned assessing authority though silent but it can definitely be presumed that, the dealer was self-assessed u/s.39 of the OVAT Act or the dealer be treated as assessee NIL for non-filing of return. So, escaped assessment u/s.43 of the OVAT Act suffers no illegality.

8. Gone through the impugned order. It is found that, though the dealer has taken the same plea before the first appellate authority but the first appellate authority has not determined this question raised before him. It is a trite in law that, the authority is under obligation to answer the grounds taken by the litigants before him under law. Once the appeal was admitted, the grounds were taken for consideration but not answered, then it can safely be said that, the authority has failed to exercise the jurisdiction vested on him. Present one is an example of that, the first appellate authority has not whispered a single word about the ground touching the maintainability of the assessment in the case in hand.

9. It is further to take note of the fact that, learned Counsel for the dealer in the argument draws the attention of the Bench to the order of assessing authority, where it has categorically mentioned that:- “the dealer was self-assessed u/s.39 of the OVAT Act upto the period quarter ending March, 2012. As per the return figure available in the data base of the department i.e. VATIS, the dealer has filed return for four quarters starting from April, 2011 to March, 2012”. In view of the statement as reflected in the order of assessing authority it indicates, the dealer was self-assessed upto the period ending March, 2012 but for the rest period the dealer was not assessed under any of the provision mentioned above. So, the escaped assessment u/s.43 of the OVAT Act covering the entire period i.e. from 01.04.2011 to 28.02.2013 has not legs to stand. The escaped assessment should have confined to the period from 01.04.2011 to 30.03.2012 only as the rest period was not assessed under any of the provision. Learned

Counsel further stated that, the dealer had filed return for the rest period on 26.04.2013 and there was also a revised return filed on 28.09.2013. The vigilance report was submitted on 06.12.2012. When the vigilance report basing which the escaped assessment was done was prepared only on 06.12.2012, in that case, any period thereafter cannot be a part of escaped assessment u/s.43 of the OVAT Act. In that view of the matter, here in this case, it is believed that, the assessment for the period beyond March, 2012 is not sustainable in law. In consequence thereof, it is believed that, the matter should be remitted back to the assessing authority to verify/scrutiny the vigilance report. On verification it is found that, there was self-assessment upto the period ending March, 2012, the assessing authority will do well to scrutinize if there can be escaped assessment for the period 01.04.2011 to 30.03.2012 with respect to the tax evasion report submitted in this case. The bifurcation of the alleged suppression relatable to period covered under escaped assessment it found not possible, in that case the entire escaped assessment will be vitiated. Otherwise, the escaped assessment can be taken up afresh for the period above. So far as the rest period is concerned, the escaped assessment u/s.43 of the OVAT Act is necessarily vitiated hereby.

With the finding above, it is hereby ordered.

The appeal is allowed on contest. The impugned order is set aside. The matter is remitted back to the assessing authority for escaped assessment afresh as per the observation hereinabove.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

Sd/-
(S. Mohanty)
1st Judicial Member