BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 24 (VAT) of 2020

(Arising out of order of the learned Joint Commissioner of CT & GST (Appeal), Sundargarh Territorial Range, Rourkela in Appeal No. AAV 62 of 2015-16, disposed of on 30.09.2019)

Present: **Shri G.C. Behera, Chairman**

M/s. Pooja Sponge Pvt. Ltd.,
Plot No. 214, IDCO Industrial Estate,
Kalunga, Sundargarh ... Appellant

-Versus-

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

For the Appellant : Sri R. K. Mishra, Advocate
For the Respondent : Sri N.K. Rout, Addl. SC (CT)

Date of hearing : 02.04.2024 *** Date of order : 16.04.2024

O R D E R

Dealer assails the order dated 30.09.2019 of the Joint Commissioner of CT & GST (Appeal), Sundargarh Territorial Range, Rourkela (hereinafter called as 'First Appellate Authority') in F A No. AAV 62 of 2015-16 reducing the demand raised in the assessment order of the Sales Tax Officer, Rourkela II Circle, Panposh (in short, 'Assessing Authority').

2. Briefly stated, the facts of the case are that –

M/s. Pooja Sponge Pvt. Ltd. is engaged in manufacturing of sponge iron and trading of iron ore fines & coal. The assessment relates to the period 01.04.2008 to 30.06.2011. The Assessing Authority raised tax,

interest and penalty of ₹1,30,77,147.00 u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') in *ex parte* assessment basing on the Tax Evasion Report (TER).

The Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority reduced the demand to ₹19,94,640.00 and allowed the appeal in part. Being aggrieved with the order of the First Appellate Authority, the Dealer prefers this appeal. Hence, this appeal.

The State files cross-objection and additional cross-objection.

3. The learned Counsel for the Dealer raises the point of maintainability by filing the additional grounds of appeal in view of settled law of the Hon'ble Court. He submits that initiation of proceeding u/s. 43 of the OVAT Act is otherwise illegal in absence of communication of completion of assessment u/s. 39, 40, 42 or 44 of the OVAT Act.

He contends that there is no communication of acceptance of self-assessment return to the Dealer before passing reassessment order u/s. 43 of the OVAT Act. Therefore, he submits that the orders of the First Appellate Authority and the Assessing Authority under the OVAT Act are liable to be set aside in the ends of justice.

He relies on the decisions of the Hon'ble Court in cases of ***M/s. Keshab Automobiles v. State of Odisha***, reported in **[2023] 111 GSTR 317 (Orissa)** and affirmed by the Hon'ble Apex Court in its order dated 13th July, 2022 in **SLP (Civil) No. 9912 of 2022**.

4. On the contrary, learned Addl. Standing Counsel (CT) for the State supports the orders of the fora below and submits that the self-assessment of the Dealer has been accepted u/s. 39(2) of the OVAT Act. He contends that that the Dealer has not challenged the maintainability of the proceeding at an earliest opportunity, so, he is precluded to raise the same in view of provision of Section 98 of the OVAT Act. He further submits that a

notice in Form VAT-401 under the OVAT Rules was issued when the return and revised return of the Dealer were not in order.

He also urged that the Dealer could have raised the same before the Assessing Authority and First Appellate Authority. He further submits that communication/acknowledgment of the order of acceptance of self-assessed return is a matter of fact and the same cannot be objected at belated stage. So, he submits that the orders of the fora below require no interference in appeal.

He relies on the decision of the Hon'ble Court in case of ***The State of Orissa v. Lakhoo Varjang***, reported in **[1961] 12 STC 162 (Orissa)**.

5. Having heard rival submissions and on careful scrutiny of the record, it is apparent that assessment u/s. 43 of the OVAT Act can only be made after the assessment is completed u/s. 39, 40, 42 or 44 of the OVAT Act.

