BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 396 (VAT) of 2015-16

(Arising out of order of the learned Addl. CST, Odisha, Cuttack in Appeal No. AA- CUII/JCST/706/2013-14, disposed of on dated 22.12.2015)

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

M/s. Eastern Foods Pvt. Ltd.,
New Industrial Estate, Jagatpur,
Cuttack ... Appellant

-Versus-

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

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

Date of hearing: 05.08.2022 *** Date of order: 23.08.2022

O R D E R

Instant second appeal u/s. 78 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') is directed against the order dated 22.12.2015 passed by the learned Addl. Commissioner of Sales Tax, Odisha, Cuttack (hereinafter called as 'first appellate authority') in Appeal No. AA- CUII/JCST/706/2013-14 thereby confirming the tax

demand of ₹47,33,046.00 including penalty of ₹31,55,363.92 raised by the Deputy Commissioner of Sales Tax, Cuttack-II Circle, Cuttack (in short, 'assessing authority') for the tax period 01.04.2009 to 31.03.2011 in the assessment framed u/s. 43 of the OVAT Act.

2. The factual matrix of the case leading to the filing of the present second appeal are that the dealer-assessee carries on business in manufacturing and sale of rice, rice bran, broken bran and wheat products. It also undertakes custom milling of rice for different agencies. The dealer-assessee was assessed u/s. 42 of the OVAT Act upto 31.07.2010 and u/s. 39 of the OVAT Act for the balance period. Upon receiving information that the dealer-assessee is indulged in clandestine business activities leading to under-assessment/escapement of assessment, proceeding u/s. 43 of the OVAT Act was initiated and it was served with a statutory notice. Pursuant to such notice, the dealer-assessee appeared through its Director and caused production of books of account, which were examined vis-a-vis the Tax Evasion Report (TER) and other materials on record by the assessing authority. In course of assessment, the assessing authority confronted the dealer-assessee with the allegations made in the TER submitted by the STO,

Investigation Unit, Angul. It was alleged in the said TER that during inspection of the place of business of the dealer-assessee on 28.09.2010 by a team of officials of the Enforcement Unit of the Commercial Tax Department, incriminating documents relating to the business activities of the dealer-assessee were recovered, on verification of which, some discrepancies were found. The visiting officials recovered two volumes of Andhra Pradesh Way Bills (Triplicate copies used) relating to the period from 22.08.2010 to 27.09.2010 and used tax invoices of Ichhapuram Branch with Sl. No. 301 dated 02.09.2010 to Sl. No. 236 dated 27.09.2010. It revealed from tax invoice book, tax invoice vide Sl. Nos. 1 to 1000 were printed at Konark Art Printer, Jagatpur, which were meant for use by the branch of the dealer-assessee, which led to the conclusion that the goods were despatched to different customers of Andhra Pradesh from Cuttack, but the transactions were shown as out-State branch transfer in order to avoid payment of CST. On being confronted to the allegations, the dealer-assessee explained that out-State branch at Ichhapuram has been registered w.e.f. 01.08.2009 and prior to that it was registered in the name of M/s. Eastern Roller Flour Mills Pvt. Ltd. w.e.f. 18.08.2007.

Usually, the documents of the branch are sent to the Head Office at Jagatpur for verification and compilation purpose. Moreover, the nature of transactions of branch transfer/ consignment sales have been accepted by the JCST, Cuttack-II Range, Cuttack.

2(a). The visiting officials also seized register containing 345 pages during the period from 07.06.2010 to 28.09.2010. The dealer-assessee admitted that this register was maintained for sale of wheat products in which vehicle numbers have been recorded after delivery of stock to different buyers. On subsequent verification of the said register, it was noticed that 223 transactions have not been reflected in the books of account leading to sales suppression. He further took the plea that the entries which were reflected in the said register and were not shown in the sale register, were actually the orders intended by the customers, which were later rejected due to failure of negotiations.

2(b). The assessing authority considering the contents of the TER, materials on record and the explanations submitted by the dealer-assessee came to the conclusion that the sales turnover to the tune of ₹91,58,587.00 and purchase suppression of ₹68,95,744.00

stood established; that the sale suppression to the tune of ₹14,25,661.00 also stood established; that there being discrepancy in the book balance and actual physical stock, purchase suppression of wheat to the tune of Q. 839.92 amounting to ₹11,17,094.00 stood established; that the stock relating to paddy, rice bran, broken rice, the investigating officials detected huge discrepancies and the same was confronted to the dealer-assessee wherein it took the plea that the physical stock was not recorded properly and was taken on the eye estimation and the suppression covering the transactions of ₹1,70,54,459.00 stood established. The assessing authority considering the above facts, determined the GTO and TTO at ₹3,94,42,049.00, which was taxed @ 4% and on calculation the tax liability was determined at ₹15,77,681.96 on which penalty of ₹31,55,363.92 was imposed.

3. The dealer-assessee being dissatisfied with the demand raised by the assessing authority, preferred appeal before the first appellate authority, who also confirmed the order of assessment holding that the assessing authority has reasonably taken into account the purchase and sale suppressions detected by the STO, Investigation Unit, Angul. The dealer-assessee being further

dissatisfied with the order of the first appellate authority thereby confirming the order of assessment, filed the present second appeal.

The State-respondent pursuant to the notice issued by this forum has filed cross-objection supporting the impugned orders of the forums below.

4. It was vehemently urged by the learned Counsel for the dealer-assessee that the initiation of proceeding u/s. 43 of the OVAT Act was illegal and bad in law in the absence of formation of any independent opinion by the assessing authority as required u/s. 43(1) of the said Act. The escaped turnover assessment could not have been initiated u/s. 43 of the OVAT Act when the dealer-assessee was not self-assessed u/s. 39 of the Act. The very initiation of such proceeding by the assessing authority u/s. 43 of the OVAT Act without complying the requirement of law and in contravention to the principles laid down by the Hon'ble High Court of Orissa in case of **M/s. Keshab Automobiles Vs. State of Odisha (STREV No. 64 of 2016 decided on 01.12.2021)** is bad in law. He vehemently urged that there is nothing on record to show that the dealer-assessee was self-assessed u/s. 39 of the OVAT Act after filing the return and it was communicated in writing about such self-

assessment. When the very initiation of proceeding u/s. 43 of the OVAT Act is bad in law, the entire proceeding becomes a nullity and is liable to be dropped. Neither the assessing authority nor the first appellate authority has whispered a single word about the self-assessment of the dealer-assessee u/s. 39 of the OVAT Act, which is a condition precedent for initiation of proceeding u/s. 43 of the said Act. So, in the absence of any finding with regard to self-assessment of the dealer-assessee by the forums below, the extra demand raised by them is illegal and unsustainable in the eyes of law. On this submission, learned Counsel for the dealer-assessee prayed for allowing the appeal and setting the aside the orders of the forums below.

5. Per contra, the learned Standing Counsel (CT) for the revenue refuting the contention raised by the learned Counsel for the dealer-assessee vehemently urged that the assessing authority has clearly observed in its order that the dealer-assessee was self-assessed where after proceeding u/s. 43 of the OVAT Act was initiated. The dealer-assessee could not produce any material to show that it was not self-assessed as per Section 39 of the OVAT Act. He vehemently urged that the order of the Hon'ble Court passed in M/s. Keshab Automobiles' case (supra) is not

applicable to the facts and circumstances of the case and, therefore, the extra demand raised by the assessing authority and subsequently confirmed by the first appellate authority is just, reasonable and according to law and the same does not warrant any interference of this Tribunal.

6. In the memorandum of appeal as well as in the additional grounds of appeal, the dealer-assessee has taken several grounds challenging the impugned orders of the forums below. But, in course of hearing of the appeal, learned Counsel for the dealer-assessee harped on the issue that the initiation of proceeding u/s. 43 of the OVAT Act was bad in law as there was no assessment u/s. 39 of the Act. The issue raised by the learned Counsel for the dealer-assessee will go to the root of the case and the answer to this issue will decide the fate of the assessment proceeding initiated by the assessing authority raising extra demand of ₹47,33,046.00. Before addressing on the issue whether the initiation of proceeding u/s. 43 of the OVAT Act was maintainable in the absence of any assessment u/s. 39 of the Act, it would be profitable to refer to some of the relevant provisions for effective adjudication of the dispute. Section 43 of the OVAT Act, as it stood prior to 01.10.2015, provides that –

"43. Turnover escaping assessment –

(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 twice 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."

6(a). A cursory look at the provisions contained U/s. 43 of the OVAT Act makes it abundantly clear that only after assessment of dealer 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 escaped assessment, or been under-assessed, or been assessed at a rate lower than the rate at which it is assessable, then it may giving the dealer a reasonable opportunity of hearing and after making such enquiry assess the dealer to the best of his judgment. Similar issue also came up before the Hon'ble High Court in case of **M/s. Keshab Automobiles (supra)** where in the Hon'ble court interpreting the provisions contained u/s.43 of OVAT Act, in paras- 13 to 16 of the judgment observed as follows :-

> "13. It is significant that prior to its amendment with effect from 1st October, 2015 the trigger for invoking Section 43(1) of the OVAT Act required a dealer to be assessed under Sections 39, 40, 42 and 44 for any tax period. The words "where, after a dealer is assessed' at the beginning of Section 43(1) prior to 1st

October, 2015 pre-supposes that there has to be an initial assessment which should have been formally accepted for the periods in question i.e. before 1st October, 2015 before the Department could form an opinion regarding escaped assessment or under assessment or the accused taking the benefit of a lower rate or being wrongly allowed deduction from his turnover or input tax credit to which he is not eligible.

14. However, under Section 43(1) of the OVAT Act, after its amendment with effect from 1st October, 2015 the Assessing Authority can form an opinion about the whole or part of the turnover of the dealer escaping assessment or being under assessed "on the basis of any information in his possession". In other words, it is not necessary after 1st October, 2015 for the Assessee's initial return having to be 'accepted' before Section 43(1) could be invoked.

