

**BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL:
CUTTACK**

S.A. No. 365 (VAT) of 2013-14

&

S. A. No. 8 (ET) of 2014-15

(Arising out of orders of the learned JCST, Cuttack-I Range, Cuttack in First Appeal Case Nos. AA- (OVAT) 1/CUIW/2009-10, & AA (ET) 1/CUIW/2009-10, disposed of on dated 31.01.2014)

Present: **Shri A.K. Das, Chairman**
Shri S.K. Rout, 2nd Judicial Member
&
Shri M. Harichandan, Accounts Member-I

M/s. Janata General Store,
Choudhury Bazar, Cuttack ... Appellant

-Versus-

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

For the Appellant : Sri J.M. Pattnaik, Advocate
For the Respondent : Sri D. Behura, S.C. (CT) &
Sri S.K. Pradhan, Addl.SC (CT)

Date of hearing: 18.02.2022 *** Date of order: 03.03.2022

O R D E R

Both these appeals at the instance of the dealer-appellant are taken up together for hearing and are disposed of by this common order as the matters involve common question of facts and law.

2. The S.A. No. 365 (VAT) of 2013-14 is directed against the order dated 30.01.2014 passed by the learned

Joint Commissioner of Sales Tax, Cuttack-I Range, Cuttack (hereinafter called as 'first appellate authority') in Appeal No. AA (OVAT) 1/CUIW/2009-10 thereby partly allowing the appeal and reducing the tax demand to ₹6,78,267.00 from ₹11,10,593.00 raised by the Sales Tax Officer, Cuttack-I West Circle, Cuttack (in short, 'assessing authority') for the tax period from 01.04.2005 to 31.03.2007 by invoking power u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act').

2(a). The S. A. No. 8 (ET) of 2014-15 is also directed against the order dated 31.01.2014 passed by the same first appellate authority in Appeal No. AA (ET) 1/CUIW/2009-10 thereby allowing the appeal in part and reducing the tax demand to ₹55,967.00 from ₹77,904.00 raised by the same assessing authority for the self-same tax period by exercising powers u/s. 9C of the Odisha Entry Tax Act, 1999 (in short, 'OET Act').

3. The facts leading to the filing of present appeals are that the dealer deals in purchase of stainless steel utensils, moulded luggage, kitchen ware, home appliances and brass and bell metal utensils both from outside and inside the State of Odisha for resale. The

business of the dealer was audited under the OVAT Act and OET Act on 23.11.2006 by the Sales Tax Officials of Cuttack-I Range and on 13.03.2007 by the Sales Tax Officials of the Enforcement Range, Cuttack, who found discrepancy in physical stock of goods of some items and other irregularities. On receipt of the Audit Visit Reports (AVRs), notice u/s. 42 of the OVAT Act for the tax period 01.04.2005 to 31.03.2007 was issued to the dealer-assessee for verification of the books of account. In response to the said notice, the dealer produced the books of account, i.e. purchase and sale register supported with purchase and sale invoices, which were examined with reference to the monthly returns filed by it (the dealer). The allegations made in the two AVRs, one submitted by the STO, Cuttack-I Central Circle, Cuttack and another by the STO, Enforcement Range, Cuttack were confronted to the dealer-assessee. In first AVR, it was alleged that there was irregular claim of ITC for ₹7,832.58 due to non-issue of tax invoices in violation of Section 20(8)(g) of the OVAT Act. On this allegation, the dealer explained that non-issue of tax invoices was not intentional, but due to implementation of new Act which it was not fully aware of. The second allegation was about non-

payment and non-collection of VAT on sale of brass and bell metals purchased from outside the State amounting to ₹5,17,440.00 exigible to tax @ 12% as per Notification No. 1034 dated 01.07.2005. The dealer explaining the allegation made in the AVR submitted that in view of amendment at Sl. No. 5A of Schedule-A of the OVAT Act where no specification of 'manufactured in the State' is mentioned, sale effected during months ending 09/2005 to 10/2006 may be considered as exempted goods. The third allegation was non-submission of statutory Form VAT-607 making entry of physical stock statement of the goods as on 01.04.2005 although submitted in plain paper in tabular manner amounting to ₹27,89,610.00 having ITC effect of ₹1,26,200.00. Against this allegation, the dealer explained that stock statement was submitted in plain paper in due time and not in prescribed form which amounts to technical error and rectifiable in nature for which the disallowance of ITC is not justified. In the second AVR, the STO, Enforcement Range, Cuttack alleged that there was cash discrepancy of ₹3,722.00 during inspection of the counter on 13.03.2007. The dealer explaining the discrepancy submitted that as per cash book dated 12.03.2007 the closing balance of cash was