Learned Addl. Standing Counsel (CT) for the State argued that the Dealer is precluded to raise the point of maintainability unless the same is not challenged at an earliest opportunity in view of provision of Section 98 of the OVAT Act. The relevant provision of Section of 98 of the OVAT Act is reproduced herein below for better appreciation :-

> *"**98. Assessment proceedings, etc. not to be invalid on certain grounds –***
> *(1) xx xx xx*
> *(2) The service of any notice, order or communication shall not be called in question if the notice, order or communication, as the case may be, has already been acted upon by the dealer or person to whom it is issued or where such service has not been called in question at or in the earliest proceedings commenced, continued or finalised pursuant to such notice, order or communication."*

Learned Addl. Standing Counsel (CT) for the State also relied on the decision in case of ***Lakhoo Varjang*** cited supra. In the said case, the Hon'ble Court have been pleased to observe as under :-

> "4. ... No subsequent change in case law can affect an order of assessment which has become final under the provisions of the Sales Tax Act...."

In the case of ***National Thermal Power Company Limited v. Commissioner of Income-Tax,*** reported in **1996 (12) TMI 7 – Supreme Court**, the Hon'ble Apex Court have been pleased to observe that :-

> " ...Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.
>
> The refrained question, therefore, is answered in the affirmative, i.e. the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee..."

In view of the decision in case of ***Lakhoo Varjang*** cited supra, Hon'ble Court nowhere restricts the Tribunal to allow additional ground, but the same must be limited only to the questions that were then pending before the Tribunal. Similarly, in case of ***National Thermal Power Company Limited*** cited supra, the Hon'ble Apex Court categorically observed that the Tribunal has the discretion to allow new ground where the Tribunal is only required to consider a question of law arising from the facts which are on the record in the assessment proceeding.

In the instant case, it is required to be answered whether a proceeding u/s. 43 of the OVAT Act can be initiated in absence of any proceeding u/s. 39, 40, 42 or 44 of the said Act or in absence of any communication of acceptance of self-assessment. The fact does not disclose that any communication of acceptance of self-assessment has been made to the Dealer. As the point of maintainability of assessment completed u/s. 43 of the OVAT Act can only be maintainable after completion of assessment

u/s. 39, 40, 42 or 44 of the OVAT Act, which touches the root of the case. So, the Dealer can raise the point of maintainability even at this stage.

6. Hon'ble Court in the case of ***M/s. Keshab Automobiles*** cited supra have been pleased to observe in para-22 as follows :-

> "22. From the above discussion, the picture that emerges is that if the self-assessment under Section 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 the fulfilment of other requirements of that provision as it stood prior to 1st October, 2015."

In view of the ratio laid down by the Hon'ble Court, the Department is required to communicate a formal communication or acknowledgment regarding the acceptance of the self-assessment u/s. 39 of the OVAT Act. In this case, the State has not filed any materials to show that the acceptance of the self-assessment has been communicated to the Dealer.

7. The learned Addl. Standing Counsel (CT) contends that a notice in Form VAT-401 was issued to the Dealer when the return and revised return were not in order. Section 39(1) of the OVAT Act prescribes that the self-assessment shall be made on filing of returns. Section 39(2) of the OVAT Act provides that the return shall be accepted as self-assessed if the same is found to be in order subject to adjustment of any arithmetical error apparent on the face of the said return. It is crystal clear that the provisions of Section 39 of the OVAT Act prescribe issuance of no notice in Form VAT-401 to the Dealer. So, the contention of the State on this score merits no consideration.

8. In view of the settled position of law as decided by the Hon'ble Court in case of ***M/s. Keshab Automobiles*** cited supra, the assessment proceeding u/s. 43 of the OVAT Act is without jurisdiction in absence of any assessment u/s. 39, 40, 42 or 44 of the said Act. So, the orders of the

Assessing Authority and the First Appellate Authority under the OVAT Act are not sustainable in the eyes of law as the same are without jurisdiction. Hence, it is ordered.

9. Resultantly, the appeal stands allowed and the impugned order of the First Appellate Authority reducing the demand raised in assessment order of the Assessing Authority is hereby quashed. Cross-objection and additional cross-objection are disposed of accordingly.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

Sd/-
(G.C. Behera)
Chairman