15. Therefore, the position prior to 1st October, 2015 is clear. Unless there was an assessment of the dealer under Sections 39, 40, 42 and 44 for any tax period, the question of reopening the assessment under Section 43(1) of the OVAT Act did not arise.

16. While the 'White Paper on State Level Value Added Tax' brought out in 17th January, 2005 does envisage in para 2.12 that the "dealer will be deemed to have been self assessed on the basis of before the returns submitted by him" such an observation is at the highest recommendatory in nature. It cannot be elevated to the status of law."

6(b). In view of the law expounded by the Hon'ble Court in the aforesaid decision, we have no hesitation in concluding that unless there is an assessment u/s. 39, 40, 42 or 44 of the OVAT Act, the question of reopening the assessment u/s. 43(1) of the said Act does not arise. On thorough scrutiny of the orders of the forums below passed under the OVAT Act, we find neither the first appellate authority nor the assessing authority has returned any finding whether the dealer-assessee was assessed u/s. 39, 40, 42 or 44 of the OVAT Act so as to initiate proceeding u/s. 43 of the said Act. The assessment record reveals that the assessing authority in its order dated 30.03.2013 has observed that as the dealer has already been assessed u/s. 42 of the OVAT Act upto 31.07.2010 and for the balance period u/s. 39 of the OVAT Act and the TER indicates that dealer is engaged in clandestine business activities leading to under assessment which led to initiation of proceeding u/s. 43 of OVAT Act and issuance of notice to the dealer-assessee in Form VAT-307. There is nothing on record to show as to on what basis the assessing authority held the dealer to have been self-assessed u/s. 39 of the OVAT Act. The proceeding u/s. 43 of the OVAT Act has also been initiated without recording any finding whether there is

formal communication of acceptance of self-assessment return or not. The Hon'ble Court in para-22 of the judgment cited above, categorically observed that if the self-assessments u/s. 39 of the OVAT Act for the tax periods prior to 01.10.2015 are not **accepted either by a formal communication or an acknowledgment by the Department, then such assessment cannot be sought to be reopened under Section 43(1) of the OVAT Act.** In view of such observation of the Hon'ble Court, the assessing authority was required to form an opinion as to on the basis of which material it found the dealer to have been self-assessed. The deeming provision having come into force after 01.10.2015, mere filing of the return by the dealer-assessee is not sufficient to hold that he has been self-assessed u/s. 39 of the OVAT Act. Therefore, the assessing authority was required to examine the materials on record to form an opinion that the dealer had been self-assessed u/s. 39 of the OVAT Act keeping in view the observations of the Hon'ble Court in para-22 of the judgment. In absence of any finding that the dealer-assessee has been assessed u/s. 39 of the OVAT Act, initiation of proceeding u/s. 43 cannot be maintained. It was also incumbent on the part of the first appellate authority to decide the important issue as to

whether the dealer-assessee was self-assessed u/s. 39 of the OVAT Act for the tax period under assessment which is a condition precedent to reopen the assessment u/s. 43 of the said Act, but it did not decide such issue and disposed of the appeal on merit. So, in the absence of any finding to that effect, the impugned order of the first appellate authority cannot withstand the scrutiny of law. In the absence of any finding that there was formal communication of acceptance of self-assessment return, initiation of proceeding u/s.43 of the Act is bad in law on account of which impugned orders passed by both the forums are unsustainable in the eyes of law.

Furthermore, it was vehemently urged by the learned Standing Counsel (CT) for the revenue that the dealer-assessee in the present case having been assessed u/s. 42 of the OVAT Act upto 31.07.2010, the judgment of the Hon'ble Court in **M/s. Keshab Automobiles'** case will not be applicable to the said period of assessment. The Hon'ble Court in case of **M/s. Keshab Automobiles** (supra) clearly observed for formal communication when there is an assessment u/s. 39(2) of the OVAT Act. The assessment made upto 31.07.2010 being u/s. 42 of the OVAT Act, no formal communication is required to be given as is required

in case of assessment u/s. 39(2) of the said Act. So, the assessment u/s. 43 of the OVAT Act for the period upto 31.07.2010 is maintainable under law. This contention raised by the learned Standing Counsel (CT) for the revenue is not legally tenable in view of the language couched in Section 43 of the OVAT Act. Section 43 of the OVAT Act does not make any distinction between the assessment u/s. 39 or 42 of the OVAT Act. It specifically says for initiation of proceeding under the said provision dealer must have been assessed u/s. 39, 40, 42 or 44. So, in view of such mandate of law, the assessment of the dealer-assessee u/s. 39 of the OVAT Act and formal communication of the acceptance of self assessment return is must for initiation of proceeding u/s. 43 of the OVAT Act. So, mere assessment of the dealer-assessee u/s. 42 of the OVAT Act upto 31.07.2010 does not exonerate the assessing authority to make formal communication of self assessment of the dealer-assessee for initiating proceeding u/s. 43 of the said Act. The impugned orders passed by the forums below being in total non-compliance to the provisions contained u/s. 43 of the OVAT Act, the same are illegal and unsustainable.

7. In view of the foregoing discussions, the appeal filed by the dealer-assessee is allowed and the

impugned orders of the forums below are hereby set aside. Cross-objection 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