BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL:CUTTACK

S.A.No.112(V)/2017-18

(Arising out of the order of the learned Joint Commissioner of Sales Tax (Appeal), Balasore Range, Balasore in First Appeal Case No. AA-60/BA-2013-14(VAT) disposed of on 17.04.2017)

Present: Shri A. K. Panda & Shri P.C. Pathy
Judicial Member-I Accounts Member-I

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

-Versus-

M/s. Raj Hardware & Glass,
Ganeswarpur, Januganj, Balasore. ... Respondent.

For the Appellant: : Mr. M. L. Agarwal. S.C. (C.T.).
For the Respondent: : Mr. S. Panigrahi, Advocate.

Date of Hearing: 20.08.2018 ***** Date of Order: 28.08.2018

O R D E R

The present appeal of the appellant-State has been directed against the impugned order of the learned Joint Commissioner of Sales Tax (Appeal), Balasore Range, Balasore/First Appellate Authority, (in short, 'ld. JCST/FAA') passed on 17.04.2017 allowing the appeal in part and reducing the demand to Rs.2,26,928.00 against the demand of Rs.12,09,717.00 raised by the learned Sales Tax Officer, Balasore Circle, Balasore (in short, 'ld. STO') in the order of assessment dated 29.06.2013 framed Under Section 43 of the Odisha Value Added Tax Act, (in short, 'OVAT Act') for the tax period from 2010-2011 to 2012-2013.

2. The brief facts of the case are as follows:

The dealer-respondent deals in hardware, ply wood, sun mica, glass, PVC door and aluminium sheets on retail basis. One tax evasion report was submitted by the DCST, Vigilance, Balasore basing on the surprise visit conducted at the business

premises of the dealer by a team of Officers of the Sales Tax Wing, Vigilance, Balasore Division on dtd.17.08.2012 and recorded a statement as well as took stock positions and recovered a set of business related documents in the form of diary, writing pad, exercise book, loose hand written (manuscript) and printed documents as per the following descriptions:-

1) Four volumes of notes pad (Surya Brand)- volume-2 and unbranded-volume-2
2) 'Archidply' brand diary-01 volume
3) 'Pidilite' brand diary-01 volume
4) 'Red' colour diary-01 volume
5) 'Ledger' diary-01 volume
6) 'Classmate' brand exercise copies-03 volume
7) 'Peacock' bank exercise book-01 volume
8) 'Fevicol' note pad-02 volume
9) 'Sonear' note pad-01 volume
10) 'Small' note pad-01 volume
11) IDBI bank Cheque book-03 volumes
12) Counterfoil book of UBI-01 volume
13) Loose written sheets in 7 bunches containing 14,18,19,14,10 and 8 sheets
14) One signature brand diary

With active cooperation of the proprietor of the business after thoroughly cross examining the accounts the STO (Vigilance), Balasore Division, Balasore found that the dealer is involved in clandestine business activities of both purchase and sales thereby suppressed transactions to the tune of Rs.42,92,981.00 as per the following details.

1.	Unbranded Notepad Volume-1	-	9,03,593.00
2.	Surya Brand Notepad Volume-II	-	1,07,214.00
3.	Archidply Brand Diary	-	1,01,704.00
4.	Red Colour diary Volume-1	-	19,24,796.00
5.	Classmate Brand Exercise copy	-	41,728.00

6.	Loose slips	-	12,13,946.00
	Grand Total		Rs.42,92,981.00

Consequent upon receipt of the tax evasion report the ld. STO initiated proceedings u/s. 43 of the OVAT Act and completed the assessment taking into consideration the escaped turnover in respect of the dealer-respondent for the period 2010-11 to 2012-13. The ld. STO accepted the suggestions made in the tax evasion report with the findings that the dealer is indulged in purchase and sale suppression to evade the payment of tax. He viewed that the reported transactions are unaccounted for in the purchase and sale register as well as in returns periodical filed. Hence the suppression reported were established and the returned figures as filed by the dealer were not treated as true, correct, complete and trust worthy as the dealer declared only a part of his purchase and sales transactions and suppressed the rest of the transactions to evade tax. The ld. STO completed the assessment which resulted in demand of tax and penalty to the tune of Rs.12,09,717.00. This led the dealer-assessee to prefer first appeal before the ld. JCST.

