BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 230 (VAT) of 2019

(Arising out of order of the learned JCST, Bhubaneswar Range, Bhubaneswar in Appeal No. AA- 106111010000039/BHI/ 10-11, disposed of on dated 18.05.2013)

Present: **Shri A.K. Das, Chairman**

M/s. Acharya Associates,
Plot No. 224, Shanti Nagar,
Jail Road, Jharpada, Bhubaneswar ... Appellant

-Versus-

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

For the Appellant : Sri A. R. Tripathy, Partner
For the Respondent : Sri D. Behura, S.C. (CT) &
Sri S.K. Pradhan, Addl.SC (CT)

Date of hearing: 03.06.2022 *** Date of order: 10.06.2022

O R D E R

The dealer-assessee has preferred this second appeal assailing the order dated 18.05.2013 passed by the learned Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar (hereinafter called as 'first appellate authority') in Appeal No. AA-106111010000039/BHI/10-11 thereby enhancing the assessment to ₹67,26,327.00 from ₹41,09,743.00 raised by

the Sales Tax Officer, Bhubaneswar Circle, Bhubaneswar, (in short, 'assessing authority') for the tax period 01.08.2006 to 30.09.2009 in the assessment framed u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act').

2. The factual background of the case is that the dealer-assessee is a partnership concern registered under the OVAT Act w.e.f. 07.08.2006 for execution of works contract. The partnership business of the dealer-assessee was audited for the period in question by the Audit Unit of Bhubaneswar Range, Bhubaneswar. Upon completion of the audit visit, the STO, audit Unit, Bhubaneswar Range, submitted Audit Visit Report (AVR) in Form VAT-303 and proceeding was initiated u/s. 42 of the OVAT Act for audit assessment. The dealer was noticed in Form VAT-306 to produce the books of account and to have his say in the matter. Pursuant to such notice, Sri Apurba Ranjan Tripathy, one of the partners of the firm, appeared and sought adjournment till 03.05.2010. Thereafter also the matter was adjourned on many occasions on the prayer of Sri Tripathy. Lastly on 15.07.2010 Sri Tripahty filed his written submission explaining the allegations made in the AVR. The Audit Team during audit noticed that the dealer-

assessee received certain amount from the principal towards hiring charges of machineries and the rest towards different services. It paid service tax on the value received or receivable providing different services and realized the VAT on the value received towards hiring charges. It was alleged in the AVR that the appellant purchased machineries such as escalators, loaders, bulldozers, tippers etc. both from inside as well as outside the State. Machineries and spares purchased were used partly in execution of service contract and were partly let out to different users on hire. While filing return, the dealer-assessee claimed ITC at one board for the whole purchase value of the goods purchased inside the State on payment of VAT. The Audit Team suggested for proportionate ITC in the ratio of hire charges and own use. The assessing authority accepted the suggestion of the audit and allowed ITC proportionately. Consequently, a portion of the ITC availed by the dealer-assessee which was disallowed by the assessing authority, giving rise to demand of ₹13,68,680.00 on which penalty equal to twice the amount of tax was imposed.

2(a). The dealer-assessee challenging the demand raised by the assessing authority, filed appeal u/s. 77 of the

OVAT Act read with Rule 86 of the OVAT Rules before the first appellate authority, who enhanced the demand to ₹67,26,327.00. The dealer-assessee being further dissatisfied with the order of the first appellate authority enhancing the demand raised by the assessing authority, preferred the present second appeal.

