BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 322 (VAT) of 2015-16

(Arising out of order of the learned Addl. CST, South Zone, Berhampur in Appeal No. AA (VAT)-62/2014-15, disposed of on dated 15.10.2015)

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

M/s. Sri Krishna Enterprises,
Good Shed Road, Berhamur ... Appellant

-Versus-

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

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

Date of hearing: 16.09.2021 *** Date of order:11.10.2021

O R D E R

The dealer-appellant has preferred this appeal u/s. 78(1) of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') challenging the order dated 15.10.2015 passed by the learned Addl. Commissioner of Sales Tax, South Zone, Berhampur (hereinafter called as 'first appellate authority') in First Appeal No. AA (VAT)-62/2014-15 thereby confirming the

order of assessment dated 31.10.2014 passed by the Joint Commissioner of Sales Tax, Ganjam Range, Berhampur (in short, 'assessing authority') raising demand of Rs.14,30,269.00 including penalty of Rs.9,53,512.50 u/s. 43 of the OVAT Act for the tax period 01.04.2010 to 31.03.2011.

2. The facts of the case in nutshell are that M/s. Sri Krishna Enterprises, Berhampur is a registered dealer which deals with wholesale distribution of Zuari brand cement being appointed as the consignment agent of M/s. Zuari Cement Ltd., Bangaluru, Karnataka. On receipt of Fraud Case Report (FCR) from DCST, Vigilance, Berhampur for the tax period 4/2010 to 3/2011, proceeding u/s. 43 of the OVAT Act was initiated by the assessing authority, whereafter notice in Form VAT-307 under sub-rule (1) of Rule 50 of the OVAT Rules was served on the dealer fixing the date of assessment to 17.01.2013. In response to such statutory notice, the dealer did not appear for which, another intimation was issued to the dealer fixing the date to 24.07.2013. On that date, Sri Alekha Chandra Sahu, partner of the firm filed a time petition on the ground of illness, on consideration of which the matter was adjourned to 08.08.2013. On 08.08.2013 neither the dealer nor the authorized representative appeared and produced the books of account pertaining to the assessment period 4/2010 to 3/2011 for which another intimation vide letter No. 1330 dated 09.09.2014 was issued to the dealer fixing the date to 18.09.2014, which was received by him on 16.09.2014. In spite of such service of notice, the dealer did not appear for which the assessing authority was constrained to pass order u/s. 43

of the OVAT Act exparte basing on the materials available in the FCR No. 57 dated 31.03.2012 submitted by the DCST, Vigilance, Berhampur. The assessing authority in the absence of books of account relied on the FCR wherein it was observed that that three firms i.e. M/s. Sri Krishna Enterprises (SKE); M/s. Shree Enterprises (Shree) and M/s. Shree Lingaraj Associates are interlinked with each other so far as the business relationships are concerned. Sri Surya Narayan Panda, the proprietor of M/s. Shree Enterprises is also the partner of M/s. Shree Lingaraj Associates and he practically looks after the business of the three firms and the four note books recovered from the business premises of the dealer were maintained only to keep track of the transactions of M/s. Shree Krishna Enterprises and M/s. Shree Lingaraj Associates, both of which have a common partner.

2(a). The pocket note books Sl. Nos.1 and 2 contain all the procurement of Zuari cement of M/s. Sri Krishna Enterprises on the basis of stock transfer advices during 2010-11. Besides, all the sale transactions against which there is mention of tax invoice/retail invoice nos. have been reflected in the books of account of the dealer. This note books also contain reference of receipt of Zuari brand of cement by Railway wagons at Berhampur Railway Station and subsequent despatches/sales. The dealer being the sole consignment agent of the company at Berhampur must be aware of the transactions in respect of Zuari cement at Berhampur. So, there is no iota of doubt that these two note books are exclusively maintained by the dealer

under report for keeping track of the transactions in respect of Zuari brand cement.

