BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 35 (V) of 2015-16

(Arising out of order of the learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur, in Appeal Case No. AA(VAT)36/2011-12, disposed of on dated 14.08.2014)

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

M/s. Jalaram Tobacco Industry,
At:- Plot No. 15, Rasulgarh
Industrial Estate, Bhubaneswar. ... Appellant

-Versus-

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

For the Appellant : Mr. K.R. Mohapatra, Advocate
For the Respondent : Mr. D. Behura, S.C. &
Mr. S.K. Pradhan, A.S.C.

Date of hearing:05.08.2022 *** Date of order: 16.08.2022

O R D E R

This appeal is directed against the order dtd.14.08.2014 passed by the learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (hereinafter referred to as, first appellate authority) in Appeal Case No.AA (VAT)36/2011-12, thereby reducing the extra demand to Rs.11,89,093.00 from Rs.21,35,444.00 raised

by the learned Deputy Commissioner of Sales Tax, Bhubaneswar I Circle, Bhubaneswar (hereinafter referred to as, assessing authority) for the tax period 01.04.2005 to 30.04.2008 in the assessment framed u/s.43 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act).

2. The facts of the case in nutshell are that, the dealer-assessee is engaged in manufacturing of Zarda mixed (Gutkha) tobacco products and sales the same both inside the State and in course of inter-State trade and commerce. It (dealer) for the purpose of manufacturing of Zara mixed (Gutkha) tobacco products uses raw materials as well as packing materials such as tobacco (zarda), suprari, pan madhuri, elaichi, lime and essence etc. purchased both from intra-State and inter-State. On receipt of fraud case report bearing No.11 dtd.19.06.2008 submitted by the STO, Investigation Unit, Bhubaneswar subsequently forwarded by the Asst. Commissioner of Commercial Taxes, Enforcement Range, Berhampur vide their letter No.249 dtd.21.06.2008, the learned assessing authority initiated assessment proceeding u/s.43 of the OVAT Act and issued notice in form VAT-307 to it (dealer-assessee).

2(a) It was alleged in the fraud case report that the sales tax authorities visited four different business premises of the dealer on 18.12.2007 out of which only Plot No.15, Rasulgarh Industrial Estate, Bhubaneswar

was declared to be the actual place of business in the registration certificate of the dealer. The investigating officer took exhaustive physical stock of goods both at the declared and undeclared godown of the dealer and on comparison of the books of account maintained by the dealer found several discrepancies. The charges levelled in fraud case report are delineated below:-

(A) Escapement of admitted (taxable) turnover of the dealer during 01.04.2007 to 30.04.2008 due to issuance of two parallel sets of invoices with different values for the same product sold, one for excise purpose and the other for VAT purpose amounting to Rs.13,35,182.00.

(B) Estimated escapement of (taxable) turnover under the OVAT Act during 01.06.2007 to 30.04.2008 that emanates from out of account sales or purchases of raw materials for consequent sales amounting to Rs.31,70,914.48 that has been further estimated at Rs.3,48,80,054.00 covering eleven tax periods to be levied @ 12.5% (VAT) along with penalty.

(C) Estimated escapement of (taxable) turnover of the dealer under the OET Act during 01.04.2005 to 30.04.2008 due to non-discharge of liability by the instant dealer as postulated u/s.26 of the OET Act amounting to Rs.33,30,000.00.

(D) Unauthorised trading activities and out of account holding of scheduled stock of goods such as Swagat Brand Khaini and Safety Razor Blades - Topaz Brand mandating proceeding u/s.73(10) of the OVAT Act amounting to Rs.1,25,000.00.

The investigating officer taking all charges levelled against the dealer submitted the report determining the tax liability to the tune of Rs.1,78,70,202.00.

2(b) The assessing authority on verification of the books of account produced by the dealer and considering the fraud case report and other materials on record came to the conclusion that (i) the dealer in order to make best use of opportunity for making profit and to hoodwink the Government revenue, it did not cooperate in the process of completion of investigation; (ii) the dealer voluntarily applied for registration certificate under the provisions of OVAT Act, CST Act, OET Act since 15.11.2007 declaring the purchases and sales given effect to from 01.04.2007 but the materials on record pointed out that the dealer had been carrying manufacturing activity since 01.04.2005; (iii) the dealer was actively involved in unauthorised trading of scheduled goods such as Khaini, Topaz brand blade etc. and it was actively pursuing double invoicing one for excise purpose and other for VAT purpose; (iv) the dealer had not collected entry tax on production and sale of scheduled goods as per the provisions contained u/s.26 of the OET Act; (v) the dealer

