BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL:CUTTACK

S.A.No.83(V)/2017-18

(Arising out of the order of the learned Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur, in First Appeal Case No. AA40/SA-I/VAT/2015-16, disposed of on 28.03.2017)

Present: Smt. Suchismita Misra **Chairman** **&** **Shri P.C. Pathy** **Accounts Member-I**

M/s.Mamata Hosiery,
At.Gujrati Colony,
Po:Sambalpur, Odisha. ... Appellant.

-Versus-

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

For the Appellant: : Mr. Mukesh Agrawal, ld. Advocate.
For the Respondent: : Mr. M. S. Raman, ld. Addl. S.C. (C.T.).

Date of Hearing: 26.04.2019 ***** Date of Order: 07.05.2019

O R D E R

This present second appeal has been preferred against the order of the learned Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, 'ld. JCST') passed in first appeal Case No. AA40/SA-I/VAT/2015-16, dtd.28.03.2017 reducing the demand to Rs.2,52,711.00 from Rs.19,60,776.00 raised by the learned Deputy Commissioner of Sales Tax, Sambalpur-I Circle, Sambalpur (in short, 'ld.DCST') in his order passed on 18.01.2013 under section 43 of the Odisha Value Added Tax Act, 2004 (in short, 'the OVAT Act') for the assessment periods from 01.04.2009 to 31.03.2011.

2. The dealer-appellant in the instant case is engaged in trading of readymade garments and hosiery goods on whole-sale and retail sale basis effecting purchases from outside the State of Odisha and effecting sales in the local market. Ld. DCST consequent upon receipt of a fraud case report from the Sales Tax Officer, Sambalpur–I Circle, Sambalpur reported to have paid visit to the place of business

of the dealer jointly with the enforcement officials of sales tax alleging engagement of the dealer in suppression of sales as well as purchases initiated proceeding u/s.43 of the OVAT Act were initiated. Despite due service of notice as the dealer-appellant failed to appear before the ld. DCST in hearing for the case the ld. DCST was compelled to complete the assessment basing on the materials available in the fraud case report which resulted in demand of Rs.19,60,776.00 including penalty of Rs.13,07,184.00 imposed u/s.43(2) of the OVAT Act. This led the dealer-assessee to file appeal against the order of assessment before the ld. JCST.

The ld. JCST on careful consideration of the grounds of appeal, the arguments of the ld. Advocate in the course of hearing of appeal, impugned order of assessment, written submission vis-a-vis materials available in record allowed substantial relief to the dealer-appellant by reducing the assessment to Rs.2,52,711.00 by treating the initiation of proceeding by the ld. DCST as just and proper and reasonably deleting the sale value arrived at by addition of 20% towards margin of profit to the total value of stock recorded to the tune of Rs.1,42,13,980.00 as the same was without any basis.

3. Being further aggrieved, the dealer-assessee has filed second appeal on the following grounds:-

i. The appeal order passed by the ld. first appellate authority partly allowing the appeal instead of quashing the same is totally bad in law and facts of the case. The ld. first appellate authority has not correctly gone through the submissions filed by the appellant as such the whole assessment proceeding is liable to be quashed.

ii. The order of assessment passed U/s.43 of the OVAT Act 2004, relating to the period 01.04.2009 to 31.03.2011 by the Dy. Commissioner of sales Tax, Sambalpur-I Circle, Sambalpur is bad in law and facts of the case.

iii. The ld. Assessing officer has not served the Statutory Notice as prescribed and has not at all followed the procedures to be

adopted before issue of Notice in Form VAT 307 and the order passed by not complying to the provisions is totally illegal and liable to be quashed the view taken by the Hon'ble High Court of Odisha in the case of Balaji Tobacco Stores Vs. Sales Tax Officer (2015) 81 VST 170 (Ori) totally applies in the present case as there is no indication in the assessment order or any findings that original assessment had been completed before resorting to assessment of escaped turnover.

iv. There has been misrepresentation of facts by the STO (Enforcement) by not considering the statements of the appellant at the time of verification of books of account and the order passed by the ld. Dy. C.S.T. on such report is totally illegal and liable to be quashed.

v. As is evident from the order of assessment issued in FORM VAT-312 the ld. Dy. C.S.T. has not determined the GTO or the TTO but has simply proceeded to compute the tax liability and imposition of penalty. This fact should have been considered by the ld. First appellate authority while passing the appeal order at his end and should have quashed the order of assessment.

vi. The whole assessment is based on the report of the STO (Enforcement) and the assessing officer as well as the first appellate authority has not at all applied his mind nor has taken pains to verify the correctness of the statement given by the appellant thereby making the whole assessment a biased one under such circumstances the whole assessment proceedings is liable to be quashed.

vii. The imposition of penalty is totally illegal.