2(b). On careful scrutiny of each of the entries with reference to the dealer's books of account, the Vigilance officials found the following important facts :-

(i) On receipt side, apart from the dealer under report, there are other three parties whose names have been noted down. Out of the three parties, M/s. Om Laxmi Narayan Developers Pvt. Ltd. and M/s. Lingaraj Concretes Pvt. Ltd. are registered dealers under Bhubaneswar Circle and Jatni Circle respectively. But the receiving party referred to as 'adhikariji' did not have any credible identity nor could the dealer explain anything about it. So, the receiving transaction noted against 'adhikariji' was included under the receipt of the dealer- M/s. Sri Krishna Enterprises by the Vigilance officials.

(ii) On comparative verification of quantum of Zuari cement received by the dealer as per the note book Sl.No.1 and receipt of Zuari cement as per the books of account maintained, the total receipt of Zuari cement as per the note book by M/s. Sri Krishna Enterprises was 233946 bags and by 'adhikariji' was 3894 and total receipt of Zuari cement as per the books of account by Sri Krishna Enterprises was 221610 leading to total discrepancy of 16230 bags.

2(c). The assessing authority having found total suppression of 16230 bags of cement, which the dealer had not reflected in the books of account for the year 2010-11 calculated the gross value of suppression at Rs.38,14,050.00 which was also considered as escaped turnover of the dealer-

firm for the year 2010-11 on which tax was calculated @ 12.5% which came to Rs.4,76,756.25 against which the dealer had not deposited any tax. The assessing authority also imposed penalty of Rs.9,53,512.50 u/s. 43(2) of the OVAT Act and thus, raised total tax demand of Rs.14,30,269.00 including penalty.

2(d). The dealer-appellant being aggrieved with the aforesaid findings of the assessing authority preferred the appeal before the first appellate authority, who also concurred with the views expressed by the assessing authority and confirmed the order of assessment. Hence, the present second appeal.

3. It was vehemently urged by the learned Counsel for the dealer that the appellant was not given opportunity of hearing and there is violation of principles of natural justice. The appellant could not rebut the charges framed against him in the FCR submitted by the Vigilance officials of sales tax dept because of failure of the forums below to give sufficient opportunity to him to produce the books of account and materials in support of his claim. He further argued that initiation of proceeding u/s. 43 of the OVAT Act is not maintainable in the absence of assessment made u/s. 39,40,42 of the OVAT Act. The forums below have passed the impugned orders being swayed away by the information contained in the FCR submitted by the Vigilance officers. They have not applied their own mind to the facts and circumstances of the case and to the other materials available on record. The impugned orders of both the forums below being biased orders, the same are not sustainable in the eye of law. He submitted to set aside the

orders passed by both the forums below and remit the matter back to the assessing authority in order to give opportunity of hearing to the dealer-appellant to rebut the charges framed against him in the FCR submitted by the Vigilance officers.

4. Per contra, learned Standing Counsel (CT) for the State in terms of cross-objection filed by him argued that both the assessing authority as well as first appellate authority rightly completed the assessment basing on the statutory provisions under the Act and Rules and the fraud case report. He relying on the order of this Tribunal passed in S.A. No. 154 (VAT) of 2011-12 vehemently urged that the forums below did not commit any illegality in passing the order u/s. 43 of the OVAT Act even though no proceeding was initiated u/s. 39,40,42 of the said Act. Similar question came before this Tribunal in the above stated second appeal in which this Tribunal held that the assessing authority was well within his right to make an escaped turnover assessment when it comes to his knowledge that the dealer-assessee had suppressed a portion of its turnover while making self assessment. The assessing authority did not commit any illegality or impropriety in initiating the proceeding u/s. 43 of the OVAT Act to assess the escaped turnover of the dealer-appellant. He further submitted that the record of both the forums below clearly reveals that the appellant was given sufficient opportunity of hearing which he did not avail and tried to avoid the proceeding before the forums below in order to delay and drag the same. The matter cannot be remanded only for the purpose of giving an opportunity of hearing to the dealer-appellant who

deliberately and purposefully avoided to participate in the proceeding before the forums below. He submitted to dismiss the appeal filed by the dealer-appellant.

