

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

**S.A.No. 160(V) of 2015.**

(Arising out of the order of Learned Addl.CST, Puri Range,  
Puri, in First Appeal Case No.106111811000001  
disposed of on dated 11.04.2018)

**P r e s e n t :- Shri S.K.Rout, & Shri S.R.Mishra,**  
2<sup>nd</sup> Judicial Member Accounts Member-II.

M/s. Brijsons Hotel Pvt. Ltd.,  
Sipasarubali, Baliapanda, Puri . . . Appellant,

**- V e r s u s -**

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

For the Appellant . . . Mr.J.Misra,Advocate.

&

. . . Mr.J.J.Pradhan,Advocate.

For the Respondent . . . Mr.S.K.Pradhan,  
Addl. Standing Counsel,  
(CT & GST Organisation)

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Date of Hearing: 09-10-2023.

Date Order:08 -11-2023  
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**ORDER**

The dealer appellant on filing this Second Appeal U/s. 78 of the Odisha Value Added Tax Act, ( in short, OVAT Act), seeks the intervention of this forum against the order dated 11.4.2018 passed by the Learned Additional Commissioner of Sales Tax, Puri Range, Puri, (hereinafter referred to as Learned First Appellate Authority/Ld. FAA) in First Appeal Case No.106111811000001, in reducing the order of assessment passed U/s.43 of the OVAT Act by the Learned Deputy Commissioner of Sales Tax, Puri Circle, Puri, (in short, Ld. Assessing Authority/Ld. AA) in case of M/s.Brijsons Hotel Pvt. Ltd, for the period from 1.4.2012 to 17.8.2016.

2. The brief fact of the case is that the appellant dealer which is a hotelier carries on business in providing lodging and boarding facilities to different customers with or without supply of food and beverages etc., was inspected by a team of officials of Vigilance Wing, Cuttack Division. On the basis of an adverse report submitted by the said inspecting authority alleging suppression of taxable turnover, the Ld. AA has initiated proceeding U/s.43 of the OVAT Act for the period from 1.4.2012 to 17.8.2016 which culminated in raising of an extra demand of Rs.6,69,82,527.00 including penalty of Rs.4,46,55,018.00.

3. The dealer on being aggrieved has preferred an appeal challenging the validity of the assessment order before the Ld. FAA, who vide his order dt.11.4.2018 has partly allowed the appeal by reducing the impugned demand to Rs.1,47,81,263.00 (including penalty) limiting the period of assessment from 1.4.2012 to 31.3.2016.

4. Being unsuccessful, the dealer appellant has preferred the present appeal in which it has not only challenged the additional demand raised, but also questioned the validity of the escaped assessment made. According to the dealer assessee, assessment U/s.43 of the OVAT Act which is without independent application of mind and formation of opinion by the Ld. A.A. is not sustainable in law. It is contended that initiation of proceeding U/s.43 of the OVAT Act without completion of assessment U/s.39,40,42 or 44 under the OVAT Act is bad in law. It is further contended that there was no justifiable ground before the Ld. FAA in limiting the cost of free food to the staff and complementary food and beverages etc. to the customers and managerial staff from

Rs.1365.11 Lakhs to Rs.685.00 Lakhs from 2012-13 to 2015-16 by resorting to best judgement assessment without any nexus. Lastly it was contended that imposition of penalty without establishment of mens-rea or finding of deliberate defiance of law is unlawful and therefore liable to be quashed. Precisely speaking, apart from the merits of the case, the dealer-appellant questioned the legality and judicial propriety of the very initiation of the assessment proceeding U/s.43 of the OVAT Act.

5. By way of cross objection, the State justified the action of the Ld. AA in raising the extra demand by way of initiation of the aforesaid proceeding. It is averred that since the proceeding was initiated on 6.4.2017 on the basis of the adverse material, the Ld. AA is not obliged to pass any order U/s.39 of the OVAT Act, since the relevant section was amended w.e.f. 1.10.2015. It is further contended that the Ld. AA has consciously initiated the proceeding on being satisfied with the adverse materials in his possession for which the claim of the appellant with regard to initiation of proceeding without application of mind has not leg to stand. Moreover, it is also emphasised that in view of Section 98 of the OVAT Act, the assessment order cannot be invalid only on the ground that the Ld. AA has not mentioned his findings in the order sheet at the time of initiating the proceeding.

6. While the matter stood thus, the dealer appellant has submitted reply to the memorandum of cross objection and additional grounds of appeal. In the additional grounds of appeal it has raised the question of validity of the assessment order particularly from 1.10.2015 to 17.8.2017 on the ground that the same was not passed within the statutory period

of six months as provided U/s.43(4) of the OVAT Act. With regard to the assessment proceeding for the period from 1.4.2012 to 30.9.2015, the dealer in its written note claimed that the same is also not maintainable in absence of assessment proceeding completed U/s.39 of the OVAT Act. In stating so, the dealer has relied upon the decision of the Hon'ble High Court of Orissa, in case of **M/s. Keshab Automobiles Vrs. State of Orissa in STREV No.64 of 2016.**

7. In response, the State Respondent has filed the additional memorandum of cross objection stating therein that the additional grounds taken by the dealer is not maintainable since the same was not earlier raised by the appellant. It has further been stated that the statute provides protection to certain mistake, defects or omissions, if the proceedings are in conformity to the intents and purpose in view of Section 98 of the OVAT Act.

8. Heard the contentions and submissions of both the rival parties and gone through the orders passed by the lower fora coupled with the materials available on record and the judicial citations referred to by both the parties.

