BEFORE THE ODISHA SALES TAX TRIBUNAL (FULL BENCH), CUTTACK

S.A.No. 216(V)/2012-13

P R E S E N T :

Smt. S. Misra, Chairman — Sri S. Mohanty, 2nd Judicial Member — & — Sri R.K. Rout, Accounts Member-II

(From the order of the ld. DCST, (Appeal), Sambalpur Range, Sambalpur, in Appeal No. AA.106/BGH/VAT/11-12, dtd.28.09.2012, confirming the assessment order of the Assessing Officer)

M/s. Kripal Springs India Ltd.,
At/P.O. Chakarkend,
Dist. Bargarh. ... Appellant

-Versus –

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

(Assessment period : 01.04.2007 to 31.03.2009)

Appearance :
For the Appellant ... Mr. B.N. Agrawal, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C. (C.T.)

Date of Hearing: 06.12.2018 *** Date of Order: 17.12.2018

ORDER

The present second appeal has been preferred against the order of the learned First Appellate Authority/Deputy Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur (in short, FAA/DCST) in First Appeal Case No. AA.106/BGH/VAT/11-12, dtd.28.09.2012 in confirming the order of assessment passed by the learned Assessing Authority/Asst. Commissioner of Sales Tax, Bargarh Circle, Bargarh (in short, AA/ACST) in a proceeding u/s.43

of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act) for the assessment period from 01.04.2007 to 31.03.2009.

2. The facts in brief giving rise to the present appeal are : a re-assessment proceeding u/s.43 of the OVAT Act was initiated on the basis of fraud case report submitted by Vigilance Wing, Sambalpur Division alleging thereby purchase suppression leading to sale suppression by the dealer, the AA acting upon the report, the AA proceeded with re-assessment however decided the same in absence of the dealer setting him ex-parte. It is claimed that, the self-assessment u/s.39 was the basis upon which proceeding u/s.43 of the Act was initiated and in conclusion the AA determined that, the dealer had effected total purchase of Rs.2,53,57,205/-. The tax liability of the dealer was calculated at Rs.15,76,671/-. The dealer had already deposited tax of Rs.2,38,387/-. So, the balance tax due was calculated at Rs.23,38,284/-. Besides, twice of the tax due was also imposed as penalty as per Sec.43(2) of the Act and thus, the total tax due and penalty became calculated to Rs.40,14,852/-.

3. Being aggrieved with such assessment, the dealer knocked the door of FAA on the contention like, he was not given proper opportunity of being heard. Hence, the order is violative of principle of natural justice, penalty as imposed is illegal and the very initiation of proceeding is unfounded. The FAA, in dismissal of the pleas/grounds taken by the dealer vide impugned order, confirmed the order of assessment. As a result, the demand of tax and penalty remained as it was. Thereafter, the dealer has preferred this second appeal challenging the sustainability of the order of FAA and demand of tax as determined by both the fora below.

It is contended by the dealer that, the dealer was not given proper opportunity of being heard. The impugned order is silent on

the grounds taken by the dealer, the fora below have not taken into consideration of payment of admitted tax of Rs.1,14,369/- for the year 2007-08 while raising tax demand. It is further contended that, the re-assessment order is ante-dated one as well as in an un-reasoned order. The FAA has simply reiterated the findings of the AA. Proper opportunity was not provided to the dealer to substantiate his pleas. So the assessee-dealer should be given with an opportunity afresh to advance his written statement and to adduce rebuttal to the allegations brought against the dealer.

4. The appeal is heard with cross objection by the Revenue whereby, the Revenue has simply stood by the impugned order.

5. The substantial questions of law and fact emerge for decision in this appeal are, (i) Whether sufficient opportunity of being heard to the dealer was not provided by the FAA in the facts and circumstances of the case the matter should be remitted back to the AA for re-assessment afresh ? (ii) Whether the FAA has committed wrong in calculation of tax due by not taking into consideration of the admitted tax already paid for the year 2007-08, even though it was brought to his notice? (iii) Whether the re-assessment order by the AA was ante-dated one as such the entire proceeding is liable to be dismissed? and Besides, the aforesaid grounds taken in the memo of appeal, the dealer has raised another point of law in the hearing such as :- (iv) the very initiation of proceeding invoking provision u/s.43 of the OVAT Act was bad in law keeping view the fact that, the re-assessment proceeding u/s.43 of the OVAT Act is not preceded by any self-assessment u/s.39 of the OVAT Act.

Findings :

Point No.IV.

This being the core question of dispute between the parties and is a pure question of law deciding the maintainability of the proceeding, is taken up ahead of others.