₹5,000.00 which is the audited account u/s. 44AB of the I.T. Act and hence, there is no cash discrepancy as alleged. It was next alleged that there was purchase suppression of ₹6,63,845.00 as on the date of inspection the closing balance of stainless steel items was 6,550 kgs. On this allegation, the dealer explained that he purchased stainless steel materials on kgs. and sold the same on pieces. The stock was there, but due to non-maintenance of stock account, the entire stock cannot be held as unexplained. It was further alleged that there was sale suppression of ₹1,276.00 which revealed from undated and unsigned slip No.6. The dealer explained that undated and unsigned slip cannot be utilized against the petitioner as a piece of incriminating document. It was further alleged that there were purchase suppressions due to non-entry of purchases made from M/s. Aristocrat Marketing Ltd., Cuttack for ₹15,608.00 as per slip No.7, from M/s. C. Choudhury & Co. for ₹17,980.00 as per slip No.15, from M/s. Tirupati Electronics for ₹10,890.00; sale suppression of ₹5,625.00 against slip No.25; purchase suppression at ₹50,348.00 as per slip No.27, sale suppressions of ₹36,058.00 and ₹3,15,222.00 as per slip No.47 and sale suppression of ₹4,210.90 as per slip nos. 49 & 50. The dealer

could not produce any document explaining the above suppressions.

3(a). The assessing authority on examination of the books of account and on consideration of the allegations made in the two AVRs came to the conclusion that suppression of purchase and sale stood established at ₹11,64,565.00 (sale suppression for non-issuance of sale invoice on 13.03.2007 for ₹3,722.00 + physical stock discrepancy for ₹6,63,845.00 + purchase and sale suppression as per recovered paper slip for ₹4,96,998.00) and it enhanced the GTO by ₹46,58,260.00 i.e. four times of the suppression established. The assessing authority allowed deduction of VAT at ₹19,95,865.20 and determined the TTO at ₹2,59,91,129.67. The tax due was determined at ₹24,71,825.00 against which the ITC adjustment was allowed at ₹15,16,759.00 and the balance tax due was determined at ₹9,55,066.00. The dealer having paid ₹2,40,999.00, the balance tax was determined at ₹7,14,067.00. The assessing authority also imposed penalty of ₹3,96,526.00 u/s. 42(5) of the OVAT Act for irregular claim of ITC of ₹1,33,588.58 and sale suppression of bell metal goods without payment of VAT

of ₹64,680.00. The tax and penalty together was determined at ₹11,10,593.00.

3(b). The dealer-assessee challenging the tax demand raised by the assessing authority preferred appeal before the first appellate authority u/s. 77(1) of the OVAT Act which was allowed in part and the tax demand was reduced to ₹6,78,267.00 on the following findings :-

- (i) The assessing authority is justified in establishing purchase and sale suppression at ₹11,64,565.00;
- (ii) The enhancement of suppression by four times is improper in view of the provisions contained under sub-section (4) and (5) of Section 42 of the OVAT Act; and
- (iii) The assessing authority is competent to complete the assessment to the best of his judgment basing on the materials available in the AVR, if the dealer fails to appear or cause appearance or fails to produce or cause production of the books of account and documents as required under sub-section (1) before the assessing authority.

3(c). The dealer-appellant being further aggrieved with the tax demand raised by the first appellate authority at ₹6,78,267.00 preferred S.A. No. 365 (VAT) of 2013-14.

4. So far as S.A. No. 8 (ET) of 2014-15 is concerned, the dealer-appellant challenged the order of the first appellate authority dated 31.01.2014 wherein it reduced the tax demand to ₹55,967.00 from ₹77,904.00. In entry tax assessment proceeding, the assessing authority on verification of the OVAT returns and the books of account found that the dealer disclosed total purchase from outside Odisha at ₹43,56,391.32 excluding freight and purchase inside the State of Odisha from registered dealers at ₹1,69,42,014.90. The dealer could not submit the detailed accounts of freight charges separately on account of which the assessing authority assessed adding the freight charges at ₹2,17,820.00 (i.e. 5% of the outside purchase disclosed). The assessing authority determined the purchase value of enhanced sale under the OVAT Act at ₹40,50,660.00 and after deducting 15% profit margin from the said enhancement, added the balance to the disclosed turnover. The assessing authority further found that though the dealer is dealing with goods like kitchen appliances, grinder, i.e. 2%

taxable goods under the OET Act, has not shown the said turnover separately in the purchases under the OET Act nor did he pay 2% entry tax on the same. For this reason, the assessing authority took 40% of the TTO as the purchase of 2% taxable goods and rest amount of the TTO as the 1% goods. Accordingly, he determined the GTO at ₹2,55,66,686.02, out of which ₹1,69,42,014.70 was deducted towards entry tax paid goods from the registered dealers and TTO was determined at ₹86,24,671.32 on which tax demand was raised at ₹77,904.00.

4(a). In the appeal the Learned first appellate authority determined the GTO at ₹2,26,04,398.29 out of which ₹1,69,42,014.70 was allowed as deduction towards entry tax paid goods from the registered dealers inside the State of Odisha and the TTO was determined at ₹56,62,383.59 on which tax demand of ₹55,967.00 was raised including penalty of ₹37,311.32. Hence, the second appeal.

5. The dealer-appellant challenging the impugned orders passed by the first appellate authority under the OVAT Act as well as OET Act vehemently urged that the concerned Sales Tax Officer of the Circle has no

jurisdiction to initiate assessment proceedings on the basis of the AVRs in contravention of Rule 34(12)(b) of the OVAT Rules which provides that the assessing authority shall mean the assessing authority of the Range in respect of dealers, who have been granted registration under sub-rule (1) of Rule 18 and assigned with TIN under sub-rule (1) of Rule 19. The concerned STO who initiated the assessment proceedings having not been conferred with the power to assess the dealer-appellant, the impugned orders of assessment passed by it and subsequent orders passed by the first appellate authority confirming the part of the assessment orders, are *non est* in the eyes of law. He strenuously argued that the assessing authority on the basis of AVRs, assessed the dealer-appellant and raised huge tax demands without applying his own mind. The orders of assessment passed by the assessing authority are illegal, unwarranted and without jurisdiction. The first appellate authority without touching the issue of jurisdiction which would go to the root of the matter, decided the appeals in a very whimsical and arbitrary manner reducing the tax demands. He further argued that the brass and bell metals are exempted goods as per Sl. No. 5A of Schedule A under the OVAT Act which has been

incorporated on 01.07.2005. The authorities below committed error in making the brass and bell metals exigible to VAT contrary to the provisions of the OVAT Act and Rules made thereunder. He further argued that disallowance of claim of ITC on the ground of non-submission of stock statement in Form VAT-607 and consequential approval and acceptance of jurisdictional assessing authority in Form VAT-608, is illegal and unwarranted. The dealer-appellant having submitted stock statement on plain paper, his claim should not have been negated on account of non-submission of statutory form, i.e. Form VAT-607. The authorities below could have directed the appellant to substitute the stock statement submitted in plain paper by statutory form, i.e. Form VAT-607. Simply denying the ITC for non-submission of statutory Form VAT-607 is against the law laid down by the Hon'ble High Court and Hon'ble Supreme Court of India in different judicial pronouncements. It was next contended by the learned Counsel for the dealer-appellant that the authorities below also committed serious illegality in disallowing the claim of ITC of ₹7,382.58 due to non-submission of tax invoice in violation of Section 20(8)(g) of the OVAT Act is also unsustainable in view of the notification

vide SRO No. 317/2005 dated 16.07.2005. The authorities below should have given respect to the Govt. Notification which speaks about allowing ITC in the absence of tax invoice. But, unfortunately, the notification of the Government was not taken into consideration and the claim was illegally disallowed. He further argued that the authorities below also whimsically rejected the explanation submitted by the dealer-appellant on flimsy and untenable grounds. The discrepancies pointed out in the 2nd AVR of the Enforcement Range was reasonably explained by the dealer-appellant which should have been accepted by both the forums below, but they illegally rejected the appellant's plea explaining the allegations made in the AVRs and illegally held that purchase and sale suppression of ₹11,64,565.00 was established. The basis of holding purchase and sale suppression is the slips recovered from the business premises of the dealer-appellant which have no authenticity and have not been proved by the revenue. The authorities below accepted the AVR prepared basing on the unsigned and undated slips recovered from the business premises of the dealer-appellant, which should not have been done. He

submitted to allow the appeals and set aside the orders of the forums below raising illegal demands.

6. Per contra, learned Standing Counsel (CT) representing the State supporting the impugned orders passed by the forums below vehemently urged that the assessing authority was authorized by the Commissioner of Sales Tax to assess the registered dealers of his jurisdiction and it was competent enough to assess the dealer-assessee. Therefore the orders passed by it were legally tenable. The contention raised by the learned Counsel for the dealer-appellant that the assessing authority, i.e. STO, Cuttack-I West Circle, Cuttack, has no jurisdiction to initiate the assessment proceeding and assess the dealer is not tenable in law. The STO, Cuttack-I West Circle, Cuttack has been notified to be the assessing authority by the Commissioner of Sales Tax for which he was competent enough to initiate the assessment proceeding and assess the dealer-appellant. He further argued that in view of Section 20(8)(g) of the OVAT Act, the dealer was not entitled to claim ITC in the absence of tax invoice. Section 20(8)(g) of the OVAT Act specifically prohibits the dealer to claim ITC where the tax invoice is not available. Further, Section 20(6) of the OVAT Act provides

that ITC shall not be claimed by the dealer for any tax period until the dealer receives the tax invoice in original evidencing the amount of input tax. Learned Standing Counsel (CT) for the State referring to Rule 123 of the OVAT Rules vehemently urged that the dealer claiming credit of sales tax shall provide an inventory of all the goods in hand on the day of 1st day of April, 2005 and such claim of credit of sales tax shall be made by the end of April, 2005 and the claim shall be made in Form VAT-607 and when the claim of credit being accepted, he shall be communicated in Form VAT-608. In the case in hand, neither the dealer submitted stock statement in Form VAT-607 by the end of April, 2005 nor he was communicated in Form VAT-608 regarding acceptance of his claim. The authorities below by reasoned order have disallowed the claim of ITC for ₹1,26,200.00. He further argued that the slips recovered from the business premises of the dealer-appellant showing purchase and sale of goods dealt by it could not be explained by the dealer for which the authorities below were justified in holding the purchase and sale suppression at ₹11,64,565.00. There is no illegality in such finding of the forums below. The dealer could not explain the discrepancies pointed out in the AVRs in just and

proper manner for which the forums below were correct in their approach in upholding the discrepancies pointed out by the Audit Team in the AVRs and assessing the dealer accordingly. There is no illegality or impropriety of any kind in the impugned orders of the forums below warranting interference of this Tribunal. He submitted to dismiss the appeals and confirm the orders of the first appellate authority.

7. We have heard the rival submissions of the parties, gone through the impugned orders of the forums below, grounds of appeal vis-a-vis the materials on record. The dealer-appellant in both the appeals though have raised several issues, the most important issue before us is whether the assessing authority, i.e. STO, Cuttack-I West Circle, Cuttack, had jurisdiction to initiate the assessment proceeding on the basis of AVRs submitted by the Audit Team and assess the dealer, who is a registered dealer having TIN? The sustainability of the order depends upon the finding on this issue. If it is held that the assessing authority had no jurisdiction to initiate assessment proceeding and was incompetent to assess the dealer-appellant, then the entire order passed by it as well as by the first appellate authority

would be *non est* in the eyes of law. Therefore, we feel it prudent to discuss the issue of jurisdiction first.

8. In the present case, the dealer deals in purchase of stainless steel utensils, moulded luggage, kitchen ware, home appliances and bras and bell metal utensils. The business premises of the dealer was audited under the OVAT Act and OET Act on 23.11.2006 by the Sales Tax Officials of Cuttack-I Range, and again on 13.03.2007 by the Sales Tax Officials of the Enforcement Range, Cuttack and during such audit, some discrepancies were pointed out. On submission of the AVRs, the dealer-assessee was issued notice u/s. 42 of the OVAT Act for the tax period from 01.04.2005 to 31.03.2007 as well as u/r. 15B(1) of the OET Rules in Form E-30 for verification of the books of account and completion of assessment. There is no dispute that the dealer-assessee is a registered dealer having assigned with TIN-21281202790. Now the question arises whether the STO, Cuttack-I West Circle, Cuttack was competent to initiate the assessment proceeding on the basis of the AVRs and assess the dealer. In this context, Rule 34(12)(b) of the OVAT Rules, which was in force at the relevant time, is referred to. Rule 34(12)(b) provides that for the purpose of this Rule, the

assessing authority shall mean – (a) the assessing authority of the Circle in respect of dealers, who have been granted registration under sub-rule (1) of Rule 18 and assigned with SRIN under sub-rule (4) of Rule 19; (b) the assessing authority of the Range in respect of dealers, who have been granted registration under sub-rule (1) of Rule 18 and assigned with TIN under sub-rule (1) of Rule 19. Of course this rule was subsequently omitted w.e.f from 25.02.2009.

9. In view of such provisions, it is clear that the dealers having granted registration under the OVAT Act and Rules thereof and assigned with TIN, can only be assessed by the assessing authority of the Range. In the present case, the dealer has been assessed by the STO, Cuttack-I West Circle, who was not the assessing authority as per Rule 34(12)(b) of the OVAT Rules which was in force by then. The contention raised by the learned Standing Counsel (CT) for the revenue that the STO, Cuttack-I West Circle, has been notified to be the assessing authority of the Range is not based on materials on record. Learned Standing Counsel (CT) could not produce any notification before us to show that the STO, Cuttack-I West Circle, has been notified to be the assessing authority in respect of the registered dealers having TIN. It is

only the Assessing Authority of Cuttack-I Range, Cuttack who was the competent authority to assess the dealer-appellant at the relevant time. Therefore, the orders passed by the assessing authority are without jurisdiction and *non est* in the eyes of law. On perusal of the impugned orders of the first appellate authority, we find that the question of jurisdiction though was raised before it, the same was not touched and discussed while disposing the appeals reducing the tax demands raised by the assessing authority. The impugned orders of the assessing authority being without jurisdiction, subsequent orders passed by the first appellate authority are also not tenable in law. Accordingly, we are inclined to interfere with the orders of both the forums below passed under the OVAT Act and OET Act.

10. In view of the foregoing discussions, we allow both the appeals filed by the dealer-appellant, set aside the impugned orders of the forums below and remand the matters back to the assessing authority of Cuttack-I Range for *de novo* assessment under the OVAT Act as well as OET Act after allowing opportunity of being heard to the dealer keeping in view the observations made herein above. The entire process shall be completed within a period of three

months from the date of receipt of this order. It is made clear that this Tribunal has not expressed any opinion on any of the issues/contentions raised by the learned Counsel for the dealer-appellant, which are left open to be raised before the assessing authority, who shall deal with the same in accordance with law after giving due opportunity of hearing to the dealer-appellant. The assessing authority while adjudicating the different issues will not be influenced by any of the observations made in the earlier assessment orders passed by the STO, Cuttack-I West Circle as well as the first appellate authority, which are impugned before this forum. Cross-objection filed under OET Act is 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/-
(M. Harichandan)
Accounts Member-I