4. The respondent-Revenue has filed cross objection as follows:-

A. There is no reasonable merit in the second appeal filed by the dealer which is not sustainable in the eyes of law.

B. The ld. assessing officer & first appellate authority have rightly completed assessment/appeal basing on the statutory

provisions under the Act and Rules with regard to the points raised by the dealer.

C. The order of the first appellate authority is crystal clear with respect to the other points raised by the dealer. He has dealt each and every item which is self-explanatory & requires no further interference.

5. Mr. Mukesh Agrawal, the ld. Advocate appearing on behalf of the dealer-appellant reiterated the contentions taken in the grounds of appeal. He vehemently argued that initiation of reassessment u/s.43(2) of the OVAT Act without completion of assessment for the very period and without formation of opinion by the ld. DCST in writing on the order sheet maintained for the purpose is illegal hence the orders of the lower fora ought to be quashed. Mr. Agrawal has also furnished written submission in course of hearing stating the following points:-

(a) The appellant has never received any notice as has been alleged by the Assessing Officer and as such the order passed Ex-parte is totally illegal & liable to be quashed as no reasonable opportunity has been allowed to the appellant.

(b) The notice issued in FORM VAT-307 as alleged is itself illegal and assessment made u/s.43 of the OVAT Act is also illegal and liable to be quashed. The notice clearly indicates that it is a notice for assessment of tax on escaped turnover. The question of escaped turnover will arise only after the original assessment is completed. The assessing officer has categorically mentioned in the said notice that the appellant has been assessed U/s.39/40/42 of OVAT Act for the tax period 01.04.2009 to 31.03.2011. But the assessing officer has not at all mentioned the date of such assessment or the fate of any such assessment. As far as the appellant knows that he has never been assessed for the above period. When the original assessment has not been made then the question of escaped assessment does not arise as such the issuance of Notice in FORM VAT-307 even if any made is totally

illegal and the assessment made on the basis of such notice is also liable to be quashed.

(c) The notice in FORM VAT307 is to be issued as per the guidelines of Rule 50(1) of the OVAT Act after the assessment is completed U/s.39, 40, 42 or 44 and not prior to that. But in the instant case the assessing officer has by-passed all the legal formalities at his own sweet-will and has not at-all applied his mind but was carried away by the direction mentioned in the fraud report. The assessing officer is independent who has to record the reasons and apply his mind and should have completed the original assessment first and thereafter should have proceeded to determine the turnover which might have escaped but no such steps were taken thereby making the whole assessment proceedings illegal and liable to be quashed. In this regard the appellant would like to rely on the decision of the Hon'ble High Court of Odisha in the case of Balaji Tobacco Stores Vs. S.T.O.(2015) 81 VST 170 (ori). A similar view has been taken by the Madras High Court in the case of State of Tamil Nadu Vs. Afra Car Jewels (2014) 76 VST 343 (Mad). It has also been decided by the Hon'ble High Court of M.P. (Indore Bench) in the case of Grasim Industries Ltd. Vs. Addl. Commissioner of Commercial Taxes & Another (2009) 25 VST 596 (M.P) that reassessment proceedings for escapement of turnover cannot be initiated before communication of the original assessment order to the dealer. A Xerox of Certified copy of the Order Sheet is itself explanatory wherein no opinion of the Assessing Officer has been formed nor such order has been passed for issue of notice and even if any notice is issued is itself illegal as no order had been passed for issue of notice. Hence the Assessment order passed in this case is totally liable to be quashed and this aspect has not been at all considered by the ld. first appellate authority.