5. We have heard the learned Counsel for the parties, gone through the grounds taken in the memorandum of appeal vis-a-vis the materials on record. So far as the first contention of the dealer-appellant is concerned that there is violation of principles of natural justice, we are of the humble view that there is no violation of principles of natural justice. The records of both the forums below reveal that the dealer-appellant was given plenty of opportunities to rebut the charges framed against him in the FCR submitted by the Vigilance officers, but it did not avail the opportunities. So for the fault of the dealer-appellant, the forums below cannot be blamed. It appears from the assessment record that notice issued in Form VAT-307 by the assessing authority was served on the dealer on 19.12.2012 fixing the date of assessment to 17.01.2013. In response to such notice, the dealer did not appear. So, another intimation was issued to him fixing the date to 24.07.2013 and in pursuance of such notice, Alekha Chandra Sahu, partner of the firm, prayed for fifteen days time to produce the books of account, on consideration of which the matter was adjourned to 08.08.2013. On that date also none appeared on behalf of the dealer-appellant. So, again another intimation vide letter No. 1330 dated 09.09.2014 issued to the dealer fixing the date of hearing to 18.09.2014 which was served on him on 16.09.2014. In spite of such notice also, the dealer did not turn up and produced the books of account with regard to the charges

framed against him in the FCR for which the assessing authority was constrained to pass the order u/s. 43 of the OVAT Act basing on the materials available in FCR No. 57 dated 31.03.2012. In the appeal also the learned Counsel for the dealer-appellant appeared on 17.04.2015 and filed a petition seeking one month time, on consideration of which the matter was adjourned to 30.04.2015. But on that date, neither the dealer nor his Advocate appeared and produced the books of account and other supporting documentary evidence to rebut the charges framed against him. So, another intimation was issued to the dealer-appellant fixing the date of hearing to 03.07.2015 on which date the learned Advocate on behalf of the dealer appeared and filed petition praying for one month time, on consideration of which the matter was adjourned to 23.07.2015. On 23.07.2015 learned Advocate filed an application to issue summon to one Gopal Chandra Sahu for the purpose of cross-examination which was rejected on merit. The above facts clearly show that the appellant availed sufficient opportunities to rebut the charges framed against him in the FCR, but he failed to avail the said opportunities. Therefore, it cannot be said that there is violation of principles of natural justice. So far as issuing summon to Gopal Chandra Sahu is concerned, the dealer-appellant also could not satisfy this Tribunal the purpose of cross-examining Sri Sahu relating to the note books recovered from his (the dealer's) premises. It is the dealer who is to explain the discrepancies noticed in the books of account and transactions reflected in the note books which are not reflected in the books of account. Sri Gopal

Chandra Sahu has nothing to do with it. So, the first appellate authority rightly rejected the prayer of the dealer-appellant to issue summon to Sri Sahu for the purpose of cross-examination. A witness can be examined only to prove or disprove certain fact and for this purpose, the evidence of witness must be relevant. In the instant case, the dealer-appellant could not satisfy this Tribunal how the evidence of Sri Sahu is relevant to rebut the charges framed against him in FCR by the Vigilance officers of Sales Tax Department. Therefore, we are of the humble opinion that the first appellate authority did not commit any illegality in refusing the prayer of the dealer to summon Sri Gopal Chandra Sahu for the purpose of cross-examination.