6. Advancing argument on behalf of the appellant-dealer, learned Counsel Mr. Agrawal vehemently harped on the question of law involved i.e. whether the initiation of proceeding u/s.43 of the OVAT Act in the case in hand is not maintainable for the reason that, the proceeding u/s.43 of the OVAT Act is not preceded by any kind of assessment u/s. 39, 40, 42 or 44 of the OVAT Act. Drawing attention of the Tribunal to the mandate of the provision u/s.43 of the OVAT Act, learned Counsel strenuously argued that, there was no assessment by the Department. The authorities below have based the re-assessment on the basis of the return filed by the dealer treating wrongly those as self-assessment u/s.39 of the OVAT Act. He has produced a chart of the returns filed by the dealer time to time from April, 2007 to March, 2009. The chart as it revealed, in most of the cases there was delay in filing of return. It is argued that, when the dealer had filed return after the due date of filing of return, then he cannot be said to have self-assessed as per Sec.39 of the OVAT Act on the basis of delayed return as it is not in accordance with the provision u/s.39 of the Act. Provision u/s.39 as it was by then i.e. the period before amendment of 2015 requires the filing of return within 'stipulated period' and 'in order'. Here, as the dealer had not furnished the return in due time, the return could not have treated as assessment u/s.39 of the OVAT Act. In that case it can be said that there was no basis for re-assessment proceeding u/s.43 of the OVAT Act.

It is an undisputed fact that, for initiation of proceeding u/s.43 of the OVAT Act, there must have been any kind of

assessment as per Sec.39, 40, 42 or 44 of the OVAT Act. To appreciate the controversy and for sake of brevity, the provision u/s.39 of the OVAT Act as it was before amendment in the year 2015 and after amendment is reproduced below.

Sec.39 of the OVAT Act before amendment :

> **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, it shall be deemed to be self-assessed."

Sec.39 of the OVAT Act after amendment w.e.f. 01.10.2015 :

> **39. Self assessment.-**
>
> **(1) (as before) *****
>
> (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.]"

Similarly provision u/s.43 of the OVAT Act reads as follows :

> (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 [* * *] 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.

(4) Notwithstanding anything contained to the contrary in this Act, an
Assessment under this section shall be completed within a period of six months from the date of service of notice issued under sub-section (1) :

Provided that if, for any reason, the assessment is not completed within the time specified in this sub-section, the Commissioner may, on the merit of each such case, allow such further time not exceeding six months for completion of the assessment proceeding.

Provided further that if the Commissioner feels it necessary to do so for good and sufficient reasons, he may allow such further time not exceeding another six months beyond the time allowed under the first proviso for completion of the assessment proceeding.]"

There must have an assessment u/s.39, 40, 42 or 44 of the OVAT Act, which forms the basis for proceeding u/s.43 of the OVAT Act, the period in under assessment in our case relates to pre-amendment period and the provision as it was by then contains the term like "within the prescribed time" and return so furnished "is found to be in order".

7. Learned Counsel for the dealer argued that, the dealer had not filed return in time and also it was not in order. ***Per contra,*** learned Addl. Standing Counsel, Mr. Raman harped on the point that, "is found to be in order" the term by means, is a subjective satisfaction of the taxing authority. If it is filed as per the proforma then it can be said 'found to be in order'. So far as the term "within the prescribed time", learned Addl. Standing Counsel argued that, the dealer has no right to raise this point, since he has committed fraud on the authority. He is guilty of suppression. He has committed fraud with an evil design in his mind, since from the very inception, he has clandestinely filed the return not in time but not in time such as, with a short delay. This itself shows the dealer's evil intention to defraud the taxing authority and because the dealer has committed intentional fraud, the dealer should not be left scot free taking a hyper-technical ground like, the self-return was not filed within stipulated period.

If we take consideration of the argument of the learned Addl. Standing Counsel, the same is found to be two-fold. One is the dealer has committed fraud. So even though the return was filed in delay, the provision should not have interpreted or considered in favour of the dealer. On the other hand as there were little delay in filing returns with an evil design to take benefit of the provision, the dealer can't take benefits from out of the statute.

Learned Addl. Standing Counsel placed reliance on so many authorities to establish that the act of fraud, which is an act of deliberate deception with the design of securing something by taking unfair advantage of another, should not be benefitted from the strict interpretation of the provision.

We could not conceive the argument advanced by learned Addl. Standing Counsel because, with an evil design and with an intention to commit fraud or to deceive the taxing authority the dealer has made an attempt to evade tax, in that case, taxing authority cannot go beyond the statute to levy tax or penalty on the dealer. Neither the taxing authority nor this Tribunal can adopt any method beyond the provision of law to catch hold the guilt of the tax payer. If it allows, then it will simply lead to anarchy. Tribunal or the Courts cannot exercise the jurisdiction which is not vested on them by law. They cannot go beyond the statutory mandate, even though it is found that, a wrong doer is being left free.

Coming to the provision under law and the mandates of the legislature behind particular provision i.e. u/s.39 of the OVAT Act, if we see the provision as it was before the amendment or after the amendment, it is found that, the term like 'within prescribed time' and 'return so furnished found to be in order' are omitted by amendment.

Now, we must keep in mind that, there was/is no provision under law for compulsory regular audit assessment of all dealers. So that is the reason why the provision of self-assessment is there and as because the provision u/s.39(2) has undergone an amendment which is nothing but mere clarificatory and just to avoid ambiguity in its interpretation if any. In that case, it will be fallacious to take a view that, the intention behind the legislation is different from each other in these two periods that is to say-: pre-amendment and post-amendment period.