having assessed himself on submission of return as postulated u/s.39 of the OVAT Act there was no necessity for communicating the order of self-assessment; (vi) Notice issued in form VAT-302 as postulated u/r.45(3) of the OVAT Rules was rectified at a later stage by issuing fresh notice in form VAT-401 which was received by the dealer on 04.06.2008; (vii) the products manufactured by the dealer was taxable from 01.06.2007; (viii) the plea of the dealer that Topaz brand blade was kept in the business premises for business promotion and not for sale is not trustworthy; and (ix) the books of account produced by the dealer is not reliable, accordingly the assessment is completed to the best of his judgment.

2(c) The assessing authority on the above finding determined the GTO and TTO at Rs.85,41,772.62 which was taxed @ 12.5% and tax due was determined at Rs.10,67,722.00 on which penalty of Rs.21,35,444.00 was imposed. Thus, the tax liability of the dealer-assessed was determined at Rs.32,03,166.00 which include penalty.

3. The dealer being dissatisfied with such demand raised by the assessing authority filed appeal before the first appellate authority who after hearing the dealer-assessee and going through the impugned order of the assessing authority and the materials on record came to the conclusion that the assessment completed by the assessing authority was just and proper in essence but not to the extent and that enhancement made by the

assessing authority beyond actual suppression estimated at Rs.31,70,914.48 is liable for deletion. The first appellate authority determined the GTO and TTO of the appellant at Rs.31,70,914.48on which tax was calculated at Rs.3,96,364.31 and penalty of Rs.7,92,728.62 was imposed. The dealer again being dissatisfied with the order of the first appellate authority filed the present second appeal.

4. No cross objection has been filed by the respondent-State pursuant to the notice issued by this forum.

5. 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 the absence of formation of any independent opinion by the assessing authority as required u/s. 43(1) of the said 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. The very 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 Vs. 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. When the very initiation of proceeding u/s. 43 of the OVAT Act is bad in law, the entire proceeding becomes a nullity and is liable to be dropped. Neither the assessing authority nor the first appellate authority has whispered a single word about the self-assessment of the dealer-assessee u/s. 39 of the OVAT Act, which is a condition precedent for initiation of proceeding u/s. 43 of the said Act. So, in the absence of any finding with regard to self-assessment of the dealer by the forums below, the extra demand raised by them is illegal and unsustainable in the eyes of law. On this submission, learned Counsel for the dealer-assessee prayed for allowing the appeal and setting aside the orders of the forums below.

6. Per contra, the learned Standing Counsel (CT) for the revenue refuting the contention raised by the learned Counsel for the dealer-assessee vehemently urged that the assessing authority has clearly observed in its order that the dealer-assessee was self-assessed where after proceeding u/s. 43 of the OVAT Act was initiated. The dealer-assessee could not produce any material to show that it was not self-assessed as per Section 39 of the OVAT Act. He vehemently urged that the order of the Hon'ble Court passed in M/s. Keshab Automobiles' case (supra) is not applicable to the facts and circumstances of the case and, therefore, the extra demand raised by the

assessing authority subsequently confirmed by the first appellate authority is just, reasonable and according to law and the same does not warrant any interference of this Tribunal.

7. In the memorandum of appeal the dealer-assessee has taken several grounds challenging the impugned orders of the forums below. But, in course of hearing of the appeal, learned Counsel for the dealer-assessee harped on the issue that the initiation of proceeding u/s. 43 of the OVAT Act was bad in law as there was no assessment u/s. 39 of the Act. The issue raised by the learned Counsel for the dealer-assessee will go to the root of the case and the answer to this issue will decide the fate of the assessment proceeding initiated by the assessing authority raising extra demand of Rs.32,03,166/- Before addressing on the issue whether the initiation of proceeding u/s. 43 of the OVAT Act was maintainable in the absence of any assessment u/s. 39 of the Act, it would be profitable to refer to some of the relevant provisions for effective adjudication of the dispute. Section 43 of the OVAT Act, as it stood prior to 01.10.2015, provides that –

> "43. Turnover escaping assessment –
> (1) Where, after a dealer is assessed 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 –
> (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.

