

gamcha etc. on wholesale basis by effecting purchases from outside the State. Consequent open receipt of a fraud case report arising out of surprise visit of the Sales Tax Officer, Sambalpur-I Circle, Sambalpur along with the Enforcement Officials of Sambalpur Enforcement Range to the instant dealer's place of business. Verifying the books of accounts of the dealer-appellant with reference to the physical stock of goods available inside the place of business and recovering and seizing some documents relating to the business, alleged suppression of purchases of goods amounting to Rs.8,83,072.00 and suppression of sales amounting to Rs.61,06,456.00. By adding 20% towards margin of profit to the alleged suppression of purchases the ld. assessing authority assessed the dealer exparte on merit determining the total suppression of goods amounting to Rs.71,66,140.00 as gross turnover as well as taxable turnover U/s.43 of the OVAT Act due to failure on the part of the dealer-appellant in participating in hearing for assessment. Accordingly the ld. assessing authority assessed the dealer-appellant which resulted in demand of Rs.8,59,929.00 including penalty imposed U/s.43(2) of the OVAT Act. This led the instant dealer to prefer appeal against the order before the learned first appellate authority.

3. Being aggrieved, the dealer-appellant assailed the order of the ld. assessing authority as totally illegal and liable to be quashed as the ld. assessing authority has framed the order of assessment on the basis of fraud case report U/s.43 of the OVAT Act without passing the order U/s. 39,40,42 or 44 of the Act. It has been contended that the instant dealer has never received any notice issued in Form VAT-307 and the order was passed on exparte without application of mind and without determination of gross turnover and taxable turnover. The ld. first appellate authority considering the contentions and the orders of the Hon'ble Court cited on behalf of the instant dealer set-a-side the assessment order with a direction to take up reassessment as the appellant-dealer was not provided with any opportunity for production of accounts and

the order was passed on *ex parte* which is violative of principle of natural justice.

4. Being further aggrieved the instant dealer approached this Tribunal with the following grounds of appeal:-

- (i) The order of assessment passed *EX PARTE* U/s. 43 of the OVAT Act 2004, relating to the period 01.04.2009 to 31.03.2011 by the Dy. Commissioner of Sales Tax Sambalpur I Circle, Sambalpur is bad in law and facts of the case.
- (ii) The Appeal Order passed by the Id. first appellate authority setting aside the order of assessment for fresh assessment is unjustified as the same should had been quashed as there has been total violation of the rules to be followed before issue of the notice and the assessment made thereafter is also liable to be quashed.
- (iii) When there were all the documents available in the record to prove that the assessment has been made in gross violation of the Act & the Rules and the order of the first appellate authority setting aside the order of assessment for fresh assessment is uncalled for as the first appellate authority after considering all these aspects should have quashed the assessment proceedings itself.
- (iv) There has been misrepresentation of facts by the Sales Tax authorities by not considering the statements of the appellant at the time of verification of books of account and the order passed by the Id. Dy. C.S.T. on such report is totally illegal and liable to be quashed.
- (v) As is evident from the order of assessment issued in FORM-312 the Id. Dy. C.S.T. has not determined the GTO or the TTO but has simply proceeded to compute the tax liability and imposition of penalty as per directions given in the alleged fraud report submitted by the Sales Tax Authorities as such the order passed is liable to be quashed.

(vi) The imposition of penalty is totally illegal as no tax is due at the time of passing of the order and the penalty is to be levied on the tax due.

5. Shri S. Tiberwal, the Id. Counsel appearing for the dealer has reiterated the grounds raised in the grounds of appeal filed and furnished a written submission contending that the Id. first appellate authority has not at all considered the vital issue regarding the legality of the assessment order which was argued in written submission. He has vehemently opposed that the notice in Form VAT-307 is to be issued as per the guideline of the Rule 50(1) of the OVAT Act after the assessment has been completed U/s.39, 40, 42 or 44 and not prior to that. He has relied upon the decision of the Hon'ble High Court of Orissa in the case of M/s. Balaji Tobacco Stores Vrs. STO (2015) 81 VST 170(Orissa) and similar view taken by the Madras High court in the case of State of Tami Nadu Vrs. Afra Car jewels (2014) 76 VST 343 (Mad). He has also cited the decision of Hon'ble High court of M.P. (Indore Bench) in the case of Grasim Industries ltd. Vrs. Addl. Commissioner of Commercial Taxes and Another (2009) 25 VST 596 (M.P.) that reassessment proceedings for escapement of turnover cannot be initiated before communication of the original assessment order to the dealer. Further it has been pointed out that Xerox of Certified copy of the Order-Sheet is itself explanatory wherein no opinion of the assessing officer has been formed nor such order has been passed for issue of notice. It has also been stated that sales tax officer should form his own opinion and the same should be clearly mentioned in the Order-Sheet as well as in the notice issued but the records clearly reveal that no such procedure has been followed. The Id. Advocate has cited the decision of Hon'ble Orissa High Court in the case of Suburban Industries Kalinga Pvt Ltd. & Another Vrs. STO, BBSR and Another (1993) 90 STC 280 (Ori) and the view taken by the Delhi High Court in the case of Samagya Consultants Pvt. Ltd. Vrs. CST and Another (2001) 122 STC 512 (Delhi). Hence the Id. Advocate on

behalf of the dealer contended for the assessment order to be quashed.

6. Shri S.K. Pradhan, Ld. Addl. Standing Counsel (C.T.) reiterated the contentions contained in the memo of cross objections filed and he has placed reliance on the matter of M/s. Nilachal Ispat Nigam Ltd. Vrs. State of Odisha regarding reassessment U/s.43 of the OVAT Act in absence of communication of assessment order U/s. 39, 40, 42 and 44 of the Act passed in W.P.(C) No.22343 dated 07.12.2016 and the judgment passed by the Division Bench of the Hon'ble Supreme Court of India in Appeal (Civil) on 17.02.2003 in the case of Commissioner of Sales Tax and Ors Vrs. M/s. Subhash & Company in upholding that it is open to appellate authority in appropriate cases to set aside the order and require the ld. assessing officer to decide the case de novo for the sake of adhering to the principles of natural justice.

Rival contentions above raised the following questions of law and fact for decision in this appeal:-

- A. Whether the proceeding U/s. 43 of the OVAT Act initiated by the assessing authority in the case in hand is illegal and not maintainable since not proceeded by any assessment U/s.39,40,42 and 44 of the Act?
- B. Whether non-mention of reason for reassessment in the order sheet or notice render the proceeding of the assessment not maintainable?

While arguing on point at A above, the ld. Counsel for the dealer vehemently argued that, in this case that there was no assessment by any of the provision U/s.39,40,42 and 44 of the Act. So, the proceeding u/s.43 of the OVAT Act has no legs to stand hence the assessment is not tenable. He has relied upon the decision of the Hon'ble High Court in case of Balaji Tobacco Stores Vrs. S.T.O. (2015) 81 VST 170 (Ori) in support of his argument.

On the contrary, Shri S.K. Pradhan, Id. Addl. Standing Counsel (C.T.) placed his reliance in the matter of M/s. Nilachal Ispat Nigam Ltd. Vrs. State of Odisha in W.P.C. No.22343 dated 07.12.2016 and vehemently argued that, this being the latest authority deciding the disputed question, it got overriding effect on the authorities relied by the dealer. Drawing attention to the para-12 of the decision, Shri Pradhan argued that, in this case the dealer should be treated as self assessed as per section 39 of the Act. In that event, it is inconceivable to accept that the proceeding u/s.43 of Act has no legs to stand.

