BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 251 (VAT) of 2018
&
S.A. No. 152 (ET) of 2018

(Arising out of orders of the learned JCST (Appeal), Ganjam Range, Berhampur in Appeal Nos. AA-(V) 30/2014-15 & AA-(E) 06/2014-15, disposed of on dated 11.09.2018)

Present: **Shri A.K. Das, Chairman**

M/s. Sri Krishna Drinks,
Ankushpur, Berhampur,
Dist. Ganjam ... Appellant

-Versus-

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

For the Appellant : Sri B.B. Panda, Advocate
For the Respondent : Sri M.L. Agarwal, S.C. (CT)

Date of hearing: 01.06.2022 *** Date of order: 21.06.2022

O R D E R

Both these second appeals are taken up together for hearing and are disposed of by this composite order as both the cases involve common question of facts and law.

2. The dealer-assessee has filed S.A. No. 251 (VAT) of 2018 assailing the order dated 11.09.2018 passed by the learned Joint Commissioner of Sales Tax (Appeal),

Ganjam Range, Berhampur (hereinafter called as 'first appellate authority') in Appeal No. AA-(V) 30/2014-15 thereby confirming the order of assessment dated 30.07.2014 passed by the Sales Tax Officer, Ganjam-II Circle, Berhampur, (in short, 'assessing authority') raising an extra demand of ₹9,82,623.00 for the tax period 01.04.2009 to 31.03.2012 in the assessment framed u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act').

3. The dealer-assessee also filed S.A. No. 152 (ET) of 2018 assailing the order dated 11.09.2018 passed by the same first appellate authority in Appeal No. AA-(E) 06/2014-15 thereby confirming the order of assessment dated 30.07.2014 passed by the same assessing authority raising an extra demand of ₹1,61,749.00 for the tax period 01.04.2009 to 31.03.2012 in the assessment framed u/s. 10 of the Odisha Entry Tax Act, 1999 (in short, 'OET Act').

4. The facts common in both the second appeals are that the dealer-assessee runs an aqua plant for packaging drinking water in plastic polythene pouch with containing capacity of 250 ml. after water analysis, testing, filtering and processing the raw water drawn from the water

sources like deep well which it sales in Sohela, Bijepur, Barpalli, Binka and Godbhanga in the district of Bargarh. Further, the dealer also used to purchase and sale butter milk as tax exempted goods. The STO, Investigation Unit, Sambalpur paid a surprise visit to the business premises of the dealer-assessee located at Bijepur on 23.03.2012 at about 2.30 pm and conducted an enquiry about daily production and sale of package drinking water, maintenance of books of account & records and tax compliance. On demand, the supervisor and the person-in-charge of the business could not produce full set of books of account to the STO except production register and raw water testing register. The STO, Investigation Unit, Sambalpur during raid recovered one Vinayak brand long exercise book containing 22 written pages and 24 nos. of loose handwritten slips and undertook physical stock of goods held in the business premises in presence of the supervisor of the firm. Later one Babula Panda being authorised by the proprietress of the firm appeared before the STO, Investigation Unit, Sambalpur in the office of the DCCT, Enforcement Range, Sambalpur on 22.06.2012 and produced the books of account like purchase register and sale register. The STO, Investigation

Unit, confronted the contents of the seized documents to Sri Panda and recorded his statement on SA. On confrontation, it was explained by Sri Panda that the contents of the recovered documents represent the rough estimations of the firm, not sales transaction as treated. He further replied that they have not issued any sale bills for alleged sales transaction as the same were rough estimations.

4(a). The investigating officer on scrutiny of the seized documents found that the dealer-appellant effected sale of packaged drinking water (100 unit packs of 250 ml. contained in polythene pouch with unit price of each unit is ₹1.00) on different dates to different parties of Godbhaga, Binka, Bijepur, Atabira, Bhatli, Tarbha and Sohela. No sale bills could be produced for such sales. It was reported in the Fraud Case Report (FCR) No. 07 dated 26.06.2012 that there was sales suppression of 10,379 bags (each bag contained 100 unit of pouches) of packaged drinking water for an amount of ₹10,37,900.00. The STO, Investigation Unit, on verification of seized handwritten paper slips further unearthed that those slips contained datewise and quantitywise sale of packaged drinking water to different parties in the year 2011-12 and the amount received from

them. On being confronted about non-issuance of tax invoice for the said transactions, the dealer stated that due to leakage of water and butter milk, no sale bills had been issued, which was not accepted by the STO, Investigation Unit. The investigating officer reported that the appellant committed sale suppression of ₹13,88,700.00 vide entries in 24 nos. of loose handwritten slips. The dealer-assessee was involved in clandestine nature of business activities to suppress the turnover of sales of ₹24,26,600.00 in order to avoid payment of tax. So, he suggested for assessment u/s. 43 of the OVAT Act and Section 10 of the OET Act.

4(b). On receipt of FCR No. 07 dated 26.06.2012 from the DCCT, Enforcement Range, Sambalpur, the assessing authority initiated proceedings u/s. 43 of the OVAT Act and u/s. 10 of the OET Act and issued notices for assessment. Inspite of due service of notices, the dealer-assessee did not appear for which the assessing authority proceeded to complete the assessment exparte following the best judgment principle basing on the materials on record. Learned assessing authority accepted sales suppression of ₹24,26,600.00 and completed the assessment u/s. 43 of the OVAT Act raising an extra demand of ₹9,82,623.00 under

the OVAT Act and demand of ₹1,61,749.00 under the OET Act.

4(c). The dealer-assessee being aggrieved with the aforesaid demands under both the Acts raised by the assessing authority, filed appeals before the first appellate authority, who also confirmed the orders of assessment holding that the explanation offered by the dealer to explain the allegations made in the FCR is only an afterthought and that by the date of completion of assessment u/s. 43 of the OVAT Act, the dealer-appellant having already filed return for the month of March, 2012, though was not filed by the date of visit on 23.03.2012, the argument of non-completion of self-assessment before initiation of proceeding u/s. 43 of the OVAT Act was not acceptable. The dealer-assessee being further aggrieved with the aforesaid findings of the first appellate authority, preferred the present second appeals.

5. 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 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 would not have been

initiated u/s. 43 of the OVAT Act when the dealer was not self-assessed u/s. 39 of the said Act. The investigating officer visited the business premises of the dealer-assessee on 23.03.2012 and by the said date, the dealer had not filed the return as required under the statute as filing of return was not due by the said date. The STO of Investigation Unit, Sambalpur paid surprise visit to the business premises of the appellant on 23.03.2012 and submitted the FCR alleging sales suppression on the basis of materials available as on that date. But, unfortunately the assessing authority initiated escaped turnover assessment for the period from 01.04.2009 to 31.03.2012, which was not permissible under law. The opinion formed by the assessing authority regarding sales suppression is not based on the materials on record but being biased by the FCR submitted by the STO, Investigation Unit, Sambalpur. It proceeded exparte with the escaped turnover assessment on the basis of materials collected till 23.03.2012 on which date filing of return was not due. He further argued that the assessing authority should have accepted the explanation offered by the dealer-assessee as to the alleged sales suppression and should have accordingly dropped the allegations contained therein.

He submitted that as per the usual trade practice, they used to despatch poly pouch drinking water packet to different sale counters, which is subject to verification of leakage and breakage at their end and they used to issue the sale bills thereafter. Therefore, some discrepancies were found in the books of account and the documents alleged to have been recovered from his business premises. He strenuously argued that on the basis of slips recovered from the business premises of the assessee, it cannot be burdened with tax liability without any proof that there was actual sales suppression. When the dealer disowned the slips, the revenue should have proved that the assessee had actually sold the materials as per the noting in the slips and the same were not accounted for in the books of account. Relying on the decision of the Hon'ble High Court on best judgement assessment reported in [1994] 94 STC 105 (Ori.), he argued that after denial of the alleged transactions by the dealer-assessee, the assessing authority was obliged to conduct a full-proof enquiry to ascertain the correctness of the adverse materials and for that purpose, the third party was required to be summoned. The assessing authority without making any independent enquiry has passed the

assessment order only on the basis of the allegations contained in the FCR for which the impugned orders are unsustainable in the eyes of law. The first appellate authority also without forming any independent opinion has simply confirmed the orders of assessment, therefore the order of the first appellate authority was unsustainable. He submitted to set aside the impugned orders passed under the OVAT Act and OET Act and allowed the second appeals.

6. Per contra, learned Standing Counsel (CT) for the revenue supporting the impugned orders of the forums below in terms of cross-objections filed by it, vehemently urged that the assessing authority accepted the allegations contained in the FCR submitted by the DCST, Enforcement Range, Sambalpur for the reason that the assessee did not produce the books of account and the allegations regarding alleged sales transaction were established. When the documents seized were recovered from the business premises of the dealer-assessee, the burden was on it to explain the transactions contained in those documents. The assessing authority did not commit any illegality in accepting the FCR in the absence of any rebuttal evidence from the side of the dealer. He further

argued that the explanation offered by the dealer regarding alleged sales suppression was an afterthought and no material was produced to substantiate such plea. When the dealer effects sales of polythene pouch drinking water, it is required to issue sale invoices to the purchaser and account for the same in different books of account maintained by it and in case of return of polythene pouch drinking water, document to that effect should have been maintained to substantiate how much quantity of water pouch was sold to the purchaser and how much was returned due to leakage and breakage. In the absence of any documentary evidence, the inference would be that the entire transactions reflected in the documents recovered from the business premises of the dealer-assessee were genuine and actual sale had, in fact, taken place as per the contents of the said documents. The dealer-assessee has also not taken any plea before the forums below that the slips were not recovered from its business place and it did not also disown such documents recovered from its business premises. Therefore, under such circumstance, the assessing authority correctly accepted the FCR alleging sales suppression by the dealer-assessee and assessed the dealer accordingly. When the dealer furnished

the returns as per the requirement of law, the same amounts to self-assessment of the dealer and there is no bar in initiating proceeding u/s. 43 of the OVAT Act for assessment of escaped turnover. The allegation of the dealer-assessee was that it was not self-assessed u/s. 39 of the OVAT Act is false and imaginary and such plea has been taken subsequently in order to evade payment of tax. The first appellate authority also on thorough scrutiny of the materials on record found the assessing authority to have assessed the dealer-assessee correctly and accordingly, it confirmed the orders of assessment. There is no illegality or impropriety in the impugned orders of the forums below warranting interference of this Tribunal.

7. I have heard the rival contentions of the parties, gone through the grounds raised in memorandum of appeal vis-a-vis the impugned orders of the forums below and the materials on record. The dispute that emerges from the rival contentions of the parties is whether the assessing authority was correct in its approach in initiating proceeding u/s. 43 of the OVAT Act without forming an opinion regarding self-assessment of the dealer-assessee u/s. 39 of the OVAT Act and whether in the facts and circumstances of

the present case the findings of the forums below that the sales suppression as alleged in the FCR stood established, is sustainable in the eyes of law.

7(a). Before addressing these two issues, it is relevant to take note of some material facts for proper adjudication of the dispute. Undisputedly, the dealer-assessee runs an aqua plant for packaging drinking water in plastic polythene pouch with containing capacity of 250 ml. of water and sells the same in different places of Bargarh district. The STO, Investigation Unit, Sambalpur paid a surprise visit to the business premises of the dealer-assessee located at Bijepur on 23.03.2012 at about 2.30 pm and conducted enquiry about production and sale of packaged drinking water. The STO, Investigation Unit, Sambalpur during raid recovered one Vinayak brand long exercise book containing 22 written pages and 24 nos. of loose handwritten paper slips and also undertook physical stock of goods. It, on verification of the recovered documents, opined there was sales suppression to the tune of ₹13,88,700.00 for the year 2011-12 and calculated and reported total established sales turnover of ₹24,26,600.00. There is no dispute in the present case by the date of visit,

the return for the month of March, 2012 was not due. Therefore, it was not filed by 23.03.2012 on which date the STO, Investigation Unit, Sambalpur visited the business premises of the dealer. The assessment record reveals that the FCR was received by the STO on 07.10.2012 and notices in Form VAT-307 and E-32 were issued to the dealer-assessee fixing the date to 21.11.2012.

7(b). Now, it is to be seen whether the assessing authority was correct in its approach in initiating proceeding u/s. 43 of the OVAT Act in the aforesaid factual background of the case. Section 43 of the OVAT Act, as it stood prior to 01.10.2015, provides that –

> "43. Turnover escaping assessment –
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> (1) Where, after a dealer is assessed under Section 39, 49, 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 –
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> (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."

7(c). The Hon'ble High Court in case of **M/s. Keshab Automobiles Vs. State of Odisha (STREV No. 64 of 2016 decided on 01.12.2021)** 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."

7(d). In view of the law expounded by the Hon'ble Court in the aforesaid decision, I am of the considered view 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, I 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 while issuing notice for escaped turnover assessment by its order dated 20.09.2013 observed that the dealer having already filed self-assessment return u/s. 39 of the OVAT Act for the tax period 01.04.2009 to 31.03.2012, which has been accepted as self-assessed, and there is suppression of turnover by the dealer, notices be issued to it u/s. 43 of the OVAT Act in Form VAT-307 and Form E-32 under the OET Act. 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 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 is required to examine the materials on record to form an opinion that the dealer has 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 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 broken tax period 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. Moreover, the assessment order has been passed exparte and the dealer has not got due opportunity of hearing before the forums below to substantiate his contention. Therefore, I feel it expedient, in the interest of justice, to remit the matter back to the assessing authority to form an opinion on the basis of materials on record as to whether there is completion of assessment u/s. 39, 40, 42 or 44 of the OVAT Act, which is a pre-condition for initiation of assessment u/s. 43 of the OVAT Act and thereafter to decide whether to proceed with the escaped turnover assessment or not. The other issue raised by the learned Counsel for the dealer-assessee whether the authorities below were correct in their approach in holding that sales suppression as alleged in the FCR stood established, is to be examined afresh by the assessing

authority giving an opportunity of hearing to the dealer-assessee and considering his submissions and the relevant documents to be cited by him. So far as SA No. 152 (ET) of 2018 is concerned, the same is also required to be remitted back to the assessing authority to recompute the tax liability afresh as the findings in the VAT assessment proceeding will have a bearing on the ET assessment proceeding.

8. For the foregoing discussions, the appeals under both the Acts are allowed and the impugned orders of the forums below are hereby set aside. The matters are remitted back to the assessing authority to reassess the dealer-assessee in accordance with law keeping in view the observations made herein above within a period of three months from the date of receipt of this order. Cross-objections are disposed of accordingly.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman