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

S.A. No.40(V) of 11-12

(Arising out of the order of the learned DCST(Appeal), Sambalpur Range, Sambalpur First Appeal No. AA 30/JSG/VAT/10-11, disposed of on 10.12.2010)

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

M/s. Dayalal Meghji & Co.,
At/Po-Sarbahal, Dist- Jharsuguda. ..... Appellant.

-Vrs.–

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

For the Appellant : Mr. U. Behera, ld. Advocate
For the Respondent : Mr. N.K. Rout, ld. A.S.C.(C.T.)

Date of Hearing : 05.01.2024 * Date of Order : 03.02.2024**

O R D E R

The dealer is in appeal against the order dated 10.12.2010 of the Deputy Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur (hereinafter referred to as 'ld.FAA') passed in the First Appeal Case No. AA 30/JSG/VAT/10-11 confirming the order of the Sales Tax Officer, Jharsuguda Circle, Jharsuguda (hereinafter referred to as 'ld.STO') passed under

Section 43 of the Odisha Value Added Tax Act (in short, 'OVAT Act') pertaining to the tax period from 01.04.2005 to 31.12.2009.

2. The facts of the case in nutshell are that M/s. Dayalal Meghji, Sarbahal, Jharsuguda is engaged in manufacturing and sale of Bidi under the brand name as 'Badshahi Bidi'. The ld. STO basing on the Fraud Case Report bearing No.52/2009-10 received from the STO Vigilance, Sambalpur initiated proceedings under Section 43 of the OVAT Act and raised demand of ₹74,90,985.00 including penalty of ₹49,93,990.00. The first appeal as preferred by the dealer-assessee against the order of assessment resulted in dismissal of the appeal and affirmation of the order of the ld. STO. The dealer-assessee having not availed any relief in the first appeal approached this forum for justice. Hence, this second appeal.

3. Apart from other grounds of appeal for adjudication on merit, the dealer-assessee agitates the question of maintainability of initiation of proceedings under Section 43 of the OVAT Act without being assessed either under Section 39, 40, 42 or 44 of the OVAT Act. The said ground of maintainability raised in first appeal was not taken into consideration by the ld. FAA. Accordingly, Mr. U. Behera, ld. Advocate appearing on behalf of the dealer-assessee reiterates the maintainability issue holding

that in absence the of assessment completed under Section 39, 40, 42 or 44 of the OVAT Act, reassessment under Section 43(1) of the OVAT Act is not sustainable in law as per the ratio of the verdict of the Hon'ble High Court of Odisha dated 01.12.2021 in case of ***Keshab Automobile Vrs. State of Odisha reported in STREV No.64/2016*** which has been upheld by the Hon'ble Apex Court in SLP (C) No.9823-9824/2022 dated 13.07.2022. In view of this settled principle of law, Mr. Behera advocates that in absence of any written communication or acknowledgement as to completion of assessment under Section 39 of the said Act, the impugned assessment under Section 43 of the OVAT Act is not maintainability being without jurisdiction and without any authority of law and accordingly, the re-assessment is void.

4. There is no cross objection filed by the respondent-State. Instead, the State has filed a written note of submission holding that as per the power envisaged under section 77(7), the ld. FAA disposed of the appeal by order dated 10.12.2010 in appeal case No. AA 30/JSG/VAT/10-11 and the said appellate order have attained finality under law in view of the laws enumerated under Section 77(8) of the OVAT Act, 2004. It is also submitted by the State that the protection provided under Section 98 of the OVAT Act is to avoid unjust enrichment on the part of the dealer on

account of a technical defects invalidating the proceeding for determination and quantification of tax liability. It is also submitted that there has been communication of service of notice in form VAT 307 on 29.03.2010. it is therefore, held that there has been assessment made under Section 39 of the OVAT Act before initiation proceeding under Section 43 of the OVAT Act.

5. All the materials such as assessment order, first appellate order, grounds of appeal and other allied documents available on record are gone through. The issue raised in the grounds of appeal pertains to sustainability of initiation of the 43 proceedings. This being a substantial point striking the root of the case, we feel it pertinent to look into this aspect before we consider upon other issues on merit.

6. The argument of the State as to service of notice in Form VAT 307 upon the dealer before initiation of 43 proceeding is not acceptable in asmuch as that the statutory notice in form VAT 307 is issued to the dealer who has been assessed under Section 39, 40, 42 or 44 of the OVAT Act prior to taking of reassessment proceedings under Section 43 of the OVAT Act. Assumption of communication of self assessment to the dealer-assessee upon issuance of Form VAT 307 is far from truth.

7. Perusal of first appeal order makes it clear that the dealer-assessee has raised the question of sustainability of 43 proceedings in absence of assessment completed under Section 39, 40, 42 or 44 of the OVAT Act. The ld. FAA is seen to have overlooked this issue. The dealer-assessee has raised this issue at this forum for justice. It is inferred that 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 pronounced in case of ***M/s. Keshab Automobiles Vs. State of Odisha*** (Supra) 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"

8. In the present case, it is revealed that the assessment framed under the OVAT Act relates to the tax period from 01.04.2005 to 31.12.2009 which entirely covers the pre-amendment period. The learned Assessing Authority is learnt to have not complied pre-conditions as required under section 39(1) of the OVAT Act for initiation of proceedings under section 43(1) of the OVAT Act. He has reopened the assessments simply on the basis of the Fraud Case Report. There is no evidence available on record as to communication of the assessment made U/s.39 of the OVAT Act. In view of the above principles of law, we are constraint to infer that the assessment as well as the first appeal orders made in the impugned case is not sustainable in law and as such, the same are liable to be quashed. All other points raised by the

dealer-assessee in the grounds of appeal are hereby rendered redundant.

9. Resultantly, the appeal filed by the dealer-assessee is allowed. The order of the ld.FAA is set aside. As a corollary thereof, the assessment order is hereby quashed.

Dictated & corrected by me.

Sd/-
Bibekananda Bhoi)
Accounts Member-I

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

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