Two wrongs cannot make a thing right. Delay filing of return and wrong disclosure of turnover can't make one's

assessment right. A wrong doer should not be allowed to take advantage of the flaws in law if any to justify his established wrong.

Once the return is filed that implies, the intention of the assessee to be self-assessed. If it is not in time, it is the taxing authority may refuse to accept or treat it as not filed in time or in order. Again, once no communication on non-acceptance on the belated self-return is from authority, it can be presumed under law that, the self-assessment is accepted by and delay is deemed to have been condoned/ignored. Sec.34 speaks of the consequence for default in filing of the return. Sec.38 contemplates scrutiny of return which runs as follows :

> "(1) Each and every return in relation to any tax period furnished by a registered dealer under Section 33, shall be subject to scrutiny by the assessing authority to verify the correctness of calculation, application of correct rate of tax and interest, claim of input tax credit made therein and full payment of tax and interest, payable by the dealer for such period.
>
> (2) If any mistake is detected as a result of scrutiny made under sub-section (1), the assessing authority shall serve a notice in the prescribed form on the dealer to make payment of the extra amount of tax along with the interest as per the provisions of this Act, by the date specified in the said notice."

The provision under sub section (2) as it contemplates if any mistake is detected as a result of scrutiny made under sub section (1), the AA shall serve a notice in the prescribed form on the dealer as mentioned herein above. Taking cue from the provision it can safely be said that, in absence of any defect notice as per Sec.38(2), the return filed by the dealer should be treated as accepted by the authority. Once it is accepted means the delay

deemed to have waived. If that is, the dealer can be successfully said to have self-assessed.

Thus, from the discussion above, in all probability there cannot be any escape from the definite conclusion that, the initiation of re-assessment proceeding invoking u/s.43 of the OVAT Act in the present case by the authority is not without jurisdiction, not illegal and the same is found to be sustainable in the eye of law.

Point No.1

The next point which is raised by the dealer is, sufficient opportunity of being heard was not provided to the dealer. Re-assessment proceeding was initiated on dt.05.11.2009. Delving into the case in hand, the order of the ld.ACST categorically reflects that in spite of opportunity given, the appellant-dealer had chosen not to participate in the hearing of the appeal. Needless to say that sufficient opportunity of hearing though required to be given in any proceeding but the same does not extend to the extent that till a person does not make his submission the proceeding should kept pending. Extending the principle of natural justice to such an extent would frustrate the ends of justice and also contrary to the principle and would give a scope to recalcitrant litigant who in a designed manner never participated in the proceeding and thereby fettered the authority to decide a matter. In such circumstances, we cannot agree with the submission of the learned Counsel that the order of the ld.ACST is unsustainable and the same was passed without giving him an opportunity of hearing. The statute also authorizes the first appellate authority to decide an appeal on merit. Under law the order of FAA is treated as assessment in broad sense since, the

FAA is an extended forum of assessment. When the appellant has got ample opportunity and the order of FAA is a contested one then there is no reason before this Tribunal to justify the allegation that principle of natural justice is violated as such the same is turned down as baseless.

Another point as raised by the dealer i.e. the authorities below have not gone into the details of allegation of escapement of turnover and without scrutiny of the connected documents just reiterated the order of the AA, which was an ex-parte order. It being a pretty old matter, both the fora below, who are the competent authorities have gone in details into the material particulars of the allegation and found that, the dealer is guilty of the suppression as detected in the fraud case report. No rebuttal evidence is advanced by the dealer to unsettle the finding of the fora below. In absence of any cogent, trustworthy and rebuttal evidence from the side of the appellant-dealer, there is no reason before us to interfere in the findings of the fora below on the question of fact like escapement of assessment. If that be, it is held that, the findings relating the suppression of fact calls for no interference. Hence, confirmed.

Point No.II -

The dealer has claimed that, the authorities below have not taken into account of admitted tax paid for the year 2007-2008 even though they have credited the payment of tax of Rs.2,38,387/- for the year 2008-09. Consistency and continuity are the well accepted rules in tax matter. In that view of the matter, it is believed that, there is need of redetermination of tax liability taking consideration of admitted tax already paid for the year 2007-08 as claimed.

Point No.III-

Next point raised by the dealer is, the order of re-assessment is an ante-dated one. It is claimed that, the order was shown to have prepared on dt.30.12.2011 but in fact it was prepared on dt.02.01.2012 and as such the dealer had received the same only on dt.06.01.2012. Assessment proceeding was initiated on dt.05.11.2009. As per law the same should have completed assessment within seven years. The allegation of antedating of the order seems to be baseless whether it is 30.12.2011 or dt.02.01.2012. Both the dates are within the stipulated period.

From the discussion above, it is found that, this is a fit case where the matter should be remanded back to the AA for a limited purpose of redetermination of tax liability taking consideration of tax already paid as mentioned above for the year 2007-08. The impugned order is set aside. The appeal is allowed in part on contest.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

Sd/-
(S. Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Smt. S. Misra)
Chairman

I agree,

Sd/-
(R.K. Rout)
Accounts Member-II