BEFORE THE FULL BENCH : ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 154 (VAT) of 2011-12

(Arising out of order of the learned DCST (Appeal), Angul Range, Angul, in First Appeal Case No. AA- 45/ VAT/AL/ 2010-11, disposed of on dt. 10.03.2011)

Present : **Smt. Suchismita Misra**, **Chairman**
Shri Subrat Mohanty, 2nd Judicial Member
&
Shri Rabindra Ku. Pattnaik, Accounts Member-III

M/s. Eastern Aluminium,
S-2/5, Industrial Estate, Angul. . . . Appellant

- V e r s u s –

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

For the Appellant … Mr. A.K. Mohanty, Advocate
For the Respondent … Mr. M.S. Raman, Addl. S.C. (CT)

Date of hearing: 17.01.2019 **** Date of order: 14.02.2019

O R D E R

This appeal is directed against the order dated 10.03.2011 passed by the Deputy Commissioner of Sales Tax (Appeal), Angul Range, Angul (in short, "first appellate authority") in First Appeal Case No. AA- 45/VAT/AL/2010-11 confirming the assessment order of the Asst. Commissioner of Sales Tax, Angul Circle, Angul (in short,

'assessing officer') u/S. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') pertaining to the tax period from 01.04.2005 to 31.10.2009.

2. The facts as revealed from the case record are that the dealer-assessee named and styled as "M/s. Eastern Aluminium, S-2/5, Industrial Estate, Angul" is a partnership firm comprising of six members who are engaged in manufacture and sale of aluminium utensils and aluminium circles. The dealer-firm maintains purchase register, sale register, purchase invoices and sale invoices but does not maintain any manufacturing account or stock account. The firm utilizes aluminium ingots and aluminium scraps and uses coal as raw consumable. It purchases aluminium ingots as raw materials from M/s. NALCO Ltd. through NSIC. It also purchases aluminium scraps from local dealers and procures coal from outside the State of Odisha. The firm had also furnished periodical returns determining its tax liability during the relevant period. However, on the report of Enforcement Wing of C.T. Department the firm was assessed for the period from 01.04.2005 to 31.10.2009 in respect of turnover escaping assessment. At the time of verification by the Enforcement Wing, the Sales Tax Officer, Enforcement Wing, Angul had visited the place of business of the dealer on 09.11.2009 to conduct inquiry/ investigation regarding the business activities of the firm concerned and at that time one of the

partners of the said firm was present. In course of inspection the investigating officials detected certain incriminating documents like loose written slips, bound books etc. from the business premises of the firm which were seized as per the provisions envisaged u/S. 73(6) of the OVAT Act. On 30.11.2009 one of the partners of the said firm namely Prasant Nayak appeared before the STO, Enforcement Wing to offer his explanation in respect of the entries made in those seized documents. At that time on being questioned about the seized papers the abovenamed partner explained them (the Enforcement Wing) that those documents which were some books contained the details of transaction of sales and purchases effected by their firm on different dates. Then those entries relating to sales and purchases were cross-checked with the regular books of account of the dealer-assessee corresponding to that relevant period. On verification it was detected that those questionable transactions pertaining to sales and purchases which were reflected in those seized bound books were not incorporated in the regular books of account of the dealer-assessee. The partner namely Prasant Nayak clarified that the sales reflected in those above seized documents related to sales of finished aluminium products and the purchases related to purchase of aluminium scraps from local dealers. The abovenamed partner again appeared before the STO, Enforcement Wing on 07.12.2009 in whose presence the total value of

unaccounted for finished goods for sale and the total value of unaccounted for purchases of scraps were summarized in the form of a check sheet which was duly signed by him. Thus, during the aforesaid inspection by the Enforcement Wing the partner of the appellant-firm namely Prasant Nayak was given enough opportunities to go through his statements which he had given before the Enforcement Wing on different dates and was also allowed to examine the seized documents relating to the business transactions of their firm. He was also asked to show which of those transactions in question, as revealed from the seized books, had been incorporated in their regular books of account but he failed to show any corresponding entries of those transactions in their regular books of account. Thus being certain about the suppression of turnover by the dealer-assessee they furnished their report to the effect that the total value of unaccounted for sales came to the tune of `1,78,32,434.00 and the total value of unaccounted for purchases amounted to `70,40,648.00. Thereafter proceeding u/S. 43 of the OVAT Act was initiated against the dealer-assessee. On perusal of the seized documents as well as the statements of the partner of the said firm the assessing officer determined the tax due from the dealer-assessee at `7,13,297.00 taking into account the undisclosed sales turnover for the period from 01.04.2005 to 31.10.2009 as per their (dealer-assessee)

own admission and imposed penalty of `14,26,594.00 in terms of Sec. 43(2) of the OVAT Act and issued notice making a demand of `21,39,891.00 from the dealer-assessee.

It was argued by the dealer-assessee before the assessing officer that the sale and purchase transactions which were reflected in those seized books but not entered in their regular books of account were not actual sales but those were only conversions of aluminium scraps which the firm had received from the local dealers and then by converting those scraps to finished goods i.e. utensils had handed over to them. It was also argued that the dealer-assessee had then genuinely believed those transactions to be not sales as defined in the statute and therefore, did not feel the necessity of entering those transactions in the regular books of account of the firm at that relevant time. The dealer-assessee had also taken the plea that since their firm was never assessed under any of the Sections 39, 40, 42 and 44 of the OVAT Act prior to the initiation of assessment proceeding u/S. 43 of the OVAT Act, this assessment of escaped turnover was absolutely illegal. However, the assessing officer did not accept all these contentions of the dealer-assessee and demanded the tax with penalty as mentioned above from them.

3. Being aggrieved by this order of the assessing officer, the dealer-assessee preferred an appeal before the first appellate authority but again their above pleas were not accepted by the first appellate authority. As revealed from the order of the first appellate authority he could also find from the documents that the sales and purchases in question which were reflected in the seized books and admitted to have been effected by the firm during the relevant period were not reflected/incorporated in their regular books of account. The dealer-assessee explained that those unaccounted for sales and purchases were nothing but conversion of some scraps to finished products and as such not exigible to tax under the OVAT Act. However, the first appellate authority also did not buy their such argument and agreed with the finding of the assessing officer that the unaccounted for sales and purchases were nothing but suppression of both purchases and sales transaction held by the dealer-firm at that relevant time. The first appellate authority categorically mentioned in his order that one of the partners of the dealer-firm, Sri Saroj Sahu had appeared before him on the date the matter was fixed for hearing. He filed hazira only without any books of account or the defence materials in his support. No ground of appeal was also filed by the appellant for the sake of their defence. Thus he upheld the order of assessment.

4. Being aggrieved with the order of the first appellate authority the dealer-assessee came up with the present appeal advancing the following grounds in their defence.

The order passed by the Joint Commissioner of Sales Tax is bad and illegal as he simply confirmed the order of assessment passed by the Asst. Commissioner of Sales Tax, Angul Circle, Angul without considering the pleas advanced on behalf of the dealer-assessee. Both the authorities below did not accept their written submission and passed the order accepting the investigation report furnished by the STO, Investigation Unit, Angul. The dealer-assessee admitted that being a manufacturing concern it manufactures and sells aluminium utensils and aluminium circles and for that it purchases aluminium ingots from NALCO through National Small Industries Corporation (NSIC) as raw materials and then manufactures and sells the above goods. Besides this it also receives aluminium scraps and from those scraps it makes utensils and handover the same to the dealers who provide the aforesaid scraps by receiving the making and labour charges from them. It used coal/coke as a fuel in the manufacturing process. It maintains purchase account of aluminium ingots and coal/coke and sales account for aluminium utensils, aluminium slab and aluminium circles manufactured out of aluminium ingots. It maintains purchase registers for aluminium ingots and coal

and sales register for circles and utensils manufactured out of aluminium ingots. It maintains accounts in invoices for receipt of scraps and handing over of new utensils made from those scraps. The Sales Tax Officer, Investigation Unit, Angul alongwith other officials during their visit had seized 9 (nine) note books marked as document Nos. 2 to 10 containing accounts of receipt of aluminium scraps from the vendors and handing over them new utensils in exchange of those scraps from 25.03.2009 to 07.11.2009. However, after examination of those documents on 30.11.2009 and 07.12.2009, the Sales Tax Officer, Investigation Unit, Angul jumped to a conclusion that the dealer had purchased 81,259.661 Kgs. of aluminium scraps amounting to `70,40,648.00 and sold 1,37,963.090 Kgs. of new utensils amounting to `1,78,32,434.00 out of account. Accordingly they mentioned in their report that the dealer supposed to have purchased scraps and sold aluminium utensils amounting to `70,40,648.00 and `78,32,434.00 respectively during the period from 25.03.2009 to 07.11.2009 though it (the dealer-assessee) had disclosed its purchases and sales from the period from April, 2009 to September, 2009 at `31,76,997.00 and `34,66,177.00 respectively which figures pertained to purchase of aluminium ingots and sales of aluminium utensils manufactured from

such ingots. Thus the Sales Tax Officer, Investigation Unit, Angul concluded that the dealer-assessee indulged in purchase suppression of aluminium scraps as well as sale of aluminium utensils manufactured therefrom. Then they estimated the sales turnover of the dealer for the period 01.04.2005 to 31.20.2009 which was five times of their returned turnover. Thereafter the assessing officer without allowing them (the dealer-assessee) sufficient time and opportunity completed the assessment u/S. 43 of the OVAT Act and raised the demand of `55,32,225.00 which includes penalty of `36,88,150.00 imposed u/S. 43(2) of the OVAT Act. Being aggrieved by such order the dealer-assessee preferred a Writ Petition (Civil) No. 8738 of 2010 before the Hon'ble High Court of Orissa and the Hon'ble Court were pleased to set aside the order of the assessing officer while directing him to complete fresh assessment by the end of July, 2010 vide order dated 17.05.2010. According to the dealer-assessee neither the Sales Tax Officer, Investigation Unit, Angul as per their report No.7 dated 28.01.2010 nor the Asst. Commissioner of Sales Tax, Angul Circle, Angul who took up fresh assessment as per order of the Hon'ble Court found any discrepancy in the account of purchases of aluminium ingots and sales of aluminium slabs, circles and utensils manufactured out of such ingots for the period of assessment i.e. 01.04.2005 to 31.10.2009. The dealer-assessee further contended that so far as the receipt of aluminium

scraps from the vendors and handing over them the aluminium utensils manufactured therefrom are concerned those are also not out of account transaction since those accounts were maintained in the invoices issued for the purpose and further those accounts were not meant to be exhibited in the account of purchase of ingots and manufacture of aluminium utensils out of such ingots as receiving or obtaining the scraps from the local dealers cannot be termed as purchase of scraps and handing over of aluminium utensils made therefrom were not sale. The dealer-assessee then quoted the definition of 'Sale' as given in Sec. 2(45) and 'purchase' as defined in Sec. 2(37) of the OVAT Act to apprise the Court that the transactions which it made by receiving the scraps from different people in its manufacturing unit and then handing over the same to those people as finished goods i.e. utensils were only conversion and at best can be termed as a simple 'barter' transaction. The dealer-assessee also argued that it was never assessed u/S. 39 of the OVAT Act as mentioned in the notice given to it u/S. 43 of the OVAT Act because the dealer was never informed about the acceptance or rejection of its returns by way of self-assessment which implies that the assessment of the firm u/S. 39 of the OVAT Act was never completed. As per the settled position of law when the assessment u/S. 39 of the OVAT Act is not completed, a finding of suppression of the turnover by way of assessment u/S. 43 of the OVAT

Act is not legal and valid and as such it cannot be held that there has been suppression of turnover by the assessee. It also argued that in the instant case the dealer-assessee was never afforded with opportunity to explain the transactions for which it was held liable as the investigating authority had seized some documents from its business premises and retained the same. Thus learned Counsel appearing on behalf of the dealer-assessee while summing up his argument as aforesaid contended that the action of the assessing officer was a sheer transgression of his jurisdiction. He also challenged the order of the assessing officer in respect of penalty imposed on the dealer-assessee because there was no deliberate suppression of turnover by the firm during the relevant period.

5. The State-respondent filed cross-objection in the appeal mentioning therein that the order passed by the DCST/STO appears to be just and proper. The State-respondent also pointed out that in the barter system there should not be any valuation of goods in terms of money and further consideration for the goods is also never paid in money but in the instant case the seized books reflect the money transactions between the parties. Therefore, it has rightly been considered as unaccounted for sales by the dealer-assessee.