6. The next contention that was raised by the dealer-appellant is that in absence of proceeding u/s. 39,40.42 of the OVAT Act, initiation of proceeding u/s. 43 of the OVAT Act is illegal and unsustainable in the eye of law. To appreciate the contention raised by the learned Counsel for the dealer-appellant, the provisions contained in Sections 39,40 and 42 of the OVAT Act are referred below :-

> ***"39. Self assessment.-***
>
> (1) Subject to provisions of sub-section (2), the amount of tax due from a registered dealer or a dealer liable to be registered under this Act shall be assessed in the manner hereinafter provided, for each tax period or tax periods during which the dealer is so liable.
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> (2) If a registered dealer furnishes the return in respect of any tax period, it shall be deemed to be self-assessed.
>
> ***40. Provisional assessment.-***
>
> (1) Where a registered dealer fails to furnish the return in respect of any tax period within the prescribed

time, the assessing authority, if he is satisfied that provisional assessment is necessary in that case, may proceed to assess the dealer provisionally for that period, notwithstanding anything contained in Section 42.

(2) The provisional assessment under sub-section (1) shall be made on the basis of past return or past records and, where no such returns or records are available, on the basis of information received by the assessing authority and in every such case, the assessing authority shall direct the dealer to deposit the amount of tax so assessed in such manner and by such date as may be prescribed.

(3) If the dealer furnishes return along with evidence showing full payment of the tax due and the interest and penalty, payable, if any, under Section 34 on or before the date specified under sub-section (2), the provisional assessment made under sub-section (1) shall stand revoked on the date on which such return is filed by the dealer.

(4) Nothing contained in this section shall prevent the assessing authority from making assessment under Section 42 and any tax, interest or penalty paid against the provisional assessment under this section shall be adjusted against tax, interest or penalty payable on such assessment.

42.Audit assessment.-

(1) Where the tax audit conducted under sub-section (3) of Section 41 results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit, evasion of tax or contravention of any provision of this Act affecting the tax liability of the dealer, the assessing authority may, notwithstanding the fact that the dealer may have been assessed under Section 39 or Section 40, serve on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report, requiring him to appear in person or

through his authorized representative on a date and place specified therein and produced or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.

(2) Where a notice is issued to a dealer under sub-section (1), he shall be allowed time for a period of not less than thirty days for production of relevant books of account and documents.

(3) 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), the assessing authority may proceed to complete the assessment to the best of his judgment basing on the materials available in the Audit Visit Report and such other materials as may be available, and after causing such enquiry as he deems necessary.

(4) Where the dealer to whom a notice is issued under sub-section (1), produces the books of account and other documents, the assessing authority may, after examining all the materials as available with him in the record and those produced by the dealer and after causing such other enquiry as he deems necessary, assess the tax due from that dealer accordingly.

(5) Without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under sub-section (3) or sub-section (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-section.

(6) Notwithstanding anything contained to the contrary in any provision under this Act, an assessment under this section shall be completed within a period

of six months from the date of service of notice issued under sub-section (1) along with the Audit Visit Report.

Provided that if, any reason, the assessment is not completed within the time specified in this sub-section, the Commissioner may, on the merit of each such case, allow such further time not exceeding six months for completion of the assessment proceeding.
Provided further that if the Commissioner feels it necessary to do so for good and sufficient reasons, he may allow such further time not exceeding another six months beyond the time allowed under the first proviso for completion of the assessment proceeding.

(7) * * *"

On conjoint reading of the aforesaid three provisions, we do not find any statutory bar in initiating a proceeding U/s. 43 of the OVAT Act without initiating proceeding U/s. 39,40 42 of the said Act. The fraud case report clearly depicts that the dealer-assessee had indulged itself in some business besides its disclosed business about which it did not mention anything in its return furnished during those relevant periods. Though it (the dealer-assessee) made under-assessment and submitted the returns, the same somehow did not attract the notice of the authority concerned at that relevant time. But certainly this can never preclude the authority from initiating a proceeding under Sec. 43 of the OVAT Act if it subsequently comes to their notice that there was evasion of tax by the assessee concerned. Section 43 of the OVAT Act contemplates a situation which would come to the notice of the authority concerned at a later stage regarding the suppression or under-assessment of any sort by the said assessee and proceeding to be followed upon

