BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 324 (VAT) of 2016-17
&
S.A. No. 202 (ET) of 2016-17

(Arising out of orders of the learned JCST, Sambalpur Range, Sambalpur in First Appeal Nos. AA. 61/SA-II/VAT/2015-16 AA. 09/SA-II/ET/2016-17, disposed of on dated 31.10.2016 & 28.01.2017 respectively)

Present: **Shri A.K. Das, Chairman**
Shri S.K. Rout, 2nd Judicial Member
&
Shri S. Mishra, Accounts Member-II

M/s. Samaleswari Food Products Pvt. Ltd.,
(Presently- Sri Samaleswari Gudakhu
Factory Pvt. Ltd.), Baijamunda,
PO- A. Katapali, Dist. Sambalpur ... Appellant

-Versus-

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

For the Appellant : Sri B.N. Agarwal, Advocate
For the Respondent : Sri D. Behura, S.C. (CT) &
Sri S.K. Pradhan, Addl.SC (CT)

Date of hearing: 12.04.2022 *** Date of order: 28.04.2022

O R D E R

Pursuant to the order dated 07.03.2019 passed by the Hon'ble High Court of Orissa in W.P. (C) No. 18840 of 2018, these two second appeals filed at the instance of dealer-assessee are taken up together and disposed of by this common order as facts and

circumstances of both the cases are similar and involve common question of law.

2. The dealer-appellant has filed S.A. No. 324 (VAT) of 2016-17 assailing the order dated 31.10.2016 passed by the learned Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur (hereinafter called as 'first appellate authority') in Appeal No. AA. 61/SA-II/VAT/2015-16 thereby confirming the order dated 02.02.2016 passed by the Deputy Commissioner of Sales Tax, Sambalpur-II Circle, Sambalpur (in short, 'assessing authority') for the tax period 01.01.2014 to 19.03.2014 in the assessment framed u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act').

3. It is pertinent to mention here that dealer assessee challenging the order dt.28.01.2017 passed by the Joint Commissioner of sales Tax in First Appeal No. AA 09/SA-II/ET/2016-2017 thereby setting aside the order of assessment dated 07.06.2016 passed by the same assessing authority raising tax demand of ₹3,69,998.00 for the same period u/s. 10 of the Odisha Entry Tax Act, 1999 (in short, 'OET Act'). filed S.A. No. 202 (ET) of 2016-17 before this Tribunal which was dismissed on contest by order dated 31.05.2018. This order of the Tribunal was challenged

before the Hon'ble High Court of Orissa in W.P. (C) No. 18840 of 2018 in which the Hon'ble Court vide order dated 07.03.2019 while setting aside the order remitted the matter back to this Tribunal with a direction for hearing along with the VAT appeal filed by the dealer-assessee, which is still pending for disposal. This is how S.A. No. 202 (ET) of 2016-17 again came up before this Tribunal for hearing along with the VAT appeal.

4. The facts and circumstances of the case giving rise to the present second appeals are that the dealer-assessee is a Private Limited Company engaged in manufacturing and trading of gudakhu out of molasses and tobacco since 10.05.2004. The Sales Tax Officer of Sambalpur Vigilance Wing, Sambalpur inspected the business premises of the dealer-assessee on 19.03.2014 in presence of Sri Keshab Dalmia, Director of the Company. The STO, Vigilance Wing during inspection took stock position of the raw materials, i.e. molasses and tobacco, and of packing materials. There was no stock of finished product, i.e. gudakhu, in the business premises of the dealer at the time of visit and the stock register produced by the dealer also revealed that the stock of gudakhu was nil. The STO, Vigilance Wing, during stock taking of raw

materials and packing materials noticed discrepancy. The assessing authority on going through the Tax Evasion Report (TER), books of account produced by the dealer-assessee and other materials on record, found that there was excess quantity of raw tobacco of 29,944 kgs. and tobacco powder of 7,277 kgs. leading to purchase suppression. So far as molasses are concerned, there was shortage of 53,444.15 kgs. leading to the conclusion that the dealer must have utilized molasses out of account in producing gudakhu and there must have been out of account sale during the material tax period. Considering the allegations made in the TER that 650 gms. of molasses and 350 gms. of dust tobacco are used to manufacture 1 kg. of gudakhu, learned assessing authority calculated the production of 82,221.769 kgs. of gudakhu worth ₹61,66,632.68 leading to sale suppression. Accordingly, the assessing authority calculated tax @ 25% on ₹61,66,632.68 which came to ₹15,41,658.17 and equal amount of penalty was also levied.