The language of Section-43 of the OVAT Act read with Rule 50 of the OVAT Rules contemplates that assessment under Section 43 of the OVAT Act can be made after a dealer is assessed either under Section 39,40,42 or 44 for any tax period, on the basis of information in possession of the assessing authority, and he 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 (i) escaped assessment, or (ii) has been under assessed, or (iii) has been assessed at a rate lower than the rate at which it is assessable, or (iv) that the dealer has been allowed. (a) wrongly any deduction from his turnover, (b) input tax credit to which is not eligible.

Reverting to the case the contention of the Id. Counsel for the dealer is not disputed to the extent that the escapement of turnover cannot be predicted before the assessment is completed. Therefore, only in case of completion of assessment by any of the provision U/s.39,40,42 and 44 of the Act the escaped assessment as provided under 43 can be taken place. The case of ***M/s. Nilachal Ispat Nigam Ltd. (supra)***, the Hon'ble Court has taken consideration of a proceeding U/s. 10 of the OET act and held it:

“under the taxation rule the assessee is required to furnish self assessment and the authority is required to assessee the same and there is no provision provided under the Act to communicate in case of acceptance of the assessment. Although

under the provision of Orissa Value Added Act under Section 38 read with Section 7(10) each and every return in relation to any tax period furnished by a registered dealer shall be subject to scrutiny by the assessing authority to verify the correctness of the calculation, application of correct rate of tax and interest etc. and in case of any mistake, detected in course of scrutiny, the assessing authority shall serve a notice in the prescribed form as we find even from the provision of Section 7 or sub-section (11), then the assessment made by the registered dealer under the provisions of Section-9 will be said to be accepted.”

So far as the point at B above is concerned it is a matter of fact that even though the order sheet is silent about any opinion of the ld. assessing authority it is evident from the notice issued for assessment of tax on escaped turnover U/s.43 of the OVAT Act that the dealer has already been assessed U/s.39 on the date of filing returns and the notice was issued requiring production of particular accounts and documents in connection with the period in question due to escaped assessment for the tax period(s). Hence, it is not proper to say that the ld assessing authority has not formed any opinion in initiating reassessment proceedings and completion thereon. The Hon’ble Apex Court in case no appeal (civil) 1374 of 2003 in case of Commissioner of Sales Tax & Ors Vrs. M/s. Subhash & Company considering the case that the challenge was made that the respondent-assessee before a Division Bench on the ground that after having held that there was no valid service of notice, the direction for de novo assessment was untenable. It was further contended that the challenge on the question of limitation was precluded by the direction. The Hon’ble Apex Court has held that “in a given case when the principles of natural justice are stated to have been violated it is open to the appellate authority in appropriate cases to set-a-side the order and require the Assessing Officer to decide the case de novo.”

7. Heard the rival contentions. Gone through the grounds of appeal, cross objections filed by the respondent-State, impugned orders of appeal and assessment, written submission filed on behalf of the dealer-appellant on the date of hearing of this appeal, photocopies of orders of the Hon'ble Courts filed by the Id. Addl. Standing Counsel (C.T.) in course of hearing before the Bench, records of appeal and assessment (without fraud case report). It is marked that there is no incongruity in the order passed by the Id. first appellate authority directing the Id. assessing authority to reassess the dealer. Considering the contentions of the instant dealer as well as the order passed on ex parte without verification of allegations contained in the fraud case report with reference to the books of accounts the Id. first appellate authority is justified in providing natural justice to the instant dealer by setting aside the assessment order.

8. In view of the above discussions the appeal filed by the dealer-appellant is dismissed and the impugned order of the Id. first appellate authority is confirmed. The matter is remanded to the Id. assessing authority for doing the needful in accordance with the law by extending opportunities of hearing to the instant dealer and to assess the dealer-appellant afresh. The cross objection is disposed of accordingly.

Dictated and corrected by me,

(P. C. Pathy)
Accounts Member-I

I agree,

(P. C. Pathy)
Accounts Member-I

(Subrat Mohanty)
Judicial Member-II