aforesaid knowledge cannot be obstructed merely on the ground that the assessing authority had never intimated the assessee about acceptance of the returns already submitted by it taking the said self-assessment of the dealer-assessee as incomplete. Neither Section 38 nor Section 39 of the OVAT Act contemplates a situation that after submission of returns by way of self assessment it is obligatory on the part of the authority concerned to intimate that the returns furnished, being correct, are accepted. These provisions of the OVAT Act rather provides that on scrutiny of returns if any mistake is detected with regard to correctness of calculation, application of correct rate of tax and interest, claim of input tax credit made therein and full payment of tax and interest payable by the dealer for such period, then the assessing officer would intimate the assessee for due compliance. Therefore, in the facts and circumstances as revealed in this case we find no strength in the argument advanced by the learned Counsel for the appellant to hold that the assessing authority had transgressed his power or jurisdiction to make an assessment u/s. 43 of the OVAT Act. In the instant case the assessing officer was certainly well within his right to make an escaped turnover assessment when it came to his knowledge on receipt of the fraud case report that the dealer-assessee had suppressed a portion of its turnover while making self assessment.

7. On perusal of the record we find that the Vigilance officers during visit to the business premises of the dealer-appellant recovered four nos. of small pocket note books which contained transactions i.e. receipt and despatches of cement

i.e. Zuari brand Sl. Nos. 1 and 2 and Deccan brand Sl. Nos. 3 and 4. The note book Sl. No. 1 contained entries of receipt of Zuari brand cement (of different specifications/grades) by the dealer under report through Railways and subsequent sells to different parties on datewise basis relating to the year 2010-11. It also contained reference of transfer of stock to Jagannathpur godown, whereas the note book Sl. No.2 contained corresponding receipt of stock from Berhampur depot and subsequent sales on datewise basis during the same year. These two numbers of books taken together depicted dealer's transaction of Zuari cement received from outside the State on stock transfer basis as well as subsequent sales during the period 2010-11. Besides that, the books also contained transactions in respect of Zuari cement purchased from other source. The note book Sl. Nos. 3 and 4 contained transactions relating to Deccan cement with regard to Berhampur stock point and Jagannathpur godown/stock yard. In case of Zuari cement relating to receipt entries, there is clear cut mention of name of receiving party such as SKE (stands for Sri Krishna Enterprises), OMLD (stands for Om Laxmi Narayan Developers Pvt. Ltd.), Lingaraj Concrete (for M/s. Lingaraj Concrete Pvt. Ltd., Jatni, Khurda and Adhikariji). In case of Zuari brand major receipts were found entered against Sri Krishna Enterprises, but in case of Deccan brand, there was no reference of any party receiving the R.R. quantity. In case of Zuari cement, note book Sl. Nos. 1 and 3, most of the receipt quantities noted against SKE and most of the sales against which there is reference of sales invoice number were found

reflected in the books of account of the dealer. The Vigilance officers detected some of the purchase transactions and good number of sales transaction reflected in the pocket note books were found missing in the books of account of the dealer. On the other hand, none of the transactions entered in the note book Sl. Nos. 3 and 4 were found incorporated in the books of account of the dealer. Sri Sahu, managing partner of the firm, was duly confronted by the Vigilance officers with all four nos. of pocket note books and was asked to explain the transactions contained in those note books and his association with the same. Sri Sahu explained that the tax invoice and retail invoice mentioned in the note books were issued by their firm and had been reflected in their books of account. But, he did not advance any explanation on transaction of receipts and sales which had not been reflected in the books of account. Sri Sahu feigned ignorance about the transaction of receipts and sales which did not find place in their books of account. Sri Sahu further stated that most of the sales had been made to M/s. Sree Enterprises, Berhampur which had been referred to as 'Shree' in note book Sl. No.1 and 2. So far as the note books Sl. No. 3 and 4 are concerned, Sri Sahu explained that M/s. Shree Lingaraj Associates, Goods Shed Road, Berhampur is the consignment sale agent of M/s. Deccan Cement Ltd., Hyderabad and also admitted that he and Surya Narayan Panda are two partners of the firm dealing in Deccan brand cement. On verification of the system generated sale register of M/s. Shree Lingaraj Associates, it transpired that all the sales transaction bearing the tax invoice Sl. No./retail invoice Sl. No.

as per note book, had been clearly reflected in the sales register. These two note books contained the transaction of Deccan brand cement of M/s. Shree Lingaraj Associates.

7(a). The DCST, Vigilance, Berhampur opined that three firms M/s. Sri Krishna Enterprises (SKI); M/s. Shree Enterprises (Shree) and M/s. Shree Lingaraj Associates were interlinked with each other so far as the business relationships are concerned. Sri Surya Narayan Panda, proprietor of M/s. Shree Enterprises was looking after the business of all the three firms. The four note books were maintained to keep track of the transactions of M/s. Shree Krishna Enterprises and M/s. Shree Lingaraj Associates, both of which have a common partner.

7(b). The pocket note book Sl. Nos. 1 and 2 incorporated all the procurements of Zuari cement of M/s. Sri Krishna Enterprises on the basis of stock advices during the year 2010-11. All the sale transactions against which there is mention of tax invoice/retail invoice nos. were reflected in the books of account of the dealer. All the note books contained reference of receipts of Zuari band of cement by Railway Wagons at Berhampur Station and subsequent despatches and sales. The dealer being the sole consignment agent of the Company at Berhampur must be aware of all transactions of Zuari cement at Berhampur. These two note books were exclusively maintained by the dealer-appellant under report, to keep track of transaction in Zuari brand cement.

7(c). On careful scrutiny of each of the entries with reference to dealer's books of account, the Vigilance officers found suppression of 16230 bags of cement which the dealer

did not reflect in the books of account for the year 2010-11. Out of the suppressed quantity of 16230 back of Zuari cement, 3894 bags were procured in the fictitious name of 'adhikariji'. Accordingly, the gross value of suppression was determined at Rs.38,14,050.00 which was also considered as the escaped turnover of the dealer for the year 2010-11.

7(d). The dealer-appellant could not explain such discrepancies in the books of account before the forums below nor could he produce any material before this Tribunal to explain such discrepancies. In course of hearing the learned Counsel for the dealer-appellant harped on the point that the assessment proceeding u/s. 43 of the OVAT Act was not maintainable in the absence of proceeding u/s. 39 ,40, 42 of the OVAT Act. In the preceding paragraph, we categorically held that it is not required under law that in order to initiate proceeding u/s. 43 of the OVAT Act, proceeding u/s. 39 ,40, 42 of the OVAT Act must be started. This was also the view of this Tribunal in S.A. No. 154 (VAT) of 2011-12 (M/s. Eastern Aluminium Vs. State of Orissa) which has not been set aside till yet. The learned Counsel for the appellant failed to substantiate any of the contentions raised in course of hearing of the second appeal. The fora below rightly basing on the Fraud case report raised tax demand against the present appellant. We do not find any infirmity or impropriety in such demand warranting interference of this Tribunal.

8. In view of the foregoing discussions, the second appeal filed by the dealer-appellant being devoid of merit stands dismissed and the impugned order of the first appellate

authority confirming the order of assessment is hereby affirmed. Cross-objection filed by State-Respondent is disposed of accordingly.

Dictated & Corrected by me

(A.K. Das)
Chairman

(A.K. Das)
Chairman

I agree,

(Sweta Mishra)
2nd Judicial Member

I agree,

(M. Harichandan)
Accounts Member-I