

BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 265 (VAT) of 2017-18

(Arising out of order of the learned Additional CST (Appeal), South Zone,
Berhampur in Appeal Case No. AA- (VAT) 06/2016-17
disposed of on 31.07.2017)

Present: Shri R.K. Pattanaik,
Chairman

M/s. Indira Electricals,
Main Road, Bhanjanagar, Ganjam ... Appellant

-Versus-

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

For the Appellant : Sri B.B. Panda, Advocate
For the Respondent : Sri D. Behura, Standing Counsel (CT)

Date of hearing: 04.02.2021 ***** Date of order: 24.02.2021

ORDER

By way of instant appeal in terms of Section 78(1) of the Odisha Value Added Tax Act, 2004 (hereinafter referred to as ‘the Act’), the dealer assessee has challenged the legality and judicial propriety of the impugned order dated 31.07.2017 promulgated in Appeal Case No. AA- (VAT) 06/2016-17 by the learned Additional Commissioner of Sales Tax (Appeal), South Zone, Berhampur (in short, ‘FAA’) confirming the order of assessment dated 26.09.2016 passed under Section 43 of the Act by the learned Joint Commissioner of Sales Tax, Ganjam Range, Berhampur (hence called, ‘AA’) raising additional demand of ₹4,99,170.00 on grounds inter alia that it is deserved to be interfered with.

2. The dealer assessee is in the trading of electrical goods and other items on wholesale-cum-retail basis and also engaged in works contract besides effecting purchase of goods inside and outside Odisha, but sale of goods only within the State. As is revealed, audit assessment under Section 42 of the Act for the tax period from 01.04.2005 to 31.12.2006 was completed and an exparte order was passed on 25.10.2008 resulting in additional demand of tax and penalty, however, being aggrieved of, the dealer assessee preferred appeal, which was allowed on 12.03.2010 with a direction to freshly assess it and accordingly, reassessment was held on 08.02.2013 and a demand of tax of ₹1,96,004.05 was raised with penalty levied under Section 42(5) of the Act. Thereafter, A.G. audit was carried out post set aside assessment dated 08.02.2013 during which an error was detected with respect to the calculation of net tax due while deducting 20% of the original assessment amount deposited at the time of filing of appeal. Accordingly, on the recommendation of the A.G. audit, reassessment under Section 43 of the Act vis-a-vis the dealer assessee was commenced which ultimately led to the demand of balance amount of tax and penalty of ₹4,99,170.00.

3. According to the dealer assessee, assessment under Section 43 of the Act was beyond jurisdiction. It is alleged that the assessment for the escaped turnover is also time barred in view of sub-section (3) of Section 43 of the Act which stipulates that no order of assessment shall be made under sub-section (1) thereof after expiry of five years from the end of the tax period in respect of which the tax is assessable. It is further claimed that assessment under Section 43 of

the Act is only on the Tax Evasion Report (in short, 'TER') which is not permissible under law. Lastly, it is contended that assessment under Section 43 of the Act solely for the purpose of levy of penalty is clearly barred. Referring to the case of Indure Limited Vs. Commissioner of Sales Tax, Cuttack, Orissa and others reported in (2006) 148 STC 61 (Orissa), it is also urged that the fundamental principles of Section 43 of the Act were not kept in mind, rather, action was taken simply based on the TER. Hence, as per the dealer assessee, the impugned order dated 31.07.2017 is unsustainable.

4. State, however, justified the decision of the authorities below and contended that an error with respect to calculation of tax due on being detected during A.G. audit on scrutiny of the set aside assessment order dated 08.02.2013 and thereafter, the AA proceeded to realize the balance amount in accordance with law and as such, no illegality was committed. It is also contended that the AA possessed jurisdiction for the reassessment and it was well within time and that apart, assessment in question was not initiated only to impose penalty. In response to the claim that such reassessment on the basis of TER resulted in change of opinion, it is replied by the State that since the AA independently applied mind to the TER and then proceeded, it is not a case of any opinion changed. Hence, the impugned order dated 31.07.2017, according to the State, is just and proper and thus, not liable to be interfered with.

5. It is a settled law that any decision for escaped assessment simply based on TER would not be in accordance with Section 43 of the Act In this

connection, the decision of the Hon'ble Court in Indure case ibid may be profitably referred to. As to the claim of the learned Counsel for the dealer assessee that the AA illegally usurped jurisdiction under Section 43 of the Act, attention is not drawn to any specific material on record. In fact, no real basis for such a claim was made out, inasmuch as, the dealer assessee utterly failed to substantiate it by proving that the AA simply relied on the TER and without independent application of mind proceeded for the assessment. Without such a ground being fully established by referring to any specific conduct of the AA, it would not at all be acceptable to allege that the jurisdiction for assessment under Section 43 of the Act was illegally exercised.

