BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 285 (VAT) of 2016-17

(Arising out of order of the learned DCST (Appeal), Koraput Range, Jeypore in Appeal No. AAV (KOR) 07/16-17, disposed of on dated 28.09.2016)

Present: **Shri A.K. Das, Chairman**
Shri S.K. Rout, 2nd Judicial Member
&
Shri M. Harichandan, Accounts Member-I

M/s. Laxmi Ganesh Rice Mill,
Govindapalli, Dist. Malkangiri ... Appellant

-Versus-

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

For the Appellant : Sri B.P. Mohanty, Advocate
For the Respondent : Sri M.L. Agarwal, S.C. (CT)

Date of hearing: 25.08.2022 *** Date of order: 03.09.2022

O R D E R

The order impugned in the present second appeal is order dated 28.09.2016 passed by the learned Deputy Commissioner of Sales Tax (Appeal), Koraput Range, Jeypore (hereinafter called as 'first appellate authority') in Appeal No. AAV (KOR) 07/16-17 thereby confirming the order of assessment dtd.25.02.2016 passed by the learned

Assessing Officer, Malkangiri Circle, Malkangiri (in short, 'assessing authority') raising demand of ₹14,50,002.00 for the tax period 01.04.2013 to 20.10.2014 in the assessment framed u/s. 43 of the Orissa Value Added Tax Act, 2004 (in short, 'OVAT Act').

2. The relevant facts for the purpose of adjudication of the present second appeal are that the dealer-assessee is a rice miller, who purchases paddy from different mandies on behalf of the Odisha State Civil Supplies Corporation and after milling delivers rice to the Department and sells broken rice and bran in the open market. On 20.10.2014 a Team headed by the DSP, Vigilance, Nabarangpur Unit accompanied with Inspector Vigilance of Jeypore & Rayagada Unit, Marketing Intelligence Inspector of CSO, Nabarangpur and Mathili, STO and ACTO of Sales Tax Vigilance Division, Jeypore made joint verification in the mill premises of the dealer-assessee. On examination of the books of account, the STO, Vigilance found discrepancies in the books of account and physical stock of the goods and accordingly, submitted Tax Evasion Report (TER) alleging shortage as sale suppression amounting to ₹96,66,684.00 and suggested for assessment

u/s. 43 of the OVAT Act. The assessing authority basing on the TER, initiated the proceeding u/s. 43 of the OVAT Act for the period 01.04.2013 to 20.10.2014 and issued statutory notice to the dealer-assessee. On appearance of the dealer before the assessing authority, allegations made in the TER were confronted. The assessing authority after due confrontation of the TER to the dealer-assessee and on examination of the books of account, held that sales suppression as reported stood established and accordingly, raised demand of ₹14,50,002.00, which includes penalty of ₹9,66,668.00.

2(a). The dealer-assessee challenging the demand raised by the assessing authority, filed appeal before the first appellate authority, who also dismissed the appeal and confirmed the order of assessment. The dealer-assessee being further dissatisfied with the order of the first appellate authority confirming the order of assessment, filed the present second appeal.

Pursuant to the notice issued by this forum, the State has filed cross-objection supporting the impugned orders of the forums below.

3. The dealer-assessee though raised several grounds in the memorandum of appeal, in course of hearing of the second appeal confined its argument only on the issue of maintainability of the initiation of proceeding u/s. 43 of the OVAT Act in the absence of any assessment u/s. 39, 40, 42 or 44 of the said Act. It was vehemently urged by the learned Counsel for the dealer-assessee that the forums below illegally did not answer the above issue while raising the extra demand against the dealer-assessee and in an arbitrary manner computed the tax liability of the dealer-assessee. The issue involved in the present second appeal having already been decided and answered by the Hon'ble High Court of Orissa in case of **M/s. Keshab Automobiles Vs. State of Odisha (STREV No. 64 of 2016 decided on 01.12.2021)** and subsequently confirmed by the Hon'ble Apex Court, the present second appeal should be allowed quashing the impugned orders of the forums below.

