BEFORE THE DIVISION BENCH : ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No. 225(V)/2016-17

(Arising out of the order of the learned DCST, Balangir Range, Balangir in first appeal Case No. AA-35 (KA) of 2015-16 disposed of on 27.07.2016)

Present :- Shri S.K. Rout & Shri S. Mishra,
1st Judicial Member Accounts Member-II.

M/s Aspire Aggregate and Associates
At/Po-Pokharibandh, Via-Viswanathpur
Dist-Kalahandi. ..... Appellant.

-Vrs.-

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

For the Appellant: :Mr. S.K. Mishra, Advocate.
For the Respondent: :Mr. M.L. Agarwal, S.C.(C.T.)
:Mr. S.K. Pradhan, A.S.C. (C.T.)

Date of Hearing : 13.05.2022 * Date of Order :09.06.2022**

O R D E R

This second appeal is directed against the appeal order bearing No. AA-35 (KA) of 2015-16 passed on 27.07.2016 by the Deputy Commissioner of Sales Tax, Bolangir Range, Bolangir (in short ld. FAA) who allowed the appeal and set-aside the order of assessment made by the Learned Sales Tax Officer, Kalahandi Circle, Bhawanipatna (in short, LAO) passed under Section 43 of the OVAT Act in which a demand of Rs.6,96,768.00 was raised relating to the tax periods from 01.04.2010 to 22.05.2013.

2. Being aggrieved by the aforesaid order of the ld. FAA, the assessee has preferred second appeal before this Tribunal challenging the said order as bereft of consideration of material facts with the

provisions of law for which the impugned order is illegal and bad in law.

3. The brief fact of the case is that the instant dealer runs a stone crusher unit and effects purchase of spalls as raw-material and converts the same to different sizes of stone chips for trading. Upon getting a Tax Evasion Report (in short, TER) from the Vigilance Wing, Koraput Division, Jeypore, the LAO issued notice in Form VAT-307 to the dealer for making assessment U/s.43 of the OVAT Act for the material period. During the course of hearing, the contents of the said report along with materials seized were confronted to the assessee vis-a-vis books of account and other relevant documents produced. In the said report, it was alleged sale suppression of Rs.1,37,720.00 relating to the year 2010-11; Rs.58,83,963.00 relating to 2012-13 and Rs.13,53,448.00 for the period 01.04.2013 to 19.05.2013. While interrogating the matter contend in the TER, the ld. Advocate for the assessee stated before LAO that the dealer has filed the return during the period under surprise visit and has paid tax accordingly. However, the LAO observed that the assessee has paid partly tax for the impugned period and after surprise visit, he has paid balance tax. Accordingly, the LAO rejected the books of account and suppression detected in the TER was established and taxed the entire amount giving rise to an extra demand of Rs.6,97,768.00 for the impugned period.

4. Being aggrieved by the aforesaid assessment order, the assessee challenged it in first appeal before the ld. FAA. The ld. FAA after due examination of the case, set-aside the assessment order passed by the LAO with the following observation:-

> "a. The learned Advocate had filed hazira with books of accounts before the learned STO only and neither written submissions filed nor any statement recorded by the learned STO from the dealer-appellant towards the Vigilance report confronted to the appellant at the time of assessment hearings.

b. The learned STO has determined the GTO and TTO as same amount i.e. Rs.7375131.00 treating this as escaped turnover and computed the output tax to Rs.367380.00 and imposed penalty U/s.43 to Rs.734760.00 which is before the adjustment of tax with interest paid by the appellant to Rs.405372.00.

c. The learned STO has not mentioned in the order that how much amount of GTO/TTO and the tax payment made by the appellant as per return during the tax periods covered under assessment. The appellant claimed that he has paid tax with interest to Rs.405372.00 but this amount whether he has paid for the escaped turnover as was determined by the learned STO or admitted tax as per returns is not ascertained as the same was not stated in the orders passed. Further, as revealed from the assessment order the learned STO mentioned that the dealer is 'partly correct'. The dealer has paid partly tax on that period and after surprise visit, he has paid tax for that tax period again.

In the matters of imposition of penalty it is pertinent to mention here that U/s.43(2) which provides that if the assessing authority is satisfied that the escapement is without reasonable cause, he may levy a penalty of an amount equal to twice the tax additionally assessed on the escaped turnover, which is before amendment of the section w.e.f. 01.10.2015. Hence, this implies that penalty is allowed by law if there is escaped assessment without reasonable cause and acts deliberately in defiance of law.