6. It is also contended by the learned Counsel for the dealer assessee that the action under Section 43 was time barred in view of Section 43(3) of the Act as the proceeding under challenge was required to be completed on or before 24.10.2013 considering the fact that the original order of assessment under Section 42 of the Act was passed on 25.10.2008. As per the dealer assessee, the escaped or under assessment was to be concluded within five years, which stood enhanced to seven years w.e.f. 01.10.2010 by virtue of Orissa Value Added Tax (Amendment) Act, 2010. Since it relates to the tax period 2005-06, as claimed, reassessment was to be over and accomplished by 24.10.2013 as the original order of assessment under Section 42 of the Act was passed on 25.10.2008. However, it would rather appear that assessment under Section 43 of the Act was to be completed by 07.02.2018, since reassessment was completed on 08.02.2013 later

to the order dated 12.03.2010 in appeal disposed of by the learned Additional Commissioner of Sales Tax (Revenue), Cuttack, who set aside the original order of assessment dated 25.10.2008. The cause of action for the under assessment, according to the humble opinion of the Tribunal, may be said to have arisen 08.02.2013 and not from an anterior date i.e. 25.10.2008 as has been claimed by the dealer assessee. Hence, said contention on limitation must have to be rejected.

7. The learned Counsel for the dealer assessee cited a ruling of the Hon'ble Court in the case of State of U.P. and others Vs. Aryaverth Chawl Udyog and others reported in (2016) 91 VST 1 (SC) contending that there was change of opinion by the AA and hence, assessment under Section 43 of the Act is bad in law. In the decision supra, simply by placing reliance on a circular clarifying a position of law, reassessment was pressed into service and in that context, the Hon'ble Apex Court held and observed that there must exist a reason for reassessment, or else it would result in change of opinion or review of the original assessment which is outrightly impermissible. Indeed, no any particular conduct of the AA has been brought to the notice of the Tribunal to even remotely suggest that simply on receiving the TER, escaped assessment was directed. In absence of any such incriminating material shown on record, it has to be assumed that considering the TER and other materials, the AA in due discharge of statutory obligation proceeded against the dealer assessee to realize the additional tax invoking jurisdiction under Section 43 of the Act. It is reiterated that an action pure and simple based on a report may be alleged as beyond jurisdiction, but when it is

acted upon and the assessing authority judiciously considering materials on record, proceeds for reassessment assessment, it ought to be upheld. Any such decision in terms of Section 43 of the Act by forming an independent opinion uninfluenced by the TER would not amount to change of opinion or review of the original assessment. Hence, the contention of the dealer assessee alleging illegality in escaped assessment on the aforesaid ground must also have to fail.

8. With respect to imposition of penalty, the learned Counsel for the dealer assessee cited an authority in the case of State of A.P. Vs. Venkateswara Oil Producers reported in (1992) 86 STC 127 (AP) in particular and contended that simply for the purpose of penalty, reassessment could not have been taken up. In the decision supra, merely for levy of penalty, a separate and independent proceeding was exerted and under such circumstances, the Hon'ble Court observed that penalty must be imposed simultaneously with assessment and not by a separate proceeding. In the considered view of the Tribunal, said decision is inapplicable to the present case since action against the dealer assessee for assessment under Section 43 of the Act was for realization of additional tax assessable under law. Indisputably, amount required to be paid, as also assessed by the AA, stands at ₹4,45,589.00 and the additional demand raised is ₹4,99,170.00 which has, in fact, been treated as penalty under Section 43(2) of the Act. Had there been a proper assessment, additional demand would have been ₹4,99,170.00. In such view of the matter, it would not be incorrect to hold that reassessment only revealed the amount which the dealer assessee would have had

to pay, had the reassessment dated 08.02.2013 been properly accomplished.

Having said that, the Tribunal does not really find any justification to interfere with the final finding arrived at by the authorities below.

9. Hence, it is ordered.

10. For the reasons discussed herein above, the appeal stands dismissed. As a necessary corollary, the impugned order dated 31.07.2017 passed in Appeal Case No. AA-(VAT) 06/2016-17 is hereby confirmed. The cross-objection by the State is accordingly disposed of.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman