

BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.
S.A.No. 17(V)/2017-18

(Arising out of order of the Id.JCST, Sambalpur Range, Sambalpur, in Appeal
No. AA.33/JSG/VAT/2016-17,
disposed of on dtd.31.01.2017)

Present: Sri S. Mohanty & Sri P.C. Pathy
2nd Judicial Member Accounts Member-I

M/s. Shree Radharaman Stone Crusher
Pvt. Ltd., At/P.O. Belpahar,
Dist. Jharsuguda. ... Appellant

-Versus-

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

For the Appellant : Mr. U. Behera, Advocate

For the Respondent : Mr. S.K. Pradhan, Addl. Standing Counsel (C.T.)

Date of Hearing: 31.05.2018 *** Date of Order: 02.06.2018

ORDER

The present appeal is directed against the order of the learned First Appellate Authority/Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, FAA/JCST) in First Appeal Case No.AA.33/JSG/VAT/2016-17 dtd.31.01.2017 in confirming the order of assessment passed by Assessing Officer/Sales Tax Officer, Jharusguda Circle, Jharsuguda (in short, AO/STO) for the assessment period from 01.04.2012 to 30.04.2013 u/s.43 of the Odisha Value Added Tax Act, 2004 (in short, OVAT Act).

2. The brief fact of the case are :

The dealer was subjected to assessment u/s.43 of the OVAT Act on the basis of report submitted by Vigilance Wing with the allegation of escapement of turnover. The order of AA at the first instance was set-aside by the FAA at the instant of the dealer and there was assessment afresh as per the order of the FAA passed in First Appeal Case No.AA.7/JSG/VAT/2014-15

dtd.21.08.2015. In the remand assessment, the AO found that, the dealer had unaccounted for sale to the quantity of Rs.3,91,792.Cft valued Rs.74,44,048/-. Thereafter, on confrontation of the said allegation with the dealer and in consideration of the explanation of the dealer, he re-determined the GTO and TTO of the dealer and calculated the tax liability i.e. assessed at Rs.3,13,434/-. Penalty was imposed at twice on it as per Sec.42(5) of the OVAT Act to the extent of Rs.6,26,868/-, resulting the total demand raised to Rs.9,40,302/-.

3. Being aggrieved with such order, the dealer preferred first appeal. The FAA reiterating the view of the AO did not interfere with the order of the AO and confirmed the demand, raised by the AO.

4. Being aggrieved, dealer has preferred this appeal with the contention like, the AO has not followed the procedure for re-opening of the assessment. He has not formed any opinion and mechanically re-opened the assessment. It is further contended that, in absence of any assessment by any of the provision u/s.39, 40, 42 or 44, the assessment u/s.43 straight way has no legs to stand keeping in view the authority in **M/s. Balaji Tobacco Store Vrs. The Sales Tax Officer, Cuttack-I** on 18 March, 2015 in Orissa High Court, Cuttack, W.P.(C) No.31251 of 2011. Accordingly, the dealer has prayed for quashing the proceeding.

5. On the contrary, State has raised cross objection in support of the impugned order and contended that, there was self-assessment u/s.39 before the assessment proceeding u/s.43 of the OVAT Act. Accordingly, it cannot be said, the re-opening of the assessment has no basis.

6. In this appeal, it is to be seen that, whether the re-opening of the assessment by the AO was justified and sustainable under law ?

7. At the outset, it is pertinent to mention here that, so far as the allegation of suppression, escapement of turnover as detected by the Investigation Wing, which was confirmed by the AO in the assessment and by the FAA in the impugned order are gone unchallenged by the dealer. The dealer failed to dispute this allegation successfully before the fora below. The only question raised by the dealer is, the initiation of proceeding is not in

accordance with law. Learned Counsel for the dealer argued that, there was no assessment u/s.39, 40, 42 or 44 prior to the assessment u/s.43 in this case. His next plank of argument is, the AO was duty bound under law to form a definite opinion on the basis of the Vigilance report to proceed with proceeding u/s.43, which is also not followed in this case. Learned Addl. Standing Counsel on the other hand, argued that, the first assessment was set-aside by the FAA and the matter was remanded back on this point i.e. to observe the procedure as per law. The Id.AO thereafter followed the procedure as per law and conducted the assessment. So, the defect, if any, which was committed by the AO at the first instance was cured during the assessment afresh as per the order of the FAA. So, the dealer is debarred from raising this plea again before this forum. When the FAA remanded the matter at the first time vide its order dtd.21.08.2015, the said order was not challenged by the dealer before the appellate order. In agreement with the view taken by the FAA giving thereby an opportunity to AO to rectify the defect, if any, and to follow the procedure while making for assessment u/s.43 of the OVAT Act, the dealer has participated in the proceeding.

On perusal of the assessment record, it is found that, the AO has categorically held that, the dealer had filed his periodical return, which should have been treated as self-assessment u/s.39 of the OVAT Act. If that be, proceeding u/s.43 has a basis. Re-opening was not straight way without preceded by any assessment. Further, the question of forming opinion is become redundant keeping the fact that, the dealer is found guilty of suppression and that question has almost gone undisputed. In the considered view of this forum, once the dealer had accepted the order of the FAA while remanding the matter to the AO with a direction for assessment afresh by following the procedure in that case, the dealer has waived the procedural defects committed by the AO. Moreover, keeping in view the observation of the Hon'ble Court in **Nilachal Ispat Nigam Ltd. Vrs. State of Orissa in W.P.(C) No.22343/dtd.01.12.2016**, it is held that, there was self-assessment on the basis of return filed by the assessee-dealer which can be a basis on which re-

assessment u/s.43 of the OVAT Act can be done. Thus, in the totality of the facts and circumstances discussed above, we are of the consensus view that, there is no procedural irregularity or illegality committed by the AO. Hence, the impugned order need not be interfered with. Accordingly, it is ordered.

The tax appeal preferred by the dealer sans merit, hence dismissed.

Dictated and Corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

Sd/-
(S. Mohanty)
2nd Judicial Member

I agree,

Sd/-
(P.C. Pathy)
Accounts Member-I