9. It is pertinent to mention here that the dealer appellant has been challenging the validity of the proceeding initiated U/s.43 of the OVAT Act, since the time of filing of first appeal before the Ld. FAA. Hence it is felt proper to decide jurisdictional issue as raised by the dealer on priority without delving into other factual issue. In order to decide the jurisdictional issue the following fundamental questions are framed for decision by this forum.

***i) Whether the present proceeding U/s.43 of the OVAT Act was initiated without application of judicial mind and if so, whether it is sustainable ?***

***ii) Whether the assessment proceeding initiated U/s.43 of the OVAT Act in the present case is factually valid ?***

10. With regard to Question No.(i) the argument advanced by the learned counsel of the appellant is that since the present proceeding was initiated mechanically without application of judicial mind the entire proceeding is infructuous. In stating so, the learned counsel has placed before us the certified copy of the tax evasion report and the order sheet maintained by the Ld. AA while initiating the present proceeding. From the tax evasion report submitted by the Sales Tax Officer, Vigilance Wing, bearing Case No.1/2017 dated 25.2.2017, it transpires that the allegation of evasion of tax for the period from 1.4.2012 to 31.3.2015 was raised on the basis of examination of returns vis-a-vis the Balance Sheet submitted by the dealer. In the said tax evasion report, the reporting officer had suggested the Ld. AA to take steps to ascertain about any possible discrepancy upon verifying the Balance Sheet for the year 2015-16 with reference to the Balance Sheet of the corresponding period. But ironically it is found that the Ld. AA has initiated the proceeding from 1.4.2012 to 17.8.2016 although there was no conclusive finding about any suppression for the period from 1.4.2015 to 17.8.2016 detected prior to initiation of the proceeding.

11. Besides the learned counsel of the appellant has referred to the brief note of the Ld. AA while initiating the proceeding. On perusal of the

relevant order sheet, it is observed that the tax evasion report bearing No.1/2017 dated 25.2.2017 was placed by the Bench Clerk before the Ld. AA basing on which the later has initiated the proceeding on 6.4.2017 with the following brief note :-

“Seen the M.N. Issue Notice in Form VAT-307 fixing the date to 3.7.2017.”

12. The learned counsel of the dealer appellant has also referred to the statutory notice in Form VAT-307 issued for the entire period from 1.4.2012 to 17.8.2016 in the pre-amended form. It is a fact that the new form in VAT 307 becomes operational w.e.f. 1.10.2015 with the amendment of the OVAT Act. Hence for the period from 1.10.2015 to 7.8.2017 the statutory notice issued in old form by the Ld. AA is considered to be inoperable.

13. The aforesaid illustrative facts brought to our notice by Sri Pradhan, amply speaks about non-application of judicial mind by the Ld. AA while initiating the proceeding. Rather it is found that the said proceeding was initiated mechanically and in doing so, the Ld. AA has blindly abdicated his discretion to the tax evasion report submitted by the Inspecting Officers. The aforesaid action of the Ld. AA is therefore considered to be contradictory to the rulings of the Hon'ble High Court of Orissa in case of the **Indure Ltd. Vrs. Commissioner of Sales Tax & Others in O.J.C. No.7738 of 1999.**

14. Further for the period from 1.4.2012 to 30.9.2015 i.e. prior to the amendment of the OVAT Act, on 1.10.2015, it is the settled principle of law that no proceeding can be initiated U/s.43 of the OVAT Act without

completion of assessment U/s.39,40,42 or 44 of the said Act. The same has been decided by the Hon'ble High Court of Orissa in case of **M/s. Keshab Automobiles Vrs. Stat of Orissa, delivered on 1.12.2021 in STREV No.64 of 2016**. The same was also upheld by the Hon'ble Apex Court vide their order dt.13.07.2022 in S.L.P (Civil) No.9912 of 2022 in case of Deputy Commissioner of Sales Tax Vrs. Rathi Steel and Power Ltd and Batch. In this context, the revenue has utterly failed to demonstrate the fact of completion of assessment(s) U/s.39,40,42 or 44 of the OVAT Act. Although the statutory notice issued in Form VAT-307 indicates about the completion of assessment U/s.39 of the OVAT Act, no order(s) in this respect or communication of such orders to the dealer could be produced by the revenue. Hence we are of the opinion that the present proceeding U/s.43 of the OVAT Act was initiated by the Ld. AA without fulfilment of the legal pre-requisites. Since the law is well settled that when the statute requires to do certain things in certain way, other methods or mode of performance are simply and necessarily forbidden, the protection sought for by the revenue U/s.98 of the OVAT Act is therefore, considered to be misplaced and devoid of substance. Similarly the case laws cited by the revenue have got no bearing in the present case as the proceeding it-self is considered to be still born.

15. Since the initiation of proceeding it-self is found to be illegal and invalid for the reasons discussed above, any discussion on merit of the case becomes redundant.

16. Resultantly, the appeal preferred by the dealer is allowed in full and the impugned order dated 11.4.2018 passed by the Ld. FAA is

hereby set-aside. As a necessary corollary the impugned order of assessment is also quashed. Cross objection and additional memorandum of cross objection filed by the State are accordingly disposed of. Excess amount paid, if any, may be refunded to the dealer as per the provisions of law.

Dictated and corrected by me

Sd/-

**(S.R.Mishra)**

Accounts Member-II.

Sd/-

**(S.R.Mishra)**

Accounts Member-II.

I agree,

Sd/-

**(S.K.Rout)**

2<sup>nd</sup> Judicial Member.