

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

**S.A. No. 178(V) of 2020**

(Arising out of the order of the learned Addl.CST,  
Territorial Range, Jajpur, Jajpur Road in first appeal  
case No.AA 663 CUIII 16-17 dtd.09.07.2020)

**Present:** **Shri G.C. Behera, Chairman**  
**&**  
**Shri B. Bhoi, Accounts Member-II**

M/s.Yazdani Steel & Power Ltd.  
Kalinga Nagar Growth Centre,  
Jakhapur, Jajpur. .... Appellant.

**-Versus -**

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

For the Appellant : : Mr. D.K Sahoo, Id. Advocate  
For the Respondent: : Mr. D. Behura, Id. SC(C.T.)  
: Mr. S.K. Pradhan, Id.ASC(C.T.)

-----  
**Date of Hearing : 09.05.2023 \*\*\* Date of Order : 18.05.2023**  
-----

**O R D E R**

The dealer-assessee is in appeal against the order dated 09.07.2020 of the Additional Commissioner of Sales Tax, Territorial Range, Jajpur, Jajpur Road (hereinafter called as 'Id. FAA') passed in First Appeal Case No. AA-663 CUIII 16-17 without going into the aspects of maintainability of the proceeding initiated U/s.43 of the OVAT Act by the Sales Tax Officer, Jajpur Circle, Jajpur Road (in short, called Id. STO) and causing remand of the case back to the Ld.STO for fresh adjudication on certain disagreement noticed in the assessment order while on hearing of the first appeal with respect to

physical stock of goods noted by the Special Investigating Team and the books of accounts produced.

2. The facts, in nutshell are that M/s. Yazdani Steel & Power Limited, Kalinga Nagar, Industrial Complex, Jakhapur, Jajpur Road, having TIN-21331402049 is an integrated steel plant engaged in manufacturing/sale of Sponge Iron, M.S. Billets and TMT bars. The Company-assessee was assessed U/s.43 of the OVAT Act for the tax period from 01.04.2014 to 31.03.2015 basing on the Tax Evasion Report No.01 dated 22.08.2015 submitted by the Special Investigation Team, headed by the DCST, Bhubaneswar-II Circle, Bhubaneswar and raised demand of ₹1,10,67,390.00 which includes penalty of ₹73,78,260.00 The ld. FAA remanded the order of assessment back to the Ld.STO for fresh adjudication in the first appeal as preferred by the dealer-assessee.

3. On being aggrieved, the dealer-assessee preferred this second appeal before this forum submitting the grounds of appeal. The learned Counsel of the dealer appellant has filed additional grounds appeal on 26.4.2023 contending that in absence of the completion of the assessment U/s. 39, 40, 42 an 44 of the OVAT Act, reassessment U/s.43 and 43(2) of the OVAT Act is not maintainable in the eyes of law. The learned Counsel of the dealer-appellant relies on the decision made by the Hon'ble High Court of Odisha in case of **Keshab Automobiles Vs. State of Odisha** decided on 01.12.2021 in **STERV No.64 of 2016**. Relying upon the above judgment of the Hon'ble High Court and orders passed by the Odisha Sales Tax Tribunal on various cases, the learned Counsel appeals that in view of the aforesaid facts, the orders of the ld. assessing authority and the ld. FAA ought to be quashed.

4. The State represented by Mr. D. Behura, learned Counsel argues by submitting that additional grounds submitted by the dealer-appellant as to the maintainability of the present case later in

the second appeal without the same having been agitated either in the assessment stage or before the Id. FAA are not justified.

5. Heard the contentions and submissions of both the parties in this regard. The order of assessment and the order of the Id. FAA coupled with the materials on record are gone through. Before looking into other aspects of the grounds of appeal such as discrepancy in between the physical stock of goods detected by the Investigating Squad and the books of accounts produced at the forums below and assessment resorted to thereunder, maintainability of the assessment U/s.43 of the OVAT Act as agitated in the additional grounds of appeal filed by the learned Counsel of the dealer-appellant is required to be examined. The contention taken by the State as regards rebuttal of additional grounds appeal is looked into. It is a fact that the dealer-assessee has not taken the ground of maintainability in the grounds of appeal at the time of filing the second appeal. Moreover, this ground was neither agitated at assessment taken up U/s.43 of the OVAT Act not at first appellate stage. The dealer-assessee took the plea of maintainability in the additional grounds of appeal. The State objects to the acceptance of the additional grounds. The objection raised by the State is not entertainable on the pretext that the Tribunal has wide powers to decide the question of facts as well as law while deciding the appeals filed before it. The dealer-assessee has sought for the additional ground touching the maintainability of 43 proceeding and it strikes the root of the proceeding and so, the same cannot be refuted only because he has taken the same before this forum for the first time. Therefore, the objection raised by the State merits no consideration and the same is rejected. In view of this, the additional grounds of appeal filed by the dealer-assessee are accepted for consideration.

6. The order of assessment passed U/s.43 of the OVAT Act is perused. It is apparent from the record that the said 43 proceeding has been initiated basing on the Tax Evasion Report bearing No.01

dated 22.08.2015 submitted by the Special Investigation Team headed by the DCST, Bhubaneswar II Circle, Bhubaneswar. There is no evidence on record as to completion of assessment U/s.39, 40, 42 or 44 of the OVAT Act before re-assessment taken up U/s. 43 of the said Act. It has simply been mentioned in the order of assessment denoting that the dealer/company was self assessed U/s. 39(2) of the OVAT Act. Further, as is apparent from the 1<sup>st</sup> appeal order, there is no mention of such compliance of pre-requirements for initiation of 43 proceedings. Accordingly, the assessment passed U/s. 43 of the OVAT Act as well as the order of the first appellate authority in the present case is not maintainable being devoid of jurisdiction in view of the decision of the Hon'ble High Court of Odisha pronounced in case of **M/s. Keshab Automobiles Vs. State of Odisha** as referred in Para 3 above which 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 1<sup>st</sup> 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 1<sup>st</sup> October, 2015.”