(2) If the assessing authority is satisfied that the escapement or under assessment of tax on account of any reason(s) mentioned in sub-section (1) above is without any reasonable cause, he may direct the dealer to pay, by way of penalty, a sum equal to twice the amount of tax additionally assessed under this section.

(3) No order of assessment shall be made under sub-section (1) after the expiry of seven years from the end of the tax period or tax periods in respect of which the tax is assessable."

7(a). A cursory look at the provisions contained U/s. 43 of the OVAT Act makes it abundantly 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 it may 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)** where in the Hon'ble court interpreting the provisions contained u/s.43 of OVAT Act, in paras- 13 to 16 of the judgment observed as follows :-

> "13. It is significant that prior to its amendment with effect from 1st October, 2015 the trigger for invoking Section 43(1) of the OVAT Act required a dealer 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 or the accused taking the benefit of a lower rate or being wrongly allowed deduction from his turnover or input tax credit to which he is not eligible.

14. However, under Section 43(1) of the OVAT Act, after its amendment with effect from 1st October, 2015 the Assessing Authority can form an opinion about the whole or part of the turnover of the dealer escaping assessment or being under assessed "on the basis of any information in his possession". In other words, it is not necessary after 1st October, 2015 for the Assessee's initial return having to be 'accepted' before Section 43(1) could be invoked.

15. Therefore, the position prior to 1st October, 2015 is clear. Unless there was an assessment of the dealer under Sections 39, 40, 42 and 44 for any tax period, the question of reopening the assessment under Section 43(1) of the OVAT Act did not arise.

16. While the 'White Paper on State Level Value Added Tax' brought out in 17th January, 2005 does envisage in para 2.12 that the "dealer will be deemed to have been self assessed on the basis of before the returns submitted by him" such an observation is at the highest recommendatory in nature. It cannot be elevated to the status of law."

7(b). In view of the law expounded by the Hon'ble Court in the aforesaid decision, we have no hesitation in concluding that unless there is an assessment u/s. 39, 40, 42 or 44 of the OVAT Act, the question of reopening the assessment u/s. 43(1) of the said Act does not arise. On thorough scrutiny of the orders of the forums below passed under the OVAT Act, we find neither the first appellate authority nor the assessing authority has returned any finding whether the dealer-assessee was assessed u/s. 39, 40, 42 or 44 of the OVAT Act so as to initiate proceeding u/s. 43 of the said Act. The assessment record reveals that the assessing authority in the notice issued to the dealer has mentioned about self assessment of the dealer U/s.39(2) of the OVAT Act but there is nothing on record to show as to on what basis the assessing authority held the dealer to have been self-assessed u/s. 39 of the OVAT Act. The dealer specifically contended before the assessing authority that there is no assessment U/s.39(2) of the OVAT Act as mentioned in the notice and there is no communication of such assessment order before initiating the proceeding U/s. 43 of the OVAT Act on account of which the proceeding U/s.43 of the OVAT Act was not maintainable under law. The assessing authority turned down such contention of the dealer on the ground that it is not mandatory under law. The appellate authority at all did not touch such issue which will strike at the root of the matter and simply

confirmed the order of assessment. At this juncture we feel it expedient to refer to the observation of the Hon'ble court in para-22 of the judgment cited above, wherein the Hon'ble court 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 under Section 43(1) of the OVAT Act.** In view of such observation of the Hon'ble Court, the assessing authority was required to form an opinion as to on the basis of which material it found the dealer to have been self-assessed. The deeming provision having come into force after 01.10.2015, mere filing of the return by the dealer-assessee is not sufficient to hold that he has been self assessed u/s. 39 of the OVAT Act. Therefore, the assessing authority was required to examine the materials on record to form an opinion that the dealer had been self-assessed u/s. 39 of the OVAT Act keeping in view the observations of the Hon'ble Court in para-22 of the judgment. In absence of any finding that the dealer has been assessed u/s. 39 of the OVAT Act, initiation of proceeding u/s. 43 cannot be maintained.

7(c) It was also incumbent on the part of the first appellate authority to decide the important issue as to whether the dealer-assessee was self assessed u/s. 39 of the OVAT Act for the tax period under assessment which

is a condition precedent to reopen the assessment u/s. 43 of the said Act, but it did not decide such issue and disposed of the appeal on merit. So, in the absence of any finding to that effect, the impugned order of the first appellate authority cannot withstand the scrutiny of law.

8. In view of the foregoing discussions, the appeal filed by the dealer-assessee is allowed and the impugned orders of the forums below are hereby set aside.

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