BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 115 (VAT) of 2018
&
S.A. No. 61 (ET) of 2018

(Arising out of orders of the learned JCST, Jajpur Range,
Jajpur Road in First Appeal Case Nos. AA- 649 KJ 16-17 (OVAT) &
AA 650 KJ 16-17 (OET) disposed of on 30.11.2017)

Present: Shri R.K. Pattanaik,
Chairman

M/s. Sharma Ply & Hardware,
At- Arjun Market Complex, Near Gandhi Chhak,
PO/Dist. Keonjhar ... Appellant

-Versus-

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

For the Appellant : Sri A.K. Roy, Advocates
For the Respondent : Sri D. Behura, Standing Counsel (CT)

Date of hearing: 03.02.2021 ***** Date of order: 22.02.2021

O R D E R

Both the above appeals, since involve same parties and assessment periods, are taken up together for disposal by the following order.

S.A. No. 115 (VAT) of 2018:

2. Instant appeal under Section 78(1) of the Odisha Value Added Tax Act, 2004 (hereinafter referred to as 'the Act') is at the behest of the dealer assessee assailing the impugned order dated 30.11.2017 promulgated in Appeal Case No. AA- 649 KJ 2016-17 (OVAT) by the learned Joint Commissioner of Sales Tax, Jajpur Range, Jajpur Road (in short, 'FAA') confirming the order of assessment

dated 30.03.2016 passed under Section 43 of the Act by the learned Sales Tax Officer, Keonjhar Circle, Keonjhar (hence called, 'AA') on the grounds inter alia that it is not sustainable in law and thus, liable to be set aside in the interest of justice.

S.A. No. 61 (ET) of 2018:

3. Present appeal under Section 17(1) of the Odisha Entry Tax Act, 1999 (in short, 'OET Act') is also at the instance of the dealer assessee challenging the legality of the impugned order dated 30.11.2017 promulgated in Appeal Case No. AA- 650 (KJ) 2016-17 (OET) by the FAA vis-a-vis order assessment dated 30.03.2016 passed under Section 10(1) of the Act by the AA on the ground that the reassessment as has been directed is not tenable in law and hence, deserves to be interfered with.

4. The dealer assessee is a proprietorship firm located at Keonjhar and was subjected to assessment under Section 43 of the Act for the periods from 01.04.2010 to 31.03.2014. As revealed from the record, the dealer assessee carries on business in purchase and sales of ply woods, laminates and other goods on wholesale-cum-retail basis. It is further revealed that on receiving information that the dealer assessee was involved in clandestine business activity, the Vigilance Wing of Balasore Division inspected its place of business on 24.07.2013 and examined books of accounts. During such examination, certain discrepancies, on being noticed by the Vigilance Wing, were confronted to the dealer assessee. At the end, a Tax Evasion Report was furnished by the Vigilance Wing. On receipt of such a report, notice in Form VAT-307 was issued to the dealer assessee. Then, the AA, considering the report alleging sales suppression of

₹85,34,614.00, proceeded to determine the tax liability vis-a-vis the dealer assessee, who, though appeared initially, failed to participate later and as a result, the assessment was completed ex parte on the strength of the materials available on record. Finally, the AA concluded that the dealer assessee is liable to pay tax and penalty to the tune of ₹34,56,081.00. Similarly, an amount of Rs 2,56,038.00 was demanded under the OET Act. Later to which, the dealer assessee filed appeals before the FAA, who, however, confirmed the orders of assessment dated 30.03.2016. Being unsuccessful, the dealer assessee preferred the aforesaid appeals and not only challenged the additional demands raised, but also questioned the validity of the escaped assessment and reassessment made.

5. According to the dealer assessee, assessment under Section 43 of the Act without independent application of mind and formation of opinion by the AA is not sustainable in law. It is contended that the forums below did not have the jurisdiction to assess the dealer assessee in terms of Section 43 of the Act for the periods from 01.04.2012 to 31.03.2014 in absence of any order passed under Section 39 of the Act. It is further contended that there was no justifiable ground to estimate the turnover of ₹85,08,293.00 at higher rate of tax without any nexus with the materials on record. Lastly, it is contended that the authorities below miserably failed to exercise jurisdiction vested under law with regard to levy of penalty, which is essentially a discretionary power. Precisely speaking, apart from the merits of the case, the dealer assessee questioned the legality and judicial propriety of the very initiation of the assessment under Section 43 of the Act on the ground that the AA without proper judicial application of mind simply voiced the objection raised by

the Vigilance Wing in its Tax Evasion Report which is not at all tenable in law. Likewise, reassessment under the OET Act has been challenged as being invalid.

