

**BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL:
CUTTACK.**

S.A. No. 3(V) of 2016-17

(Arising out of the order of the learned JCCT, Koraput Range,
Jeypore, in First Appeal case No. AAV-(KOR)17/2015-16
disposed of on 28.01.2016)

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

M/s.Subhralaxmi Cashew Industries,
Majurmunda, Ambaguda. ... Appellant.

- V e r s u s -

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

For the Appellant ... Mr. P.K. Jena, Adv.
For the Respondent ... Mr. D. Behura, SC

Date of hearing: **02.02.2023** * * * Date of Order: **09.02.2023**

O R D E R

Dealer prefers this appeal challenging the order dated 28.01.2016 passed by the learned Deputy Commissioner of Sales Tax (Appeal), Koraput Range, Jeypore (in short, DCST/FAA) in first appeal case No.AAV(KOR)17/2015-16, thereby confirming the order of assessment passed by the learned Sales Tax Officer, Koraput Circle, Jeypore (in short, STO/AO) under Section 43 of the OVAT Act,2004 relating to the period from 01.04.2012 to 31.03.2014 raising a demand of Rs.38,47,837.00 including penalty of Rs.25,65,224.44 under Section 43(2) of the Act.

2. The case at hand is that the dealer appellant carries on business in processing and trading of cashew kernels

and effects purchases both from inside as well as outside the State of Odisha and sales inside as well as outside the State of Odisha. Pursuant to fraud case report, with regard to sales suppression, learned assessing officer enhanced the returned turnover by Rs.2,59,80,267.40 and determined the GTO at Rs.3,61,76,967.40 which includes CST turnover of Rs.87,39,200.00 and the TTO at Rs.2,74,37,767.40. So tax was levied of Rs.13,71,888.37 i.e. @5%. After allowing ITC adjustment of Rs.4159.15 and tax payment of Rs.85,117.00, learned assessing officer assessed the balance tax payable of Rs.12,82,612.22. On this amount penalty was imposed of Rs.25,65,224.44 under Section 43(2) of the Act raising total demand of Rs.38,47,837.00.

3. Against such tax demand, the dealer preferred first appeal before the learned DCST (Appeal), Koraput Range, Jeypore (FAA) who confirmed the tax demand.

4. Further being dis-satisfied with the order of the learned DCST (Appeal), Koraput Range, Jeypore, the dealer has preferred the present second appeal as per the grounds stated in the grounds of appeal.

5. Cross objection is filed in this case by the State respondent.

6. During course of argument, learned counsel for the dealer submitted that in the additional grounds of appeal the plea is taken that the order of assessment under Section 43 of the OVAT Act for the period 01.04.2012 to 31.03.2014 without completion of any assessment under Section 39,40,42 or 44 is misconceived, without authority, without jurisdiction

for which the same is bad in law. Learned Counsel also submitted that the order of assessment is un-sustainable as per the settled ratio of the decision rendered by the Hon'ble High Court of Orissa in the case of M/s.Keshab Automobiles Vrs. State of Orissa passed in STREV No.64 of 2016.

7. Per contra, learned Standing Counsel for the revenue argued that the orders of the fora below are genuine which need no interference.

8. 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 JCST, Koraput Range, Jeypore for the period 01.04.2012 to 31.03.2014 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 assessee 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: M/s.Swati Marbles Vrs. State of Odisha, S.A.No.209(V) of 2013-14 Order of Hon'ble Full Bench, OSTT dated 06.06.202, 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, 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, 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 and 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 reassessment 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.

9. 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,

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

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

I agree,

(Shri G.C.Behera)
Chairman

I agree,

(Shri M.Harichandan)
Accounts Member-I