In fact, in this critical juncture and in view of the above fact and discussions the appeal is allowed and the impugned order dated 30.03.2015 passed by the learned STO is set-aside for fresh disposal of assessment within a reasonable time and as per the provisions of law after examining each individual transaction for which tax evasion report submitted and then decide whether it constitute suppression of purchases and sales and tax thereof or not. Secondly, 1st ascertain the GTO/TTO returned and payment of admitted tax and interest made by the dealer-appellant for the tax periods for which escapement

assessment is to be made and then add or enhance the turnover if any established towards the Vigilance report over and above the GTO returned after affording reasonable opportunity of hearing and confronting the vigilance tax evasion report bit by bit to the dealer-appellant. Then, determine the GTO/TTO and tax payment thereof in the event of re-assessment and after adjustment of tax paid, it can impose penalty if any on the balance tax payable in lieu of the turnover escaping assessment as per the provisions of law."

5. Being further aggrieved by the aforesaid order of ld. FAA, the assessee preferred second appeal before this Tribunal assailing the order of ld. FAA as bad in law.

6. From the rival contentions made at the time of hearing by both the Counsels of the appellant-assessee and respondent-State and materials available on the record including records of forums below, the following issues are raised in the present case in shape of grounds of appeal which are dealt in accordingly for a just, reasonable and fair order.

a. It is alleged by the assessee that proceeding U/s.43 of the OVAT Act is invalid inasmuch as the assessee was neither assessed U/s.39 nor U/s.42 of the OVAT Act and there was mechanical application of mind to the contents for assessment U/s.43.

   In order to address above issue, we refer to Section 43 of OVAT Act which inter-alia 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 position, 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-

   a. escaped assessment, or
   b. been under assessed, or
   c. ……..

   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. .....

In this connection, we refer to a judgment of Hon'ble Orissa High Court in STREV No. 64 of 2016 in case of M/s. Keshab Automobiles Vrs. State of Orissa in which their Lordship in their judgment dtd.0.12.2021 in Para 22 has observed as follows:-

"22. From the above discussion, the picture that emerges is that if the self-assessment U/s.39 of the OVAT Act for tax periods prior to 1st October, 2015 are not 'accepted' either by a formal communication or an acknowledgement by the department, then such assessment cannot be sought to be re-opened under section 43 (1) of the OVAT Act and further subject to fulfilment of other requirements of that provisions as it stood prior to 1st October, 2015."

It is revealed from the letter bearing issue No. 1477 dtd.18.05.2022 issued by the Office of Deputy Commissioner of CT & GST, Kalahandi Circle, Bhawanipatna addressed to the Establishment Officer(SR Section), Commissionerate of CT & GST, Odisha, Cuttack that the returns filed for the impugned period are duly been accepted and acknowledged by the respective circle. As such, the contention taken by the assessee on this score doesn't hold good and rejected.

b. It is taken as second ground that the visiting officer who recorded the statement on 22.05.2013 is not known in absence of evidence. The report submitted by the Deputy Commissioner of Sales Tax for taking of assessment U/s.43 is illegal.

From the assessment record, we observe that during the visit of the Vigilance Wing on 22.05.2013 only one statement was recorded from one Shri Prahallad Mishra and no books of account was produced before the Investigating Officers on the said date. Further, as regards identity of the authority who recorded the statement of Shri Prahallad Mishra, the documented page 34 column 7 clearly shows the name and rank of officers who conducted/assisted in the inspection/checking as revealed from the assessment record.

c. It is stated in the grounds of appeal that recording of the statement on 12.06.2013 and verification of books of account on 17.06.2013 by Assistant Sales Tax Officer was without due authority under law.

At page 34 of the assessment record, it reveals the FIR bearing No.32/2013 that states the constituent members of the Team who paid visit to the business premises of the dealer. It is further revealed that at the time of visit on 22.05.2013, the Sales Tax Officer was present and consequently the report was prepared by the Deputy Commissioner of Sales Tax. Both the authorities are empowered U/s.73 to discharge functions and duties vide notification No.5205-III(III)-21/2009-CT dtd.13.03.2009 and 5217-III(III)-21/2009-CT, dtd. 13.03.2009. As such, we do not find any infirmity on this score.

d. It is further stated in grounds of appeal that the entire process from submission of TER till completion of assessment U/s.43 is vitiated for want of due process of law.