(d) Presuming but not accepting the fact that original assessment had been completed then before issue of a notice in

Form VAT 307 the Sales Tax Officer should form his own opinion and the same should be clearly mentioned in the Order-Sheet as well as in the notice issued but the records clearly reveals that no such procedure has been followed nor there is any mention for issue of a such notice which is clearly a violation of OVAT Act & Rules and as such the proposed action is illegal as has been decided by the Hon'ble Orissa High Court in the case of Suburban Industries Kalinga Pvt. Ltd. Another Vs. STO, BBSR & Another (1993) 90 STC 280 (Ori). A similar view has been taken by the Delhi High Court in the case of Samagya Consultants Pvt. Ltd. Vs. CST & Another (2001) 122 STC 512 (Delhi).

6. Per contra, Mr. M. S. Raman, the learned Additional Standing Counsel (C.T.) appearing on behalf of the State in the contention that the order passed by the ld. JCST is just and proper. He took the contention submitted that the ld. DCST has properly completed reassessment u/s.43 of the OVAT Act as the dealer has not responded to the date fixed for hearing despite due service of notice. He brought to the notice of this Bench the fact of issue of notice and service of the same. He contended that as the dealer neither appeared nor caused production of books of accounts nor sought further time for hearing u/s.43 of the OVAT Act reassessment was completed exparte on the basis of materials available in the record. However, as the dealer-appellant appeared/participated in hearing the ld. JCST has taken into consideration the grounds and arguments proffered on behalf of the dealer-assessee. He further took the contention that the dealer-appellant has not challenged the notice but has approached this Tribunal against the first appeal order in accordance with the provision u/s.78 of the OVAT Act. He further submitted that the ld. DCST has issued proper notice which has been served on the dealer-appellant and as the ld. DCST found that there was prima-facie evidence of suppression of purchase and sales reported by the inspecting authorities on verification of the business premises of the dealer-appellant, the completion of assessment on

exparte on the materials available in the report due to non-cooperation on the part of the dealer-assessee it cannot be said that the assessment is invalid only on the ground that there is no signature of the ld. DCST in the order sheet while initiating the proceeding. In this regard he brought to the notice of this Bench the relevant provision contained u/s.98 of the OVAT Act which is reproduced below:-

> ***"98. Assessment proceedings, etc. not to be invalid on certain grounds.-***
>
> No return, assessment, appeal, rectification, notice, summons or other proceedings accepted, made issued or taken, or purported to have been accepted, made, issued or taken in pursuance of any of the provisions of this Act shall be invalid or deemed to be invalid merely by reason of any mistake, defect or omission in such return, assessment, appeal, rectification, notice, summons or other proceedings, if such return, assessment, appeal rectification, notice or other proceedings are, in substance and effect, in conformity with or according to the intents, purposes and requirements of this Act.
>
> The service of any notice, order or communication shall not be called in question if the notice, order or communication, as the case may be, has already been acted upon by the dealer or person to whom it is issued or where such service has not been called in question at or in the earliest proceedings commence, continued or finalised pursuant to such notice, order or communication."

7. Heard the rival contentions. Gone through the Grounds of appeal, impugned orders of appeal and assessment, cross objection, relevant records of appeal and assessment and the written submission filed by the ld. Advocate on behalf of the dealer-appellant and case laws cited. In the instant case this Tribunal is required to adjudicate the following issues:-

(i) Whether the assessment done u/s. 43 of the OVAT Act on exparte without assessing the dealer u/s.39, 40 or 42 of the OVAT Act for the

period in respect of the dealer-assessee is legally valid or not in the facts and circumstances of the case and the provision under the law?
(ii) Whether non-mention of opinion in the Order Sheet and notice vitiates the procedure for completion of reassessment u/s.43 of the OVAT Act?

In course of hearing both the parties advanced their contentions basing upon the grounds submitted by them and cited case laws to justify their contentions. Ld. Counsel on behalf of the dealer-assessee vehemently argued that in this case assessment u/s.43 of the OVAT Act is not at all sustainable and he apprised the Court that when no assessment is made u/s.39 or u/s.42 of the OVAT Act the escapement of or under assessment as envisaged in section-43 cannot be comprehended. A plain reading of section-38 read with section-39 of the OVAT Act and the corresponding Rules as contained in Rule-40 of the OVAT Rules makes it abundantly clear that acceptance of a return as self-assessed is preceded by scrutiny of return and only upon finding to the effect that the return is free from any errors, mistake or unjustified claim the same can be accepted as self-assessed. The statute does not envisage any communication to the dealer regarding acceptance of such self-assessed return in case no deficiencies is found on scrutiny of the same but Mr. Agrawal, the ld. Advocate on behalf of the dealer-appellant urged before the Court that in such a case the assessing authority must record a finding regarding acceptance of such self-assessed returns. Since such a finding is absolutely lacking in the instant case it has to be held that an assessment as envisaged U/s.39 has not been made in the case of dealer-assessee. To fortify his argument he cited the Judgment of Hon'ble High Court of Odisha rendered in the case of Balaji Tobacco Stores Vs. Sales Tax Officer, Cuttack-East Circle, Cuttack reported in (2015) 81 VST 170 (Ori) and the Judgment of Madras High Court rendered in State of Tamil Nadu Vs. Afra Car Jewels reported in (2014) 76 VST 343 (Mad) and the Judgement of Hon'ble Madhya Pradesh High Court, Indore Bench

rendered in the case of Grasim Industries Ltd. Vs. Addl. Commissioner of Commercial Taxes M.P. and Another reported in (2009) 25 VST 596 (M.P).

In reply to this argument ld. Addl. SC. (C.T.) for the State submitted that Sec.2(47) of the OVAT Act defines what is self assessment. In the instant case the dealer had furnished returns which were accepted along with challans. The dealer had assessed himself and submitted the returns. Therefore, as per the provision of Sec.38 of the OVAT Act if any mistake is detected as a result of scrutiny made under sub-section (1) of the aforesaid section the assessing authority shall serve a notice in the prescribed form on the dealer to make payment of the extra amount of tax along with the interest as per the provisions of the Act by the date specified in the said notice. This section does not say further that the assessing authority, if does not detect any mistake in the said return, is also required to inform the same to the assessee concerned. Sec. 43 of the OVAT Act provides where after a dealer is assessed under sections 39, 40 or 42 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 (a) escaped assessment, or (b) been under-assessed, or (c) been assessed at a rate lower than the rate at which it is assessable; or that the dealer has been allowed (i) wrongly any deduction from his turnover, or (ii) input tax credit to which he is not eligible, the assessing authority may serve a notice on the dealer in such form and manner as may be prescribed and after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he deems necessary, proceed to assess to the best of his judgment the amount of tax due from the dealer. In support of his submission, learned Addl. S.C. (C.T.) for the State cited and relied upon the Judgment rendered in the case of M/s. Neelachal Ispat Nigam Vs. State of Odisha by our Hon'ble High Court in (W.P. (C) No.22343 of 2015 decided on 07.12.2016.

On perusal of assessment record it is observed that that notice in Form VAT-307 read with sub-Rule-1 of Rule-50 and intimation issued there-under have already been served on the dealer-appellant but the dealer-appellant didn't respond to the same on account of which re-assessment was completed on exparte basing on the materials available in the fraud case report. It is an undisputed fact that, for initiation of proceeding u/s.43 of the OVAT Act, there must have been any kind of assessment as per Sec.39, 40, 42 or 44 of the OVAT Act. To appreciate the controversy and for sake of brevity, the provision u/s. 39 of the OVAT Act as it was before amendment in the year 2015 is reproduced below:-

Sec. 39 of the OVAT Act before amendment:

39.Self assessment:-

"(1)Subject to provisions of sub-section (2), the amount of tax due from a registered dealer or a dealer liable to be registered under this Act shall be assessed in the manner hereinafter provided, for each tax period or tax periods during which the dealer is so liable.

(2) If a registered dealer furnishes the return in respect of any tax period within the prescribed time and the return so furnished is found to be in order, it shall be accepted as self assessed subject to adjustment of any arithmetical error apparent on the face of the said return."