The instant dealer assailed the order of the ld. STO on the ground that tax and penalty were demanded without any basis of suppression which is illegal and bad in law as the dealer has accounted for all the transactions in his books of accounts which were not properly examined. It was also contended that the ld. STO has not given sufficient opportunity to explain the facts and circumstances of the case in assessment and maximum cash sales has been effected by the appellant and the same has also been accounted for properly in the books of account and disclosed in the periodical returns. The appellant has effected purchases both from inside and outside the State by paying due VAT to the selling dealer and outside purchases are effected against Govt. way-bills. It is also alleged that at the time of assessment the ld.STO has enhanced hundred times of the actual suppression which is totally illegal and

against the provisions of law. The ld. JCST carefully considering the contentions of the dealer-assessee reduced the demand to Rs.2,26,928.00.

3. Being aggrieved with the order of the ld. JCST, the Revenue preferred second appeal before this Tribunal on the following grounds:-

(i) The order of the first appellate authority appears to be unjust and improper.

(ii) The dealer had submitted some bills before the first appellate authority which he had failed to submit before STO for which tax demand earlier raised of Rs.4,03,239.00 has been reduced to Rs.75,643.00. It is not understood why the same bills could not be produced by the dealer before the reporting authority as well as before the STO. It appears to be an afterthought activity and the document produced by him is the post item document which needs no interference.

(iii) The order of first appellate authority may be set aside and that of the STO may be restored.

4. The dealer-respondent has filed following cross objections:-

(a) The grounds as stated by the appellant are fallacious and outcome of misreading of the relevant provisions of the statute. The assessing authority had travelled beyond the scope of provisions of rules and allegations raised by the Dy. Commissioner of Sales Tax, Vigilance, Balasore Division, Balasore.

(b) The respondent had produced books of accounts before the Vigilance Wing for verification which were not verified and whimsically submitted a report for assessment.

(c) It is evident from the assessment order that the ld. Sales Tax Officer has not verified the books of account. The ld. Sales Tax Officer has simply mentioned the report submitted by the Vigilance without giving any opinion.

(d) The ld. Sales Tax Officer erred in law by initiating and completing the assessment proceeding Under Section 43 of the OVAT Act without fulfilling the necessary conditions of the said provisions and as such, such action of the ld. Assessing Authority in initiating the assessment proceeding u/s.43 of the OVAT Act, is without Authority of any law, therefore, the order of assessment as passed by the ld. STO and the first appeal order passed by the ld. JCST (Appeal) are liable to be quashed.

(e) On consideration of Section 43 of the OVAT Act and Rule 50 of the OVAT Rules, when any dealer under the OVAT Act, is already assessed U/s. 39,40,42 or 44 of the OVAT Act for any tax period or period (s) in that case, on the basis of any information and on consideration of the same, if the ld. Assessing Authority is of the opinion that whole or any part of the turnover as assessed U/s.39, 40, 42 or 44 of the OVAT Act has escaped assessment or been under assessed or assessed at a lower rate than the rate at which is assessable, the ld. Assessing Authority can invoke his jurisdiction U/s. 43 of the OVAT Act for reassessing the said escaped turnover.

But in the present case on hand the ld. STO has initiated the assessment proceeding without completing any assessment proceeding U/s. 39, 40, 42 or 44 of the OVAT Act and therefore, the assumption of Authority in initiating the assessment proceeding U/s. 43 of the said act by the ld. STO is untenable in law. (M/s. Balaji Tabaco Store Vrs. Sales Tax Officer, Cuttack-I East Circle. 81 VST-170 of 2015, ORISSA HIGH COURT)