4. Per contra, the learned Standing Counsel (CT) for the revenue in terms of the cross-eobjection filed by it strongly supported the impugned orders of the forums below contending inter alia that once the return is filed by the dealer-assessee u/s. 39 of the OVAT Act, it is deemed to

have been self-assessed and the contention raised by the learned Counsel for the dealer-assessee relying on the judgment of the Hon'ble High Court in case of **M/s. Keshab Automobiles (supra)** is not legally tenable as the facts of both the cases are different and distinguishable. He submitted to dismiss the appeal and confirm the orders of the forums below.

5. The sole question that falls for consideration in the present second appeal is whether in the absence of assessment u/s. 39, 40, 42 and 44 of the OVAT Act, initiation of proceeding u/s. 43 of the said Act for escaped assessment is maintainable. The provisions contained u/s. 43 of the OVAT Act specifically provides for initiation of proceeding under the said section by the assessing authority where after the dealer is assessed u/s. 39, 40, 42 or 44 for any tax period, on the basis of any information in his possession, it is of 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 has been under assessed or been assessed at a rate lower than the rate at which it is assessable; or that the dealer has been allowed wrongly any deduction from his turnover, or input tax credit,

to which he is not eligible and after service of notice on the dealer in such form and manner as may be prescribed and after giving the dealer a reasonable opportunity of hearing and making such enquiry as he deems, fit and proper, shall assess him to the best of his judgment the amount of tax due from the dealer. The provisions contained in the said section clearly mandate that before initiation of proceeding u/s. 43 of the OVAT Act, the dealer must have been assessed u/s. 39, 40, 42 or 44. The Hon'ble High Court in case of **M/s. Keshab Automobiles *ibid*** interpreting Section 43 of the OVAT Act and the corresponding Rule 48, specifically observed that there must be a formal communication of acceptance of self-assessed return for initiation of proceeding u/s. 43 of the OVAT Act. This forum also in S.A. No. 96 (VAT) of 2014-15 & S.A. No. 168 (VAT) of 2014-15 (M/s. New Laxmi Steel & Power (P) Ltd. Vs. State of Odisha) decided on 22.08.2022 and in S.A. No. 396 (VAT) of 2015-16 (M/s. Eastern Foods Pvt. Ltd. Vs. State of Odisha) decided on 23.08.2022, relying on the above judgment of the Hon'ble High Court categorically observed that the proceeding u/s. 43 of the OVAT Act is not maintainable in the absence of finding to the effect that the dealer has been

formally communicated the acceptance of the self assessment return. In the present case, the assessing authority in its order of assessment did not return any finding whether there was formal communication of acceptance of self assessment return filed by the dealer-assessee and it proceeded to decide the escapement assessment initiated u/s. 43 of the OVAT Act on merit. In the appeal, the appellant though raised such specific issue, the first appellate authority negatived such plea on the ground that the assessment u/s. 40, 42 or 44 of the OVAT Act is not necessary if no specific notice is issued proposing departmental audit of the books of account of the dealer-assessee within a time specified in the Act; that the dealer shall be deemed to have been self-assessed on the basis of return submitted by him; that the assessment u/s. 39 read with Rule 48 is a deeming provision, which has been later on amended accordingly and that the assessment made by the assessing authority u/s. 43 of the OVAT Act has rightly been complied with the requirement of that section. This finding of the first appellate authority, in our considered view, is contrary to the provisions contained in Section 43 of the OVAT Act and the law laid down by the Hon'ble High Court

in case of **M/s. Keshab Automobiles *ibid*** and the orders of the Full Bench of this Tribunal in the aforesaid second appeals. The deeming provision having come into force on 01.10.2015, the first appellate authority was not correct in its approach in holding that the dealer-assessee is deemed to have been self-assessed on the basis of the return submitted by it. The finding of the first appellate authority to this effect is illegal and against the sanction of law. Therefore, the impugned order of the first appellate authority on this score is not sustainable

6. 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 requirements of law and without giving any finding that the dealer-assessee was formally communicated about the acceptance of self-assessed return, said proceeding itself is not maintainable. Accordingly, the impugned order passed therein by the assessing authority and subsequently confirmed by the first appellate authority in Appeal No. AAV (KOR) 07/16-17 is unsustainable in the eyes of law.

7. For the foregoing discussions and reasons, the appeal filed by the dealer-assessee is allowed and the impugned orders of the forums below are hereby set aside. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

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

I agree,

Sd/-
(M. Harichandan)
Accounts Member-I