6. From all these assertions and counter assertions of the parties as mentioned above it could be gathered that in the instant case this Tribunal is required to determine;

(i) Whether the assessment done u/S. 43 of the OVAT Act in respect of the dealer-assessee is legally valid or not ?

(ii) Whether the transactions made by the dealer-assessee in obtaining scraps from different local dealers (vendors) besides its obtaining aluminium ingots in manufacturing of aluminium utensils, aluminium slabs and aluminium circles and further converting those scraps to utensils and delivering the same to those people cannot be considered as sale and purchase as defined under the OVAT Act but has to be accepted as a process of conversion only which should be considered as a barter transaction ?

(iii) Whether the seizure of documents by the Enforcement Wing and its retention by the authorities concerned deprived the dealer-assessee from advancing its pleas in a proper manner which resulted in violation of natural justice as well as other provisions of law ?

7. In course of hearing argument both the parties advanced their respective contentions basing upon the grounds as submitted by them and cited some decisions to justify their contentions

respectively. Learned Counsel for the dealer-assessee vehemently argued that in this case the assessment u/S. 43 of the OVAT Act is not at all sustainable and he apprised the Court that when no assessment is made u/S. 39 of the OVAT Act the escapement or under-assessment as envisaged in Sec. 43 cannot be predicted. A plain reading of Sec. 38 read with Sec. 39 of the OVAT Act and the corresponding rules as contained in Rule 40 of the OVAT Rules makes it abundantly clear that acceptance of a return as self-asseessed is preceded by scrutiny of the return and only upon finding to the effect that the return is free from any errors, mistake or unjustified claims the same can be accepted as self-assessed. He fairly conceded that the statute does not envisage any communication to the dealer regarding acceptance of such self-assessed return in case no deficiency is found on scrutiny of the same but urged before the Court that in such a case the assessing authority must record a finding regarding acceptance of such self-assessed returns. Since such a finding is absolutely lacking in the instant case it has to be held that an assessment as envisaged u/S. 39 has not been made in the case of dealer-assessee. He further submitted that sub-section (2) of Sec. 39 was amended by inserting a fiction by virtue of which a return filed by the dealer will be deemed to have been self-assessed on mere filing of the same w.e.f. 01.10.2015 which also establishes that earlier to such amendment it was imperative on the part of the authority concerned

that the return must be scrutinized and a finding of its correctness be recorded so as to make the return to be considered as self-assessed. To fortify his argument he cited the judgment of the Hon'ble High Court of Orissa rendered in the case of Balaji Tobacco Store Vs. Sales Tax Officer, Cuttack-I East Circle, Cuttack, reported in [2015] 81 VST 170 (Ori.) and the judgment of the Division Bench of this Tribunal delivered in the case between M/s. Subhasini Tyres, Berhampur, Ganjam Vs. State of Odisha in S.A. No. 194 (V) of 2009-10 which was decided on 06.03.2012.

8. In reply to this argument learned Addl. Standing Counsel (CT) for the State submitted that Sec. 2(47) of the OVAT Act defines what is self assessment. In the instant case the dealer had furnished returns which were accepted alongwith chalans. The dealer had assessed himself and submitted the returns. Therefore, as per the provision of Sec. 38 of the OVAT Act if any mistake is detected as a result of scrutiny made under sub-section (1) of the aforesaid section the assessing authority shall serve a notice in the prescribed form on the dealer to make payment of the extra amount of tax alongwith the interest as per the provisions of the Act by the date specified in the said notice. This section does not say further that the assessing authority, if does not detect any mistake in the said return, is also required to inform the same to the assessee concerned. Sec. 43 of the OVAT Act provides

whereafter a dealer is assessed u/Ss. 39; 40; 42 or 44 for any tax period the assessing authority on the basis of any information in his possession (emphasis supplied), 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 (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. In support of his submission, learned Addl. Standing Counsel (CT) for the State cited the judgment of the Full Bench of this Tribunal passed in the case of Akay Steel Vs. State of Odisha in S.A. No. 244 (V) of 2013-14 dated 03.09.2018 in which the case of M/s. Neelachal Ispat Nigam Vs. State of Odisha (W.P. (C) No.22343 of 2015 decided on 07.12.206) as decided by the Hon'ble High Court of Orissa was relied upon.