5. Mr. M.L. Agarwal, the ld. Standing Counsel (C.T.) appearing on behalf of the Revenue reiterated the points raised in the grounds of appeal filed. He took the contention that the ld. FAA has reduced the demand without having any basis for the same just swayed away by the cash memos produced before him which were neither produced before the investing authority nor before the ld. STO. Moreover whether the said turnover has been included in

returns filed with supporting document have not been proved by the dealer-assessee. There is no material in record to show as to how and why the claim of proper maintenance of books of accounts reflecting true picture of the business is just. No material in record is there to substantiate the reduction of demand in appeal. The cash memos appears to be handmade and forged ones. In absence of availability of any material in record the observation of ld. FAA in the order is just based on averment of the dealer without any cogent material in token of the same. All records were produced before the Vigilance and ld.STO wherein the cash memos mentioned in first appeal order found no place. Hence the order of the appellate forum is perverse. No accounts and documents have been produced and proved by the dealer-respondent in second appeal to support the first appeal order or for reduction of tax imposed by the ld. STO. He has further argued that the plea taken by the dealer-respondent about the completion of assessment proceedings u/s.43 of the OVAT Act without completion of assessment proceedings u/s.39,40,42 and 44 of the OVAT Act is not tenable under the law is not correct in view of the judgment of our Hon'ble High Court in the case of M/s. Neelachal Ispat Nigam Vrs. State of Odisha in W.P.(C) No.22343 of 2015 decided on 07.12.2016. He has also furnished a copy of the judgment of the Hon'ble High Court of Odisha in this connection.

6. Mr. S. Panigrahi, Advocate appearing on behalf of the dealer-respondent reiterated the points raised in cross objections filed. He took the contention that the ld. STO has neither confronted the contents of the tax evasion report nor verified the alleged suppressions with reference to the books of accounts maintained and produced at the time of hearing for assessment. He also took the plea that the ld. STO has not recorded any statement from the dealer confronting the contents of tax evasion report. The proprietor of the business could not explain the matter before the Investigating authority due to fear and due to lack of time on the part of investigating officers to take up detailed verification of stock

positions and documents recovered from the business premises of the dealer-assessee on the date of the surprise visit.

7. Heard the rival contentions. Gone through the grounds of appeal, the impugned orders of appeal and assessment, records of assessment as well as appeal and the cross objections filed on behalf of the dealer-respondent and the law cases cited by both the parties. The question now for consideration before the Bench is whether, on the facts and circumstances of the case and the documents in the records, the order of the ld. JCST can be sustained as just and proper? The ld. JCST has reduced the demand of tax and penalty from Rs.12,09,717.00 to Rs.2,26,928.00. On careful perusal of the appeal record it is observed that there is no availability of documentary evidence basing on which the ld. JCST reduced the tax and penalty and discussed in the appeal order. The date of hearing fixed and the related notings in the note sheets do not tally as observed from the appeal record. Only certain information in the shape of statements regarding monthly sales from the period 01.04.2010 to 31.03.2013 and monthly statement of purchase for the period 01.04.2010 to 31.03.2013 and list of purchases of hardware and glass of 4% VAT category for the period from 01.04.2010 to 31.03.2012 are available from the corresponding side of appeal record at pages bearing sl. nos.35 to 42. Thus, it is evident that the ld. JCST has not verified the alleged transactions and the evidences of sale bills produced before him with reference to the periodical returns filed by the dealer-assessee. It is also observed that in assessment record consisting of 31 pages, excluding the tax evasion record, the ld. STO has not confronted the contents of the report to the dealer-assessee but simply noted down the contents of fraud case report in the assessment order and has not mentioned as to what are the books of accounts produced by the dealer-assessee at the time of hearing for assessment. Even though the proprietor along with the ld. Advocate appeared and the case was partly heard on 11.04.2013 and on 13.05.2013 and on

16.05.2013 only the proprietor appeared on 16.05.2013 and the case was partly heard but no statement was recorded from the proprietor of the business confronting the contents of the report. Hence it is evident that neither the ld.FAA nor the ld.STO verified the books of accounts of the dealer with reference to the allegations made in the tax evasion report and the periodical returns filed by the dealer-assessee. In view of the above discussion the appeal order is not considered as just and proper. From the tax evasion report submitted by the STO Vigilance, Balasore Division, Balasore it is observed that the proprietor has admitted the transactions not to have been accounted for in the regular books of accounts maintained in course of business. As the dealer-respondent failed to explain the transactions unearthed by the inspecting officers of Balasore Vigilance Division, Balasore and failed to produce any relevant books of accounts and evidence in support of entry of transactions in the books of accounts and incorporation of the said transactions in the returns filed periodically. The appeal record is also silent about the evidence of bills and documents produced before the appellate authority and the verification of the same with reference to the periodical returns filed by the dealer-assessee for which the appeal order cannot be sustained as just and proper in the eye of law. Hence the same warrants interference. The ld. Advocate appearing on behalf of the dealer-respondent failed to produce any cogent or documentary evidences or relevant books of accounts before the Bench rebutting the alleged transactions. Further the ld. STO in his assessment order has not indicated the reason of taking the suppression amount to be Rs.42,21,981.00 instead of the alleged amount of suppression of Rs.42,92,981.00 as per the tax evasion report.

The ld. Advocate on behalf of the dealer-respondent has challenged the very initiation of the proceedings U/s.43 of the OVAT Act by raising the contention that the dealer-respondent has not been assessed earlier U/s. 39, 40, 42 and 44 of the OVAT Act for

the assessment period in question i.e. for the assessment period from 2010-11 to 2012-13 and as such the same is clearly violative of the provision mentioned u/s.43 of the OVAT Act. It is true that, in the case of ***Balaji Tobacoo Store*** the Hon'ble High Court of Orissa has held that a proceeding u/s.43 of the OVAT Act in absence of any earlier proceeding u/s.39, 40, 42 or 44 of the OVAT Act is not permissible in the eye of law. The statute itself also speaks that where after a dealer is assessed u/s.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 has escaped assessment or 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 the assessing authority may xxx xxx xxx proceed to assess to the best of his judgment the amount of tax due from the dealer. Though the appellant-dealer has not specifically advanced the argument that, it has not been self-assessed, from the argument advanced, it appears that, it has raised the contention that, as because no intimation has been received from the authority by it with regard to the acceptance of the return filed after self-assessment, the same cannot be said to be a completed self-assessment u/s.39 of the OVAT Act and as such no proceeding u/s.43 of the Act is permissible under the provisions of law. But, the contention raised by the appellant-dealer bears no substance as because section 39 of the OVAT Act which deals with the provision of self-assessment does not speaks of issuance of any intimation relating to acceptance of the return furnished by the dealer in all cases. Here it is beneficial to refer to section 39 of the OVAT Act which speaks as follows:-

"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."

From a bare reading of the section, it appears that, only in case of any adjustment or any arithmetical error apparent on the face of the return the dealer is entitled to get any intimation from the authority to cure the error or defect as the same is a condition for the acceptance of the return. There is an identical provision in Section 9 of the Orissa Entry Tax Act, 1999 which also relates to the self assessment of the dealer. While dealing with that provision of the Orissa Entry Tax Act, the Hon'ble High Court of Orissa in the case of ***M/s. Neelachal Ispat Nigam Vrs. State of Odisha in W.P.(C) No.22343 of 2015*** decided on 07.12.2016 has held that :-

"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 a 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."

In view of the above discussion, it is very much clear that, the plea taken by the dealer-respondent with regard to the assessment u/s.43 of the OVAT Act in absence of any prior assessment u/s.39, 40, 42 or 44 of the Act bears no substance the same being factually incorrect.

8. As a result, the appeal is allowed and the order of the ld. JCST is set aside. The case is remanded back to the ld. STO to assess the dealer afresh by allowing reasonable opportunity of being heard to the dealer-assessee and after confronting the allegations levelled against the business activities for the relevant period in tax evasion report of Balasore Vigilance Division, Balasore, in accordance with the provisions under the law, within a period four months from the date of receipt of this order.

Dictated and Corrected by me.

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

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

I agree,

Sd/-
(A. K. Panda)
Judicial Member-I