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

S.A. No.49(V) of 2016-17
&
S.A. No.84(V) of 2016-17

(Arising out of the order of the learned Addl.CST(Appeal), South Zone, Berhampur in Appeal Case No.AA(VAT)-130/2011-12, disposed of on 20.02.2016)

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

S.A. No.49(V) of 2016-17

M/s. Hind Metals & Industries Pvt. Ltd.,
Holding No-544, Bhubaneswar Marg,
Bhubaneswar-14. TIN-21081111817. ..... Appellant.

-Vrs. –

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

S.A. No.84(V) of 2016-17

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

-Vrs. –

M/s. Hind Metals & Industries Pvt. Ltd.,
Holding No-544, Bhubaneswar Marg,
Bhubaneswar-14, TIN-21081111817. ..... Respondent.

For the Dealer: : Mr. D. Mohanty, ld. Advocate
For the State : : Mr. N.K. Rout, ld. A.S.C.(C.T.)

Date of Hearing : 18.07.2023 * Date of Order : 09.08.2023**

O R D E R

The Revenue and the dealer-assessee are in appeals challenging the order dated 20.02.2016 of the Additional Commissioner of Sales Tax(Appeal), South Zone, Berhampur

(hereinafter called as 'ld. FAA') passed in Appeal Case No. AA(VAT)-130/2011-12 in respect of the order of assessment passed by the Deputy Commissioner of Sales Tax, Bhubaneswar I Circle, Bhubaneswar, (in short, 'learned assessing authority) under Section 43 of the OVAT Act.

2. The facts, in nutshell, are that M/s. Hind Metals & Industries Pvt. Ltd., K-1,Kalpana Square, Bhubaneswar is engaged in manufacture of Silico Manganese out of manganese ores, coke ferro manganese slags etc. and trades thereof in course of intrastate trade, interstate trade or commerce and effects export sale. The dealer-assessee was assessed U/s.43 of the OVAT Act vide order dated 29.04.2010 on the basis of a Tax Evasion Report No.48/CTV dated 16.10.2009 carrying extra demand of `8,16,60,654.00. The said assessment was completed ex-parte. The dealer assessee approached the Hon'ble High Court of Odisha filing a writ petition. The Hon'ble Court has been pleased to quash the impugned assessment while disposing the W.P.(C) No.11482 of 2010 and remitted the case back to the assessing authority for re-assessment assigning the reasons of re-opening the assessment. The dealer assessee was equally directed to assist in the process of assessment adducing all the required documents. Pursuant to the order of the Hon'ble High Court, the learned assessing authority assessed the dealer-assessee to `67,82,067.00 including penalty of `45,21,378.00. In the first appeal as preferred by the dealer-assessee, the ld.FAA deleted the penalty imposed under section 43(2) of the OVAT Act limiting the demand thereby to only the tax of `22,60,689.00.

3. Both the dealer-assessee and the State have gone for second appeals against the order of the ld.FAA. Both the parties have submitted the additional grounds of appeals as well as the

additional cross objections on rival cases in addition to the grounds of appeals.

4. The State vehemently argues that when the export sale is not substantiated by documentary evidence, it is an act by the dealer-assessee to befool the Revenue to avoid payment of tax in the guise of export sale. It is submitted that the Hon'ble High Court of Odisha in case of NALCO Vrs. DCCT reported in 56 VST 68 has upheld the imposition of penalty on valid reasons. The State through filing of additional cross objection holds that the dealer-company was assessed under Section 43 of the OVAT Act on the basis of a Fraud Case Report submitted by the ACCT, Vigilance Division, Balasore which is found to be in order as per provision of law. The appellant dealer has already been self-assessed under section 39 of the OVAT Act. The Hon'ble High Court of Orissa has disposed of the writ petition bearing No.WP(C) 11482 of 2010 and remitted back to the Assessing Authority for re-assessment. Hence, the re-assessment order passed by the LAO is in order.

The learned Counsel representing the State holds that in case of State of Orissa vs. Lakhoo Varjang 1960 SCC On Line Ori 110 : (1961) 12 STC 162, the Hon'ble Apex Court observes as under:-

"....The tribunal may allow additional evidence to be taken, subject to the limitations prescribed in Rule 61 of the Orissa Sales Tax Rules. Bu this additional evidence must be limited only to the questions that were then pending before the Tribunal...

.....The Assistant Collector's order dealt solely with the question of penalty and did not go into the question of the liability of the assessee to be assessed because that question was never raised before him. The member, sales Tax Tribunal, should not therefore

have allowed additional grounds to be taken or additional evidence to be led in respect of a matter that had been concluded between the parties even at the first appellate stage. If the aggrieved party had kept the question of assessment alive by raising it at the first appellate stage and also in the second appellate stage, the member, Sales Tax tribunal would have been justified in admitting additional evidence on the same and in relying on the aforesaid decision of the Supreme Court in Gannon Dunkerley's case, for setting aside the order of assessment. No subsequent change in case law can affect an order of assessment which has become final under the provisions of the Sales Tax Act…."

The additional grounds taken by the appellant may not be taken into consideration in view of Rule 102 of the OVAT Rules which has prescribed for restrictions to adduce fresh evidence before the Tribunal.

5. The dealer-assessee on the other hand defends that the determination of escaped TTO at `5,65,17,228.88 without appreciating that they are penultimate sales in course of export and are exempted under section 5(3) of the CST Act, is illegal, arbitrary and as such are liable to be deleted. Mr. D. Mohanty, ld. Counsel appearing for the dealer-assessee submitted additional grounds of appeal urging that the notice issued in Form VAT-307 is without the authority of law and as such, the re-assessment framed on the basis of such notice is liable to be quashed. This said notice contains observing that "you have been assessed under section 39, 40, 42 or Section 44 of the Orissa Value Added Tax Act, 2004, for the tax period (s) 01.04.2005 to 31.03.2009 on 02.01.2010". But no such assessment has ever been completed or communicated to the dealer-appellant at any point of time. The dealer-respondent is

not aware under which section either 39, 40, 42 or 44 of the OVAT Act it has been assessed. It is a pure question of law as affirmed by the Hon'ble High Court of Orissa in STREV No.64 of 2016 decided in case of **M/s. Keshab Automobiles Vs. State of Odisha.** It has been held that in absence of assessment under Section 39,40,42 or 44 of the OVAT Act, re-assessment under Section 43 of the OVAT Act is not sustainable in law. The ld. Counsel of the dealer-assessee submits that the above decision of the Hon'ble High Court has been upheld in the Apex Court in SLP (C) No.9823-9824/2022 dated 13.07.2022.

The ld. Counsel of the dealer-assessee has placed reliance on the judgment of Hon'ble Apex Court in case of **National Thermal Power Corporation Limited Vrs. Commissioner of Income Tax**, reported in (1997) 7 SCC Page-489 (S.C.) which observes that "the Tribunal has jurisdiction to examine a question of law, even though raised for the first time before the Tribunal, which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee". Accordingly it is argued that in absence of assessment completed under section 39, 40, 42 or 44 of the OVAT Act, re-assessment proceedings under section 43 of the OVAT Act is non est in law.

6. Heard the contentions and submissions of both the parties in this regard. The order of assessment and the order of the ld. FAA coupled with the materials on record are gone through. The contention of the State protecting admission of additional grounds at this second appellate stage without the same being raised earlier in the forums below is not acceptble at all. For, the Tribunal has powers of widest amplitude. It has discretion to consider the question of law arising in assessment proceeding although not raised earlier, as the new/additional ground

became available on account of change of circumstances or law. Since it stakes question of law striking the root of the case, the contention of the State is turned down in entirety. On the other hand, the additional grounds placed by the ld. Counsel of the dealer-assessee bear justification for consideration. Accordingly, before we consider upon other grounds of appeal as filed at the time of filing of second appeal, we consider it essential to look into the sustainability of the proceedings framed under section 43 of the OVAT Act. The Hon'ble High Court of Orissa in WP(C) No.11482 of 2010(Supra) has been pleased to quash the assessment passed under section 43 of the OVAT Act vide order dated 29.04.2010 and directed the assessing authority to reassess the dealer afresh. The law is settled. We are to go by the law presently in vogue. The question of law in the present case arises whether the proceeding drawn under section 43(1) of the OVAT Act and the consequential demand therein complies the pre-requirements/pre-conditions precedent to initiation proceedings or not?

7. 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 and 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"

9. In the present case, it is revealed that the assessment framed under the OVAT Act relate to the tax period from 01.04.2005 to 31.03.2009 which entirely covers the pre-amendment period. The learned assessing authority is learnt to have overlooked compliance of pre-conditions as required under section 39 of the OVAT Act for initiation of proceedings under section 43 of the OVAT Act. He has reopened the assessment simply on the basis of the Tax Evasion Report. There is no evidence available on record as to communication of the assessment made U/s.39 of the OVAT Act to the dealer-assessee. The ld.FAA has also ignored the aspect of maintainability of the case. In view of the above principles of

law, we are constraint to infer that the assessment made in the impugned case is not sustainable in law and as such, the same is liable to be quashed. The other issues taken by the both parties in the grounds of appeals/additional grounds of appeals are therefore rendered redundant.

10. Under the above backdrop of the case, the second appeal filed by the State is hereby dismissed and that of the dealer-assessee is allowed. The orders of the ld. STO and ld. FAA are thus set-aside. As a necessary corollary thereof, the assessment order is hereby quashed. The cross objections are disposed of accordingly.

Dictated and corrected by me.

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

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