BEFORE THE JUDICIAL MEMBER-II:
ODISHA SALES TAX TRIBUNAL: CUTTACK.

P r e s e n t: **Shri S.K. Rout,**
2nd Judicial Member

S.A. No. 188(V) of 2019
(Arising out of the order of the learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur, in Appeal Case No. AA(VAT)RGD 46/2016-17, disposed of on dtd.23.08.2018)

M/s. JGP Bhavani Agencies,
At/P.O.- New Colony, 1st Line,
Rayagada. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. N. Anand Rao, A.R.
For the Respondent ... Mr. D. Behura, S.C.

Date of hearing: 13.07.2023 *** Date of order: 01.08.2023

O R D E R

The dealer prefers this appeal challenging the order dtd.23.08.2018 passed by the learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (hereinafter referred to as, ACST/first appellate authority) in Appeal Case No. AA(VAT)RGD 46/2016-17, thereby confirming the order of assessment passed by the learned Deputy Commissioner of Sales Tax, Rayagada Circle, Rayagada (hereinafter referred to as, learned DCST/assessing authority) u/s.43 of the Orissa

Value Added Tax Act, 2004 (in short, the OVAT Act) raising demand of ₹16,02,996.00 including penalty of ₹10,68,664.00 imposed u/s.43(2) of the said Act for the tax period 01.04.2010 to 27.11.2013.

2. The case at hand is that, the dealer-appellant in the instant case M/s. JGP Bhavani Agencies is engaged in the trading of hardware goods including cement and other building materials in wholesale as well as on retail basis. Pursuant to tax evasion report bearing No.3/2014 from the Deputy Commissioner of commercial Taxes, Vigilance, Koraput Division, Jeypore proceedings u/s.43 of the OVAT Act was initiated against the dealer for the period under challenge and the demand as mentioned above was raised.

3. Against such demand, the dealer preferred first appeal before the learned first appellate authority who confirmed the tax demand.

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

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

6. The learned counsel appearing for the dealer-assessee contended that the order passed by the learned forums below are illegal and arbitrary. No assessment u/s.39, 42 or 44 was made before initiation of proceeding u/s.43 of the OVAT Act. Since the concept of deemed assessment of the return has been introduced for the first time since 1st October, 2015, the impugned orders of reassessment are liable to be

quashed for the period under challenge. Further contention on behalf of the dealer in ET case is that the return filed by way of self-assessment under Section 9(1) r/w Section 9(2) of the OET Act has not been accepted by the department by a formal communication which is against the principle of Ecmas Resin Pvt. Ltd. case as decided by the Hon'ble High Court of Orissa.

7. Per contra, the learned Standing Counsel appearing for the Revenue argued stating that the second appeal preferred by the dealer-appellant is not sustainable in the eye of law and that the learned assessing authority and first appellate authority have rightly completed the assessment basing on the statutory provisions under the Act and Rules. Further, contention raised on behalf of the learned Standing Counsel for the Revenue is that the additional ground as taken by the dealer-appellant should not be accepted at a belated stage and that the case of M/s. Keshab Automobiles v. State of Odisha (STREV No.64 of 2016 decided on 01.12.2021) is not at all applicable to the present case. Noteworthy to mention that a law point can be raised at any time and as such the contention raised on behalf of the learned Standing Counsel for the Revenue holds not good on this score.

8. Heard the contentions and submissions of both the parties in this regard. The sole contention of the dealer-appellant is that the assessment orders are not maintainable. It was vehemently urged by the learned Counsel for the dealer-assessee that the initiation of proceeding u/s.43 of the OVAT Act was illegal and bad in law in absence of formation of independent opinion by the assessing authority as required

u/s.43(1) of the Act. The escaped turnover assessment could not have been initiated u/s.43 of the OVAT Act when the dealer-assessee was not self-assessed u/s.39 of the Act. Further contention of the dealer-assessee is that the initiation of such proceeding by the assessing authority u/s.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 v. 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 u/s.39 of the OVAT Act after filing the return and it was communicated in writing about such self-assessment. So when the initiation of proceeding u/s.43 of the OVAT Act is bad in law, the entire proceeding becomes nullity and is liable to be dropped.

9. After a careful scrutiny of the provisions contained u/s.43 of the OVAT Act, one thing becomes clear that only after assessment of dealer u/s.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 u/s.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 October, 2015 before the Department could form an opinion regarding escaped assessment or under assessment ....".

So the position prior to 1st October, 2015 is clear. Unless there was an assessment of the dealer u/s.39, 40, 42 or 44 for any tax period, the question of reopening the assessment u/s.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 u/s.39 of the OVAT Act for the tax periods prior to 01.10.2015 are not accepted either by a formal communication or an acknowledgment by the Department, then such assessment cannot be sought to be reopened u/s.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 acknowledgement 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 v. State of Odisha, S.A. No.209(V) of 2013-14 (Full Bench dtd.06.06.2022), State of Odisha v. M/s. Jaiswal Plastic Tubes Ltd., S.A. No.90(V) of 2010-11 (Full Bench dtd.06.06.2022), M/s. Jalaram Tobacco Industry v. State of

Odisha, S.A. No.35(V) of 2015-16 (Full Bench dtd.16.08.2022), M/s. Eastern Foods Pvt. Ltd. v. State of Odisha, S.A. No.396 (VAT) of 2015-16 (Full Bench dtd.23.08.2022) and M/s. Shree Jagannath Lamination and Frames v. State of Odisha, S.A. No.25(VAT) of 2015-16 (Full Bench dtd.15.10.2022).

10. In view of the law expounded by the Hon'ble High Court in case of **M/s. Keshab Automobiles (supra)** and subsequently confirmed by the Hon'ble Apex Court, the proceeding u/s.43 of the OVAT Act has been initiated by the assessing authority without complying with the requirement of law and without giving any finding that the dealer-assessee was formally communicated about the acceptance of self-assessed return, the proceeding itself is not maintainable. So in view of the above analysis and placing reliance to the verdicts of the Hon'ble Courts, I am of the view that the claim of the appellant deserves a merited acceptance.

11. In the result, the appeal preferred by the dealer is allowed and the orders of the forums below are hereby quashed. Cross objections are disposed of accordingly.

Dictated & corrected by me,

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

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