3. The dealer-assessee in course of argument though raised several grounds, it mainly harped on the impugned order of the first appellate authority enhancing the assessment without issuing enhancement notice to the dealer-appellant as required u/r. 89 of the OVAT Rules. He vehemently urged that the first appellate authority clearly committed grave error of law in enhancing the assessment without complying the mandatory requirement of Rule 89 of the OVAT Rules. The enhancement order has been passed by the first appellate authority in a whimsical and arbitrary manner without complying the mandatory requirement of law. Therefore, the impugned order of the first appellate authority is unsustainable in the eyes of law. He further argued that the dealer-assessee got itself registered under the OVAT Act w.e.f. 07.08.2006 whereas notice of audit visit under sub-rule (2) of Rule 44 of the OVAT Rules was served

on it (dealer-assessee) in Form VAT-301 to conduct the audit for the period 01.04.2005 to 30.09.2009. The assessing authority as well as the first appellate authority committed serious illegality in making audit assessment for the period from 01.04.2005 to 06.08.2006, during which period the dealer was unregistered. In view of Rule 41(1) of the OVAT Rules, the audit can be conducted only for the period when the dealer-assessee was registered, i.e. from 07.08.2006 onwards, and on that count also the impugned orders of the forums below are unsustainable. He also challenged the impugned order of the first appellate authority on the ground that the AVR was not submitted within seven days from the date of completion of audit; that there is violation of provision of Rule 46 of the OVAT Rules by the audit team; that the impugned order passed by the assessing authority u/s. 42 of the OVAT Act without considering the explanations submitted by the dealer-assessee is illegal and unsustainable in the eyes of law; that there is no material on record to show that the dealer-assessee wrongly availed the ITC and that rejection of claim of ITC by the forums below solely basing on the AVR is illegal.

4. On the other hand, learned Standing Counsel (CT) appearing for the revenue supporting the impugned orders of the forums below and in terms of cross-objection filed by it, urged that the orders are in accordance with law and the demand raised by the forum below is justified and reasonable. There is no illegality or impropriety in the impugned order of the first appellate authority warranting interference of this Tribunal.

5. I have heard the rival contentions of the parties, gone through the grounds raised in memorandum of appeal as well as additional grounds of appeal filed by the dealer-assessee on 06.10.2020 vis-a-vis the impugned orders of the forums below and the materials on record. On careful scrutiny of the order of the first appellate authority, I find that it has enhanced the tax demand to ₹67,26,327.00 from ₹41,09,743.00 for the period in question and there is no enhancement notice to the dealer-assessee before such enhancement. Rule 89(3) of the OVAT Rules specifically provides that the appellate authority shall not enhance an assessment or a penalty without giving the appellant a reasonable opportunity of being heard against such enhancement. The first appellate authority while enhancing

the assessment has not taken note of the provisions contained in Rule 89(3) of the OVAT Rules and has enhanced the assessment in whimsical and arbitrary manner. If the appellate authority intended to enhance the assessment on scrutiny of the materials on record, it should have issued enhancement notice to the dealer-assessee in order to give it reasonable opportunity of hearing. But the first appellate authority did not do so while enhancing the assessment. There is clear contravention of Rule 89(3) of the OVAT Rules by the first appellate authority. Therefore, the impugned order cannot be sustained in the eyes of law. Without expressing any opinion on merit of the assessment made by the assessing authority and enhancement of assessment made by the first appellate authority, I feel it just and proper to remit the matter back to the first appellate authority in order to give an opportunity of hearing to the dealer-assessee on the question of enhancement.

6. For the foregoing discussions and reasons assigned, I am inclined to allow the appeal filed by the dealer-assessee and accordingly, the appeal is allowed. The impugned order of the first appellate authority is hereby set aside and the matter is remitted back to it (first appellate

authority) to hear the first appeal afresh after giving enhancement notice to the dealer-assessee and due opportunity of hearing to him on the question of enhancement and thereafter to pass order in accordance with law. It is made clear that I have not expressed any opinion on merit of the assessment made by the assessing authority as well as enhancement made by the first appellate authority. Therefore, the first appellate authority while disposing of the appeal shall take into consideration all such contentions to be raised by the dealer-assessee before it and to deal with the same in its order in accordance with law. The entire exercise shall be completed within a period of three months from the date of receipt of this order. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman