BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL: CUTTACK.
S.A. No.286(V) of 2016-17

(Arising out of the order of the learned JCCT, Koraput Range, Jeypore, in First Appeal case No. AAV.(KOR)03/16-17 disposed of on 28.09.2016)

P r e s e n t: Shri G.C.Behera, Chairman. Sri. S.K.Rout Judicial Member-II & Shri M.Harichandan, Accounts Member-I.

M/s.Sarala Devi Modern Rice Mill,
Jayanagar, MV-42, Dist:Malkangiri. ... Appellant.

- V e r s u s –

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

For the Appellant ... Mr.B.P.Mohanty,Advocate.
For the Respondent ... Mr.M.L.Agarwal, SC(CT)

Date of hearing: **02.12.2022** * * * Date of Order:**06.12.2022**

O R D E R

Challenge in this appeal is the order dated 28.09.2016 passed by the learned Deputy Commissioner of Sales Tax (Appeal), Koraput Range, Jeypore (in short, FAA) in first appeal case No.AAV.(KOR)03/16-17, thereby confirming the order of assessment passed by the learned Asst. Commissioner of Commercial Taxes, Malkangiri Circle, Malkangiri (in short, AO) under Section 43 of the OVAT Act relating to the period 01.04.2012 to 20.09.2014 raising demand of Rs.26,08,470.00 which includes penalty of Rs.17,38,980.00 under Section 43(2) of the Act.

2. The case is that the appellant is a rice miller who purchases paddy from different mandies on behalf of the Odisha State Civil Supplies Corporation. After milling, it (appellant) delivers rice to the said corporation and sales broken rice, bran in the open market. On 20.09.2014, a team headed by the DSP, Vigilance, Nabarangapur Unit accompanied with Inspector Vigilance of Jeypore and

Raygada Unit, Marketing Intelligence Inspector of CSO, Nabarangpur and Mathili, STO, and ACTO of sales tax Vigilance Division, Jeypore made a joint verification in the mill premises of the firm and after joint verification and examination of books of accounts, the STO, Vigilance found certain discrepancies. As no entry of such discrepant stock were found in the books of accounts of the dealer, the STO, Vigilance held the paddy as out of account purchase with its consequential outturn i.e. rice, broken rice and bran. Since the main activities of the dealer is to mill paddy to produce rice, broken rice and bran. He estimated the conversion of differential Q.10141.94 paddy into rice, broken rice and bran @68%, 2% and 4% respectively, besides the shortage of raw rice and boiled rice ascertained the total amount of discrepancy. The STO, Vigilance submitted a tax evasion report against the dealer alleging such shortage as sales suppression amounting to Rs.1,73,89,798.00 and suggested assessment under Section 43 of the VAT Act. Basing on the said report, the assessing officer initiated assessment proceeding for the tax periods form 01.04.2012 to 20.09.2014 under Section 43 of the OVAT Act. After due confrontation of the relevant tax evasion report of the dealer and examining the books of accounts, he passed assessment order establishing the suppressions as reported in the said evasion report of the STO, Vigilance. So he levied tax of Rs.8,69,490.00 i.e. 5% on Rs.1,73,89,798.00. On the said tax amount he also imposed penalty of Rs.17,38,980.00 under Section 43(2) of the Act. So the assessing officer passed the assessment order raising total demand of Rs.26,08,470.00.

3. Against such assessment order, the dealer preferred the first appeal before the learned DCST (Appeal), Koraput Range, Jeypore who confirmed the order of assessment.

4. Further being dissatisfied with the order of the first appellate authority, the dealer has preferred the second appeal as per the grounds stated in the grounds of appeal.

5. Cross objection has been filed in the instant case by the State respondent.

6. Heard the contentions and submissions of both the parties in this regard. Learned Counsel for the appellant contended that no order of

assessment was passed under Section 39 or 42 of the OVAT Act prior to order of assessment passed under Section 43 of the OVAT Act for which the impugned order of assessment framed under Section 43 of the OVAT Act is liable to be quashed. To support such contention, learned Counsel relied upon the decision of M/s.Keshab Automobiles Vrs. State of Odisha (STREV No.64 of 2016 decided on 01.12.2021) by the Hon'ble High Court of Odisha. After a careful scrutiny of the provisions contained under Section 43 of the OVAT Act, one thing becomes clear that only after assessment of dealer 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 escaped assessment, or been under assessed, or been assessed at a rate lower than the rate at which it is assessable, then giving the dealer a reasonable opportunity of hearing and after making such enquiry, assess the dealer to the best of his judgment. Similar issue also came up before the Hon'ble High Court in case of M/s.Keshab Automobiles (supra) wherein the Hon'ble Court interpreting the provisions contained under Section 43 of the OVAT Act, in paras 13 to 16 of the judgment observed that " the dealer is to be assessed under Sections 39,40,42 and 44 for any tax period. The words " where after a dealer is assessed' at the beginning of Section 43(1) prior to 1st. October, 2015 pre-supposes that there has to be an initial assessment which should have been formally accepted for the periods in question i.e. before 1st. Oct, 2015 before the Department could form an opinion regarding escaped assessment or under assessment....."

So, the position prior to 1st. Oct. 2015 is clear. Unless there was an assessment of the dealer under Section 39,40,42 or 44 for any tax period, the question of reopening the assessment under Section 43(1) of the OVAT Act did not arise. The Hon'ble Court in para-22 of the judgment has categorically observed that if the self assessments under Section 39 of the OVAT Act for the tax periods prior to 01.10.2015 are not accepted either by a formal

communication or an acknowledgement by the Department, then such assessment cannot be sought to be reopened under Section 43(1) of the OVAT Act. In the instant case, the impugned tax relates to pre-amended provisions of Section 43 of the OVAT Act i.e. prior to 01.10.2015. This apart, the returns filed by the appellant were also not accepted either by a formal communication or an acknowledgment issued by the Department. There is nothing on the record to show that the dealer assessee was self assessed under Section 39 of the Act after filing return and it was communicated under writing about such self assessment. So when the very initiation of proceeding under Section 43 of the OVAT Act is bad in law, the entire proceeding becomes nullity and is liable to be dropped.

In view of the above discussion, we arrived at a conclusion that the order of assessment authority and the first appellate authority are not sustainable in the eyes of law and the same warrants interference in this appeal. Hence order.

7. The appeal filed by the dealer assessee is allowed and the impugned orders of the forums below are hereby quashed. The cross objection is disposed of accordingly.

Dictated and Corrected by me,

Sd/-

(Shri S.K.Rout)
Judicial Member-II

Sd/-

(Shri S.K.Rout)
Judicial Member-II

I agree,

Sd/-

(Shri G.C.Behera)
Chairman

I agree,

Sd/-

(Shri M.Harichandan)
Accounts Member-I