BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No.315(V) of 2016-17

(Arising out of the order of the learned JCCT, Bhubaneswar Range, Bhubaneswar, in First Appeal case No. AA-106221422000179/OVAT/BH.II disposed of on dt.28.07.2016)

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

M/s.Maa Sarala Marbles,
Plot No.30, NH-5, Pahal,BBSR. ... Appellant.

- V e r s u s –

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

For the Appellant ... Mr.K.R.Mohapatra, Advocate.
For the Respondent ... Mr. M.L.Agarwala, S.C.

Date of hearing: **29.10.2022** * * * Date of Order:**21.11.2022**

O R D E R

Challenge in this appeal is the order dated 28.07.2016 passed by the learned Joint Commissioner of Sales Tax (Appeal) Bhubaneswar Range, Bhubaneswar (in short, JCST/FAA) in first appeal case No.AA.106221422000179/ OVAT/BH.III, thereby confirming the order of assessment passed by the learned Sales Tax Officer, Bhubaneswar III Circle, Bhubaneswar (in short, STO/AO) under Section 43(1) of the Orissa Value Added Tax Act, 2004 (in short, the Act) for the tax period from 01.04.2012 to 31.05.2013 raising demand of Rs.4,74,342.00 including penalty of Rs.3,16,228.00 imposed under Section 43(2) of the Act.

2. The case at hand is that the dealer is a trader and deals in varieties of marbles, granites and tiles on wholesale and retail basis. The dealer was self assessed under Section 39 of the OVAT Act. But a tax evasion report bearing No.50 dt.31.10.2013 was received from the S.T.O. Vigilance, Bhubaneswar which was primafacie established suppression of sales and evasion of VAT on such sales. The officials of Vigilance and Enforcement wings of Bhubaneswar and Cuttack inspected the business premises of the dealer on 24.05.2013 in presence of the proprietor of the business. In course of inspection, the visiting officials seized/ recovered some written documents depicting the business transactions for further verification as the transaction could not be explained instantly by the proprietor on the date of inspection. The visiting officers obtained physical stock position of goods exhibited in the business premises. The dealer admitted that there were about 16000 sqft. of different varities of marbles at his additional place of business at Chandrasekharpur, Bhubaneswar. The visiting officials found cash proceeds of Rs.3250.00 lying in the cash box but not sale invoices were issued till the date and time of visit. After availing opportunities, the dealer proprietor appeared before the STO (Vig.) with books of accounts for verification with reference to seized documents and physical stocks held on the date of inspection. On verification of physical stocks obtained, it is found that excess stocks of 1815 boxes of tiles and shortage of 98,506 sqft. of marbles with reference of books of accounts. On being asked about the excess stock/ shortage of stocks, the dealer could not give any cogent explanation. On verification of seized documents, it was found that these loose written papers were comprised of estimate slips, hand written sale slips, rough stock inventory slips, stock transfer details from Pahal to Damana and vice-versa, marble unloading measurement sheets covering the transactions for 2012-13 and 2013-14. After verification of seized documents, the learned assessing officer observed those documents to be treated as out of account sales, to the extent of the transaction reflected therein and detected the sale suppression of Rs.8,34,222.00 for 2012-13 and Rs.1,17,751.00 for the year 2013-14. On further verification of the documents by the vigilance

officials, it was noticed that some of the transactions though the dealer produced the supporting sales invoices mostly corroborating the items and quantity sold, but differences were noticed in cash of sale value. The hand written slips/ documents depicted much higher sale value in comparison to the corresponding sale invoices produced by the dealer. So it was noticed and treated as tax evasion. The STO (V) concluded that the dealer has deliberately and clearly under stated the sale value or in other words suppressed the sale value to the extent of the differential amount which resulted sale suppression of Rs.16,47,991.00 for 2012-13 and Rs.2,62,490.00 for 2013-14. Basing upon the fraud case report No.50 dt.31.10.2013, received from the STO (V), Bhubaneswar Division, Bhubaneswar, the learned assessing officer issued notice in Form VAT-307 treating the above amount as escaped turnover and after due verification of the books of accounts, proceeded to assess the dealer to the best of judgement. At the assessment stage, the learned assessing officer after verification of documents observed that out of total sales suppression alleged in the tax evasion report at Rs.19,10,481.00, the dealer have furnished the sales invoices of Rs.7,39,256.00 against the alleged estimated slips, the sale suppression was estimated at Rs.11,71,225.00 which was added to the GTO and TTO of the dealer and taxed accordingly. The learned assessing officer assessed the dealer to a tax of Rs.1,58,114.00. This apart, penalty of Rs.3,16,228.00 equal to twice the amount of tax due imposed under Section 43(2) of the Act. Thus a total demand of Rs.4,74,342.00 was raised against the dealer on assessment made by the learned assessing officer.

3. As against such assessment order, the dealer preferred first appeal before the learned JCST (Appeal) Bhubaneswar Range, Bhubaneswar, who confirmed the order of assessment.

4. Further, being dis-satisfied with the order of the first appellate authority, the dealer has preferred the present 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. The sole contention of the dealer appellant is that the assessment order of sales tax officer, Bhubaneswar I Circle, Bhubaneswar for the period 01.04.2012 to 31.05.2013 on the ground that the notice issued in Form VAT-307 is not maintainable. It was vehemently urged by the learned Counsel for the dealer assessee that the initiation of proceeding under Section 43 of the OVAT Act was illegal and bad in law in the absence of formation of any independent opinion by the assessing authority as required under Section 43(1) of the Act. The escaped turnover assessment could not have been initiated under Section 43 of the OVAT Act when the dealer assessed was not self assessed under Section 39 of the Act. Further contention of the dealer assessee is that the initiation of such proceeding by the assessing authority under Section 43 of the OVAT Act without complying the requirement of law and in contravention to the principles laid down by the Hon'ble High Court of Orissa in case of M/s.Keshab Automobiles Vrs. State of Odisha (STREV No.64 of 2016 decided on 01.12.2021) is bad in law. He vehemently urged that there is nothing on record to show that the dealer assessee was self assessed under Section 39 of the OVAT Act after filing the return and it was communicated in 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 a nullity and is liable to be dropped.

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. The similar matter has also been decided by the Full Bench of OSTT in various cases such as:

(i) M/s.Swati Marbles Vrs. State of Odisha, S.A.No.209(V) of 2013-14 Order of Hon'ble Full Bench, OSTT dated 06.06.2022.

(ii) State of Odisha Vrs. M/s.Jaiswal Plastic Tubes Ltd. S.A.No.90(V) of 2010-11, Order of Hon'ble Full Bench, OSTT, dated 06.06.2022.

(iii) M/s.Jalaram Tobacco Industry Vrs. State of Odisha S.A. NO.35(V) of 2015-16, Order of Hon'ble Full Bench, OSTT dated 16.08.2022

(iv) M/s.Eastern Foods Pvt. Ltd. Vrs. State of Odisha S.A.No.396 (VAT) of 2015-16, Order of Hon'ble Full Bench dtd.23.08.2022

(v) M/s.Shree Jagannath Lamination and Farmes Vrs. State of Odisha, S.A.No.25 (VAT) of 2015-16, Order of Hon'ble Full Bench , OSTT dated 15.10.2022.

So in view of the above analysis, the impugned notice of assessment in Form VAT 307 issued to the dealer is to be treated as without any authority. In view of the above discussion, we arrive at a conclusion that the order of assessing authority and the first appellate authority are not sustainable in the eyes of law and the same warrant 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 set aside. The cross objection is disposed of accordingly.

Dictated and Corrected by me,

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

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

I agree,

(Shri M.Harichandan)
Accounts Member-I