Neither Section 38 nor Section 39 of the OVAT Act contemplates a situation that after submission of returns by way of self assessment it is obligatory on the part of the authority concerned to intimate that the returns furnished, being correct, are accepted. These provisions of the OVAT Act rather provides that on scrutiny of returns if any mistake is detected with regard to correctness of calculation, application of correct rate of tax and interest, claim of input tax credit made therein and full payment of tax and interest payable by the dealer for such period, then the assessing officer would intimate the assessee for due compliance. Therefore, in the facts and circumstances as revealed in this case we find no strength in the argument

advanced by the learned Counsel for the appellant to hold that the assessing authority had transgressed his power or jurisdiction to make an assessment u/s.43 of the OVAT Act. In the instant case the assessing officer was certainly well within his right to make an escaped turnover assessment when it came to his knowledge that the dealer-assessee had suppressed a portion of its turnover while making self assessment. The facts and circumstances of the order passed by the Division Bench of this Tribunal in S.A. No.15 and 17 (ET) of 2017-18 on 05.04.2019 are not identical for the issues covered under this appeal. In those second appeal cases are the issues involved orders are undated and without signature of the assessing authority. The Hon'ble High Court of Orissa while deciding similar provision of self-assessment and escaped assessment under section 9 and 10 respectively of the Odisha Entry Tax Act, 1999 in W.P.(C) No.22343 of 2015 in the case of M/s. Neelachal Ispat Nigam Ltd. Vrs. State of Odisha and Others on 07.12.2016 has made following observation:-

> "So far as the grounds taken by the petitioner that the company was assessed as per the provisions of Section 9(1) of the Act and as such, it is not known to them as to whether assessment has been finalized or not or in other words, whether the authorities have accepted the self assessment made by the petitioner-company under Section 9(1) has been accepted or not is concerned, we are of the considered view that Section 9 contains a provision for self assessment, which requires the dealer to be assessed in the manner provided for each tax period or periods during which the dealer is so liable and if the registered dealer furnishes the return in respect of any tax period within the prescribed time and the return so furnished is found to be in order, it shall be accepted as self assessed subject to adjustment of any arithmetical error apparent on the face of

> the said return. Section 10 of the Act provides for reassessment in certain cases when the authority is of the reason to believe that the dealer has escaped assessment of tax and as such communication regarding acceptance of the assessment made under the provisions of Section 9 of the Act is not required to be communicated to the petitioner and the communication can only go in a situation when on scrutiny it will be found that the same is not in order or there is arithmetical error. Under the Taxation Rule the assessee is required to furnish self assessment and the authority is required to assess the same and there is no provision provided under the Act to communicate in case of acceptance of the assessment. Although under the provision of Orissa Value Added Tax Act under Section 38 read with Section 7(10) each and every return in relation to any tax period furnished by a registered dealer shall be subject to scrutiny by the assessing authority to verify the correctness of the calculation, application of correct rate of tax and interest etc. and in case of any mistake, detected in course of scrutiny, the assessing authority shall serve a notice in the prescribed form as we find even from the provision of Section 7 or sub-section (11) and as such, if the authorities have not issued any notice under Section 7(11), then the assessment made by the registered dealer under the provisions of Section 9 will be said to be accepted."

It is observed that as the ld. DCST has determined GTO and TTO in respect of the suppressed turnover it excludes the GTO and TTO disclosed through returns by the dealer-appellant for the relevant tax periods.

Thus, from the discussion above, in all probability there cannot be any escape from the definite conclusion that, the initiation of reassessment proceeding invoking Section-43 of the OVAT Act in

the present case by the authority is not without jurisdiction, not illegal and the same is found to be sustainable in the eyes of law. The dealer-appellant could not refute the charges of suppression appearing before the ld. DCST. However the ld. JCST on proper verification of the documentary evidences reasonably deleted the suppression determined on account of physical stock position. Mere technical ground of lack of signature of the ld. DCST in the Order Sheet would not vitiate the reassessment proceeding so as to allow the dealer-assessee involved in suppression of purchases and sales to go scot-free as argued by the ld. Addl. S.C. (C.T.) referring Section-98 of the OVAT Act.

Therefore, as per the aforesaid discussions we are of the view that the order of the ld. JCST substantially reducing the demand raised in the order of assessment is neither unreasonable nor unjustified in any manner warranting interference by this Tribunal. This Tribunal does not find any strong case made out by the dealer-appellant.

8. In the result, the appeal is dismissed and the impugned order of the ld. JCST is hereby confirmed. The cross objection is disposed of accordingly.

Dictated and Corrected by me,

Sd/-
(P.C. Pathy)
Accounts Member-I

Sd/-
(P.C. Pathy)
Accounts Member-I

I agree,

Sd/-
(Suchismita Misra)
Chairman