4(a). The dealer-assessee being aggrieved with the aforesaid demand raised by the assessing authority, preferred appeal before the first appellate authority on the ground that the assessment u/s. 43 of the OVAT Act was

not completed within six months from the date of service of notice as required u/s. 43(4) of the OVAT Act; that the assessment order dated 02.02.2016 was barred by limitation; that the initiation of assessment proceeding u/s. 43 of the OVAT Act in the absence of assessment u/s. 39, 40, 42 or 44 of the OVAT Act for the broken tax period from 01.01.2014 to 19.03.2014 was illegal and against the sanction of law; and that levy of penalty without finding any mens rea on the part of the appellant was contrary to the law laid down by the Hon'ble Apex Court in case of Hindustan Steel Ltd. Vs. State of Orissa, reported in [1970] 25 STC 211 (SC). The first appellate authority on hearing the dealer-assessee and examining the materials on record concurred with the findings of the assessing authority that there was purchase and sale suppression and accordingly, confirmed the order of the assessing authority. The dealer-assessee being further aggrieved with the order of the first appellate authority confirming the order of assessment, preferred the present second appeal.

4(b). So far as the appeal under the OET Act is concerned, the dealer challenged the order of the first appellate authority remitting the matter back to the assessing authority for fresh assessment on the ground that

the assessing authority assessed the dealer-appellant without following the due procedure laid down under the OET Act and the Rules framed thereunder.

5. The learned Counsel for the dealer-appellant vehemently urged before this Tribunal that when there is no assessment u/s. 39, 40, 42 or 44 of the OVAT Act, initiation of proceeding u/s. 43 of the said Act is illegal, arbitrary and contrary to the law laid down by our Hon'ble High Court in case of Keshab Automobiles Vs. State of Odisha (STREV No. 64 of 2016, decided on 01.12.2021). The dealer though raised such ground in the grounds of appeal before the first appellate authority, it, without writing any findings on the said issue, decided the appeal on merit on account of which the impugned order of the first appellate authority is not sustainable. Similarly, the first appellate authority while setting aside the order of assessment and remanding the matter to the assessing authority has not discussed about the maintainability of initiation of the proceeding u/s. 10 of the OET Act for non-compliance of the mandatory provisions. He strenuously argued that three notices in Form E-32 were issued to the dealer-assessee, which were defective and irregular. In first notice, Col. No. 4 was not filled up regarding previous assessment. When the dealer

filed written objection to the defective notice issued by the revenue, second notice was issued showing the date of assessment as 02.03.2016 whereas the notice was issued on 19.02.2016. The dealer again challenging the second notice filed its objection before the assessing authority, who again issued third notice on 10.05.2016 mentioning in Col. No. 4 that the dealer was assessed earlier on 02.03.2016. There being non-compliance of the statutory provisions of the OET Act and rules framed thereunder, the first appellate authority should have held that initiation of the proceeding itself was bad in law and accordingly, he should have set aside the impugned order of the assessing authority. The order passed by the first appellate authority is a non-speaking order for which the same cannot be sustained in the eyes of law. He submitted that initiation of very proceeding against the dealer-assessee being contrary to provisions of Section 43 of the OVAT Act and Section 10 of the OET Act, the impugned orders of the forums below should be set aside.

6. Per contra, learned Standing Counsel (CT) for the revenue supporting the impugned orders of the first appellate authority passed under both the Acts in terms of cross-objections filed by it, vehemently urged that the dealer

was assessed u/s. 39 of the OVAT Act, which was reopened u/s. 43 of the said Act on submission of the TER by the STO, Vigilance Wing, Sambalpur. He further submitted, basing on material on record, that on filing of the return by the dealer-assessee an acknowledgment was issued to it, which is sufficient compliance of Section 39 of the OVAT Act legalizing the initiation of proceeding u/s. 43 of the OVAT Act on detection of escaped assessment. The dealer could not explain the allegations made in the TER regarding purchase and sale suppression and shortage of molasses of 53,444.15 kgs. leading to production suppression of 82,221.769 kgs. of gudakhu worth ₹61,66,632.68. The assessment made by the assessing authority raising tax demand of ₹30,83,316.00 is reasonable and according to law. There is no illegality or impropriety in the impugned orders of the forums below warranting interference of this Tribunal. He further argued that there being sufficient compliance of the provisions laid down in Section 43 of the OVAT Act and Section 10 of the OET Act, the decision of the Hon'ble Court in the case of Keshab Automobiles (supra) is not applicable to the facts and circumstances of the present case and is clearly distinguishable. He submitted to dismiss

both the appeals and confirm the orders of the first appellate authority.

7. We have heard the rival submissions of the parties, gone through the grounds of appeal vis-a-vis the impugned orders and the materials on record. The dealer-assessee challenged the impugned orders of the first appellate authority mainly on three grounds out of which ground no. (i) is very important which will go to the root of the case. On perusal of the impugned order of the first appellate authority passed in Appeal No. AA- 61/SA-II/VAT/2015-16, we find that the dealer-assessee has specifically challenged the orders of the assessing authority on the ground that initiation of proceeding u/s. 43 of the OVAT Act was bad in law as it was not assessed u/s. 39, 40, 42 and 44 of the OVAT Act. When the dealer raised such ground before the first appellate authority, the judgment of the Hon'ble Court in case of Keshab Automobiles (supra) was not there. The first appellate authority while disposing of the appeal, neither accepted such contention of the dealer-assessee nor discarded the same. It, without touching the main issue, which will go to the root of the matter, disposed of the appeal exparte by passing a cryptic order.

The findings of the assessing authority was neither confirmed nor reversed by the first appellate authority.

7(a). The Hon'ble High Court in case of Keshab Automobiles' case 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.
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> 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."

8. In view of the law expounded by the Hon'ble Court in the aforesaid decision, we are of the unanimous view 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. Therefore, it was incumbent on the part of the first appellate authority to decide the important issue as to whether the dealer-assessee was assessed u/s. 39, 40, 42 and 44 of the OVAT Act for the broken Tax period which is condition precedent to reopen the assessment u/s. 43 of the said Act and in the absence of any finding to that effect, the impugned order cannot withstand the scrutiny of law.

9. Similarly, the first appellate authority in Appeal No. AA- 09/SA-II/ET/2016-17 has set aside the impugned order passed under the OET Act and remitted the matter back to the assessing authority without discussing the reason for remanding the case to him. It is pertinent to mention here that Section 10 of the OET Act does not say about any previous assessment as required u/s. 43 of the OVAT Act for reopening the assessment. It is a fact that Col. No.4 requires the assessing authority to mention the previous assessment of the dealer-assessee, but the provisions contained under Section 10 of the OET Act does not prescribe about the requirement of earlier assessment for reopening the assessment under said Section. The Form E-32 cannot override the statutory provisions under the OET Act. The first appellate authority without examining the notice issued by the assessing authority in Form E-32 in the light of provisions contained u/s. 10 of the OET Act has set aside the order of assessment and remanded the matter to the assessing authority for reassessment without giving any direction and without observing anything about the flaws in the impugned order. The impugned order passed by the first appellate authority in Appeal No. AA-09/SA-II/ET/2016-17

is also a non-speaking order, therefore, the said order cannot be sustained in the eyes of law.

10. For the foregoing discussions, we are inclined to allow both the appeals filed by the dealer-assessee. Accordingly, the impugned orders of the forums below are set aside and the matters are remitted back to the first appellate authority to dispose of both the appeals in the light of our observations made herein above within a period of three months from the date of receipt of this order allowing a reasonable opportunity of hearing to the dealer-assessee. Cross-objections are 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/-
(S. Mishra)
Accounts Member-II