7. In the instant case, it is observed that the ld. assessing authority has failed to comply the pre-requirements for initiation of proceeding U/s.43 of the OVAT Act as mandated in the aforementioned decisions of the Hon'ble Courts. The State has not filed any materials showing any communication or acknowledgement pertaining to acceptance of the self assessment U/s.39 of the OVAT Act. Accordingly, the assessment passed U/s.43 of the OVAT Act in the instant case is without jurisdiction in absence of any assessment U/s.39, 40, 42 or 44 of the said Act. So the orders of the ld. assessing authority and the ld. FAA are not sustainable in the eyes of law, as the same are without jurisdiction. Hence, it is ordered.

8. Resultantly, the appeal stands allowed and the orders of the ld. assessing authority and the ld. FAA are hereby set-aside. As a necessary corollary thereof, the assessment order is hereby quashed. The cross-objection is disposed of accordingly.

**Dictated and corrected by me.**

**Sd/-  
(Bibekananada Bhoi)  
Accounts Member-II**

**I agree,**

**Sd/-  
(Bibekananada Bhoi)  
Accounts Member-II**

**Sd/-  
(G.C. Behera)  
Chairman**

**S.A. No. 178 (V) of 2020****11/09.05.2023**

At the time of hearing, both the learned Counsels for the appellant and respondent are present. The learned Standing Counsel (CT) for the respondent-State files additional cross-objection to the additional grounds of appeal of the Dealer.

Heard both the parties.

Learned Counsel for the appellant has taken the ground of maintainability of proceeding u/s. 43 of the OVAT Act in absence of proceeding u/s. 39, 40, 42 or 44 of the OVAT Act. He relies on the decision of the Hon'ble High Court in the case of *M/s. Keshab Automobiles v. State of Odisha* (STREV No. 64 of 2016 decided on 01.12.2021). He has relied on the decision of the Hon'ble Apex Court in the case of *National Thermal Power Co. Ltd. v. Commissioner of Income-tax*, reported in **2002-TIOL-279-SC-IT-LB**.

Learned Standing Counsel (CT) for the State objects the additional grounds of appeal on the ground that the appellant has not taken such ground at the outset and submits that the appellant is precluded to raise the same at this stage of second appeal as per the provision of Section 98 of the OVAT Act. He relies on the decision of the Hon'ble Court in the case of *State of Orissa v. Lakhoo Varjang*, reported in **[1961) 12 STC 162 (Orissa)**.

Perused the record. The record shows that the Assessing Authority has initiated a proceeding u/s. 43 of the OVAT Act. The Dealer appeared. The Dealer filed second appeal against the First Appellate Authority. The Dealer has not taken the ground of

maintainability in the grounds of appeal. The Dealer took the plea of maintainability in the additional grounds of appeal.

Section 98 of the OVAT Act provides the provision that the assessment shall not be invalid on certain grounds. The said provision is not applicable to the present facts and circumstances of the case as the additional ground touching the maintainability of the proceeding which strikes the root.

The question whether a fresh question of law or a fresh mixed question of law and facts should be permitted to be raised for the first time before the Tribunal or not, requires to be decided in the light of the powers conferred on the Tribunal for hearing the appeal. The Tribunal has wide powers to decide the question of facts as well as law while deciding the appeals filed before it. Once when the appeal is filed before the Tribunal it is within the jurisdiction to decide it as per provisions contained in Section 78 of the OVAT Act.

In the case of *National Thermal Power Co. Ltd.* cited supra, the Hon'ble Apex Court have been pleased to observe as follows :-

“Tribunal has jurisdiction not only to allow a new ground to be raised but also consider a question of law arising from the facts and having a bearing on tax liability of the assessee.”

In the case of *State of Gujarat v. Gandhi Cold Drink House*, reported in [1999] 116 STC 333 (Gujarat), Hon'ble Gujarat High Court have been pleased to observe that as follows :-

“(i) that the Tribunal had power to entertain fresh questions of law or fresh mixed question of law and facts raised for the first time before it;

(ii) that new grounds which affect the very jurisdiction of the sales tax authorities to levy tax, can be raised before the Tribunal; and

(iii) that if the subject-matter remains the same, the matter can be argued from a different approach by raising new grounds also. The subject-matter of the second appeal was the entire assessment order and reassessment order passed by the Assistant Commissioner of Sales Tax in the first appeals. Therefore, the new ground sought to be raised by the dealer had been rightly allowed to be raised by the Tribunal and did not in any way change the subject-matter of the appeals pending before the Tribunal.”

Section 43 stipulates that proceeding u/s. 39, 40, 42 or 44 are sine qua non for maintainability of the proceeding. The Hon'ble Court have been pleased to observe in the case of *M/s. Keshab Automobiles* cited supra that reassessment proceeding u/s. 43 of the OVAT Act is maintainable only when there is an assessment either any of the provisions of Sections 39, 40, 42 or 44 of the Act and after acceptance/acknowledgement of return. The Dealer has sought for the additional ground touching the maintainability of 43 proceeding and it strikes the root of the proceeding, so, the same cannot be refused only because he has taken the same before this forum for the first time. Therefore, the objection raised by the State merits no consideration and the same is rejected.

Accordingly, the additional grounds of appeal filed on behalf of the Dealer is accepted. Put up later for further hearing of appeal.

**Accounts Member-II**

**Chairman**