In this connection, we observe that on the date of visit i.e. on 22.05.2013, the supervisor of the assessee assured for production of books of account before the concerned authority on a later date for which notice in form VAT-401 was issued by the Sales Tax Officer and duly served on the assessee. On subsequent dates, on production of documents and records, the Deputy Commissioner of Sales Tax recorded statement and submitted TER for determination of liability. Accordingly, the LAO issued notice in Form VAT-307 and after due participation by the assessee, completed the assessment U/s.43 of the said Act. Further, section 98 of the OVAT Act stipulates that after participation in the proceeding, no assessment proceeding could be said to have been invalid. In this connection, we made reference to the Hon'ble Apex Court judgment in case of Commissioner of Sales Tax Vrs. Subhash & Co. reported in (2003) 130 STC 97 that holds good to the present case.

e. By the way of ground no.5 with reference to period of limitation stipulated in section 42, the assessee sought to apply the same to assessment made u/s.43 of OVAT Act.

We observe that the period of assessment relates to 01.04.2010 to 22.05.2013 and the LAO has issued notice for hearing on 16.01.2014 fixing date on 18.02.2014. The assessment was completed on 30.03.2015. As such, proceedings can be drawn within seven years from the end of the tax period as contemplated in section 43(3) of the OVAT Act. In the instant case, the assessment has been completed on 30.03.2015 which is within seven years from the end of the tax period and as such we do not find enough force in the contention taken by the dealer-assessee.

f. Relying on the verdict of Hon'ble Orissa High Court in **Deo Ispat Alloys Ltd. Vs. Commissioner of Commercial Taxes reported in 2014 (II) ILR-CUT 1166,** the assessee has submitted that there was no confrontation with adverse materials utilized against him during the course of assessment.

In the aforesaid judgment, the Hon'ble Court held that "the incriminating materials utilized against the petitioner in the assessment order have not been supplied to the petitioner to which the petitioner is entitled to.

In the fact situation, we quash the order of assessment dtd.26.11.2013 passed under Section 43 of the OVAT Act for the period from 01.04.2009 to 06.09.2012 and remand the matter to the Assessing Officer to make the assessment afresh after confronting the adverse materials he intends to utilize against the petitioner and considering the petitioner's explanation against such allegation(s). The entire exercise shall be completed within a period of eight weeks from today."

In this connection, we refer to another settled case of Hon'ble Orissa High Court in case **D. Ch. Guruvalu Son & Co. Vrs. Sales Tax Officer, 2007 SCC on line (Ori) 242 =14 VST 509 (Ori.)** that are taken into consideration the case law in Ugratara Bhojanalaya (Supra) in which it is observed as follows:-

"….. Law is also settled that if the dealer responds and participates in the proceedings, it is open to him to seek for the reasons which

necessitated the reopening of the proceeding. At that stage, the assessing officer cannot take the plea that the reasons are not to be indicated. If he is in possession of the materials which he proposes to use against the dealer in the proceeding for re-assessment, he must before using the materials bring them to the notice of the dealer and give them adequate opportunity to explain and answer the case on the basis of those material. (See Sales Tax Officer, Ganjam V. Uttareswari Rice Mills, reported in [1972] 30 STC 567)"....

In the instant case, it is observed from both the assessment record and appeal record that, the dealer-appellant was accorded many a opportunities at re-assessment stage in which reasons for such re-assessment was confronted to the dealer which the dealer availed satisfactorily by appearing and producing certain documents for adjudication vis-a-vis returns available on record.

Furthermore, the first appellate authority having set-aside the matter for fresh assessment, further opportunity could have been availed by the assessee-dealer to put forth its claim instead of approaching this Tribunal.

7. Relying on the judgment rendered by the Hon'ble Supreme Court of India in the case of Hindustan Steel Ltd. Vs. State of Orissa reported in (1970) 25 STC 211 (SC), the assessee has prayed in his grounds to delete the penalty imposed on it in view of the observation made by the appellate authority.

In this connection, we observe that imposition of penalty is a statutory provision contained in the Act. We further rely on the decision rendered by Hon'ble Orissa High Court in case of **National Aluminium Company ltd. Vs. DCST reported in (2012) 56 VST 68 (Ori.)** in which it is held as under:

"Against the assessment of tax and penalty, there is a provision for appeal. In appeal, if the amount of tax assessed under section 43 of the OVAT Act is reduced, the quantum of penalty will also be reduced automatically.

In view of the above, once the assessing officer comes to the conclusion that the dealer is indulged in fraudulent activities and assesses him under section 43 of the OVAT Act, there is no need for the assessing officer to make further investigation to find out whether the escapement is without reasonable cause for the purpose of imposition of penalty under section 43 (2) of the OVAT Act."

8. Taking into consideration our above observation, it is now ordered.

The appeal filed by the assessee is rejected, being devoid of any merit and the appeal order passed by the ld. FAA for the impugned period is confirmed.

Dictated & corrected by me.

Sd/-
(S. Mishra)
Accounts Member-II

Sd/-
(**S. Mishra)**
Accounts Member-II.

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member.