9. In the instant case the dealer-assessee cannot plead that he was not afforded opportunity to explain the transactions made by the firm which were revealed from the books seized from its business

premises and subsequently on verification it was found that those transactions were not reflected/incorporated in the regular books of account of that firm. The dealer-assessee is admittedly a manufacturing unit and as such proper maintenance of a stock register by this Unit is a sine qua non for all purposes. In this regard learned Addl. Standing Counsel (CT) for the State relied upon a decision rendered in the case of Commissioner of Sales Tax Vs. Girja Shankar Awanish Kumar, [1996] 11 SCC 648. Since the appellant in the instant case took a plea that it had obtained scraps from different local dealers and then manufactured utensils therefrom which it sold to them by maintaining sale and purchase invoices as reflected in those seized books, learned Addl. Standing Counsel urged before the Court to verify those books since it is clearly revealed from those books that the appellant had received the scraps on payment of money to them and further manufactured the finished goods and supplied the same also on receipt of money. He thus questioned when the transactions were made in this way by the appellant-assessee, how can it be termed as a simple 'barter' transaction or only a conversion of scraps to finished goods as claimed by the dealer-assessee. On the contrary all these transactions clearly revealed that sales and purchases were involved therein which were not reflected in the books of account of the said firm. The appellant also failed to prove that proper stock registers were maintained in respect of

receipt of those scraps in its firm. Thus learned Counsel for the State urged that under such circumstances it cannot be held that the assessing officer came to a wrong conclusion while determining the escaped tax liability of the dealer-assessee.

10. On a careful consideration of all the documents particularly the seized books as well as admission of the dealer-assessee regarding its filing of returns in respect of the transactions which it made by purchasing aluminium ingots from NALCO and then selling the same by manufacturing aluminium utensils, aluminium slabs and aluminium circles therefrom for which it had maintained books of account alongwith its explanation that it did not enter the transactions involving its (dealer-assessee) purchase of scraps and sale of finished goods such as utensils manufactured therefrom about which it had mentioned in some other books without reflecting the same either in any stock register or the regular books of account of the firm, it becomes clear 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) thus 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 that the dealer-assessee had suppressed a portion of its turnover while making self assessment and submitted the returns accordingly.

11. Now the question comes whether the transactions i.e. receiving scraps from local dealers and then converting those scraps to finished goods such as utensils for sale cannot be termed as 'sale' but only conversion of goods and would be considered as barter transaction only. In the instant case the dealer-assessee has not adduced any evidence from which it could be gathered that it had obtained scraps from certain local dealers and then converted the same to utensils and returned those utensils to the local dealers from whom it had received the scraps and further no consideration money was exchanged between the parties in the process except the labour/making charges. In this regard a thorough verification of the documents seized from the business premises of the dealer-assessee was made and the facts revealed therefrom proved otherwise. The statements given by one of the partners of the dealer-asssessee before the authority concerned clearly indicates that the said business establishment being a manufacturing unit was also involved in the aforesaid questionable transactions for which it had never maintained any books of account or stock register. It did not choose to furnish returns in respect of these

transactions on the pretext of those to be neither purchase or sale of goods which would attract tax liability. The dealer-assessee has not adduced any evidence from which it could be gathered that it had genuinely believed that those transactions were only simple conversion of articles and exchanged between the parties concerned as done in a barter system. Since the nine books which were seized from its custody indicate that the scraps were purchased for a price and the finished goods were also sold for a price in terms of money we are unable to comprehend that those transactions do not attract tax liability of the dealer-assessee under the OVAT Act.

12. So far as the retention of seized documents by the authorities is concerned it is found from the record that throughout the proceedings the dealer-assessees were allowed to peruse those documents in order to explain the contents therein and to advance their defence. Therefore, such a plea advanced on its behalf does not seem to be acceptable. Apart from this there is also no legal provision which prohibits the retention of seized documents till the dispute attains its finality.

13. Therefore, as per the discussion made in the foregoing paragraphs it is held that the order of the first appellate authority confirming the order of assessment is neither unreasonable nor unjustified in any manner inviting interference by this Tribunal.

14. In the result, the appeal is dismissed and the impugned order of the first appellate authority is hereby confirmed. The cross-objection is disposed of accordingly.

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

Sd/-
(Subrat Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Rabindra Ku. Pattnaik)
Accounts Member-III