6. By way of a cross-objection, State justified the actions of the authorities below. It is contended that the inspection was conducted by the Vigilance Wing and many discrepancies were noticed consequent upon which Tax Evasion Report was submitted. It is further contended that the AA with the available material and on its examination reached at a decision that there was sales suppression and accordingly, raised the additional demands and correctly the FAA after taking into account the conduct of the dealer assessee and the fact that the assessment was completed exparte rightfully arrived at a logical conclusion that the allegations to be well proved and thus, confirmed the orders of assessment dated 30.03.2016, which are, therefore, not to be disturbed.

7. To summarise, the following are the grounds, such as (i) whether, assessment framed under Section 43 of the Act without independent application of mind and forming an opinion is sustainable in law? (ii) whether, the authorities below did have the jurisdiction to assess the dealer assessee in terms of Section 43 of the Act respecting periods from 01.04.2012 to 31.03.2014 in absence of assessment under Section 39 thereof? (iii) whether, it was justified to estimate the taxable turnover at ₹85,08,293.00 with higher rate of tax and levy of penalty? (iv) whether, reassessment under the OET Act can also be sustained?

8. In fact, the assessment under the Act stood accomplished without the participation of the dealer assessee. For the fact that the dealer assessee was provided ample opportunity during the assessment proceeding, the

FAA, considering its conduct and appreciating that the inspection by Vigilance Wing revealed sales suppression, was inclined to confirm the additional demands. In course of argument, it is contended by the learned Counsel for the dealer assessee that there was no independent application of mind and opinion formed for escapement of turnover as it was simply based on the findings of the Vigilance Wing and as such, reopening of assessment under Section 43 of the Act was invalid. Further contended that Tax Evasion Report was only a piece of information which was to be considered by the AA, who, by applying judicial mind, was required to form an independent opinion before proceeding to assess the dealer under Section 43 of the Act which is conspicuously absent on a reading of the order dated 07.11.2013 passed in the assessment proceeding. Thus, according to the dealer assessee, without forming an objective opinion and only by considering the Tax Evasion Report, assessment under Section 43 of the Act was reopened and for that, the proceeding stands vitiated. In course of argument, on a query from the Tribunal, it is contended that such a question on jurisdiction may be raised at any stage notwithstanding participation of the dealer assessee in the assessment proceeding and also in appeal. In this regard, a decision of the Hon'ble Apex Court in the case of Kiran Singh Vs. Chaman Paswan reported in AIR 1954 SC 340 and few other rulings are cited. A decision of the Hon'ble Delhi High Court in the case of Principal Commissioner of Income Tax Vs. Silver Line reported in (2016) 383 ITR 455 (Delhi) is also placed reliance, while arguing that a jurisdictional issue may be raised before the Tribunal even after participating in the assessment.

9. It is settled law that a question as to jurisdiction can be raised at any stage. If, a dealer assessee, for whatever reasons, failed to challenge validity of a proceeding for want of jurisdiction, being a pure question of law, cannot be precluded from raising it, even after participating in the assessment proceeding. Since, such a question is related to jurisdiction and as to the validity of an action under the Act, a dealer assessee, despite its participation at the initial stages, is certainly not ineligible to agitate or precluded from challenging the same at any later point of time. The AA, in the case at hand, whether, independently acted upon receiving the Tax Evasion Report or not shall have to be ascertained by the Tribunal, since it directly touches upon the validity of action initiated under Section 43 of the Act.

10. Settled law as enunciated by the Hon'ble Apex Court in Sales Tax Officer Vs. Uttareswari Rice Mills reported in (1972) 30 STC 567 (SC) is that there must exist certain reasons for the purpose of initiating and reopening assessment and for that, an audit objection may be a valid factor. The said ratio of the Hon'ble Apex Court has been referred to by the Hon'ble Court in the case of Indure Ltd. Vs. Commissioner of Sales Tax, Cuttack, Orissa and others reported in (2006) 148 STC 61 (Orissa). If the later decision of the Hon'ble Court is sincerely read and proper understood, a reassessment must have to disclose the basis prior to the issuance of notice to a dealer assessee. In so far as Section 43 of the Act is concerned, as it stood prior to 01.10.2015, assessment may be initiated after a dealer is assessed under Section 39, 40, 42 or 44 for any tax period and the assessing authority on the basis of any information received is of the opinion that

the whole or any part of the turnover in respect of the tax periods did escape assessment, or under assessed, or assessed at a lower rate of tax than the rate at which it is assessable, or that the dealer was allowed wrongly any deduction or ITC to which it is not eligible. The learned Counsel for the dealer assessee referring to the decisions supra contended that no objective opinion was formed by the AA after receiving the Tax Evasion Report for the purpose of reopening the assessment which is a mandatory in law and cannot at all be dispensed with or even waived. While contending so, another decision reported in (2008) 2 SCC 350 (Chief Engineer, Hydel Project and others Vs. Ravindar Nath and others) was cited too. In Kiran Singh's case, the Hon'ble Apex Court held and observed that a decree passed by a Court without jurisdiction is a nullity and its invalidity can be set up whenever and wherever it is sought to be made and even at the stage of execution and also in collateral proceedings, inasmuch as, a defect of jurisdiction, whether, it is pecuniary or territorial, or whether it is in respect of the subject matter of the action strikes at the very authority of the Court to pass a decree and such a defect cannot be cured even by consent of parties. In other words, as per the above decision, lack of jurisdiction since a question of law can be raised at any stage even subsequently and any order or decree passed by a Court with such defect vis-a-vis jurisdiction would be a nullity in the eye of law and thus, cannot be validated even on the consent of the parties. In Ravindar Nath case ibid, it is also held and observed that a question on jurisdiction, if was not earlier raised, cannot stand as a bar to agitate later, while dealing with a matter under the Industrial Disputes Act, 1947. Law is well settled that absence of jurisdiction and an issue in that respect,

since goes to the root of a case, can be raised, if not agitated before, even at the stage of appeal and thereafter and on the ground that there is participation and adjudication in presence of parties, such defect cannot be condoned and waived. In the decision of Silver Line supra, the Hon'ble Delhi High Court held that a question of law as to jurisdiction vis-a-vis order of reassessment without compliance of a notice under the Income Tax Act, 1961 was held to be a subject matter that may be raised before a Tribunal, if it had not been previously agitated. In the present case, the question is, whether, the AA validly initiated assessment under the Act and connected reassessment under the OET Act and raised the demands against the dealer assessee? It is no doubt true that the AA is possessed of the authority to respectively assess and reassess the dealer in terms of the Act and OET Act. What is being claimed is, the AA, without forming an objective opinion, as is mandatorily required under law, proceeded to assess and reassess the dealer and hence, the action to be void ab initio. In order to ascertain, whether, the AA did really form any such opinion, the Tribunal examined the assessment record. Of course, the learned Counsel for the dealer assessee furnished copies of the orders dated 07.11.2013 and onwards passed by the AA, who, on 30.03.2016 by the order of assessment, raised the additional demands. From the assessment record, it is made to realize that the dealer assessee appeared initially and thereafter did not participate which ultimately led to the passing of the orders of assessment dated 30.03.2016. It is alleged that the AA, simply on receipt of the Tax Evasion Report, issued notice to the dealer assessee vide order dated 07.11.2013. The notice dated 07.11.2013 is in the record and the same is perused. From the

order dated 07.11.2013, it is not at all discernible that the AA after considering the Tax Evasion Report and on an independent exercise, formed an objective opinion to reopen the assessment under Section 43 of the Act. In fact, the AA was statutorily obliged to form an opinion for escaped assessment after objectively examining and considering the Tax Evasion Report. It appears that the AA simply received the Tax Evasion Report and then, straightaway proceeded to issue notice to the dealer assessee in order to assess it under Section 43 of the Act. Since there appears no independent application of mind by the AA revealed from the record and as without forming any opinion proceeded to assess the dealer assessee, which in the considered view of the Tribunal, clearly invalidate the proceedings. In order to go for escaped assessment, an objective opinion was required to be formed by the AA which is found to be conspicuously absent on a bare perusal of the order dated 07.11.2013. As earlier discussed, since a question on jurisdiction can be raised even before the Tribunal and having such a question been raised now, the Tribunal reaches at an inescapable conclusion that the observations of the Tax Evasion Report have simply been voiced by the AA who without due application of mind and forming objective opinion proceeded to assess the dealer under Section 43 of the Act which cannot be held as tenable in law.

11. Since it has been held that action under Section 43 of the Act to be invalid, the other grounds which have been raised by the dealer assessee are not discussed by the Tribunal. Similarly, in S.A. No. 61 (ET) of 2018, no separate order is passed as the initiation of proceeding for that matter has to be held as without jurisdiction for the self same reasons.

12. Hence, it is ordered.

13. Thus, the appeals stand allowed. Resultantly, the impugned orders dated 30.11.2017 passed in Appeal Case Nos. AA- 649 KJ 16-17 (OVAT) and AA 650 KJ 16-17 (OET) are hereby set aside. As a necessary corollary, the respective orders of assessment are quashed. The cross-objections filed by the State are accordingly disposed of. The excess tax, if any, paid in the meantime by the dealer assessee shall be refunded as per and in accordance with law.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman