

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

S.A.No.82(VAT) of 2017-18

(Arising out of the order of the learned JCST, Sambalpur Range, Sambalpur, in Appeal No.AA.539/SA-I/VAT/2014-15, dtd. 15.03.2017 confirming the order of ld. AA dtd. 17.12.2013 is proceeding U/s. 43 of the OVAT Act.)

**P r e s e n t : Shri Subrat Mohanty, & Shri P.C.Pathy,
2nd Judicial Member. Accounts Member-I.**

M/s.Maa Automobiles,
Shop No.G-1, Sagar Junction,
Ainthapali, Sambalpur. ... Appellant

- V e r s u s -

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

For the Appellant: : Mr. S. Roy, Advocate.
For the Respondent: :Mr.S.K.Pradhan, Addl. S.C.(CT).

Tax Period : : 02.04.2012 to 25.05.2013.

Date of hearing: 02.06.2018 *** Date of Order: 02.06.2018

ORDER

The dealer has preferred this appeal against confirming order of the first appellate authority, whereby the order of assessing authority under section 43(2) of the OVAT Act (in short, 'the Act') finding the dealer guilty of escapement of turnover is confirmed.

2. The facts in brief, giving rise to this appeal are, the instant dealer who is engaged in trading of both old and new batteries, invertors, UPS, Tyres, Tubes etc. was subjected to assessment U/s.43 (2) of the Act on the basis of a report submitted by the STO, Vigilance Division, Sambalpur. The Vigilance Squad detected and seized '90' slips reflecting purchases of old scraps, batteries which were found unaccounted for in the purchase register or books of accounts. The assessing authority accepted the vigilance report

because the dealer could not explain such unaccounted for purchase as a result he added the value of the batteries by adding 10% profit margin and then taxed it @13.5% calculated at Rs.2,98,548.00. Penalty u/s. 43(2) of the Act at twice of it was levied, thereby the total due became raised to Rs.8,95,644.54.

3. The dealer being aggrieved with such demand of tax and penalty, preferred first appeal No.AA.539/SA-I/VAT/2014-15 wherein and whereby the first appellate authority (FAA) did not interfere with the findings of escapement/unaccounted for purchase but he reduced the tax rate from 13.5% to 5% treating the goods as scrap. As a result, the tax due became reduced to Rs.1,10,573.00. Penalty under Section 43(2) at the rate of twice of it was added and the total due became calculated at Rs.3,31,720.00.

4. Being further aggrieved, the dealer has preferred this appeal on the contentions like, the very initiation of assessment proceeding U/s. 43 of the Act by the learned assessing officer is illegal and without jurisdiction as the same is not preceded by any assessment u/s. 39,40,42 or 44 of the Act. It is further contended that, the penalty imposed U/s. 43(2) of the Act is illegal and unjust.

5. State has raised cross objection stating therein, the order of both the fora is in accordance with law and the proceeding u/s. 43 of the Act in the case is based on assessment u/s.39 of the Act.

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

(i) If the proceeding u/s.43 of the Act initiated by the assessing authority in the case in hand is illegal and not maintainable since not preceded by any assessment U/s.39,40,42 and 44 of the Act?

(ii) If the penalty as imposed is illegal and not sustainable?

7. While arguing on point no (i) above, Id. Counsel for the dealer vehemently argued that, in this case there was no assessment by any of the provision U/s. 39,40,42,44 of the Act, so the proceeding u/s. 43 of the Act has no legs to stand hence the assessment is untenable. Id. Counsel has advanced two orders to this Tribunal passed in S.A. 114(V)2014-15 dated 23.06.2016 and in S.A. 145(V) 2015-16 dated 03.09.2016 in support of his argument. On the contrary, Shri S.K.Pradhan, Id. Additional Standing Counsel (CT) placed his reliance in the matter of **M/s.Nilachal Ispat Nigam**

Limited Vrs. State of Odisha in W.P.C No.22343 dated 07.12.2016 and submitted that, this being the latest authority deciding the disputed question, it got overriding effect on the authorities relied by the dealer. Drawing attention to 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 the argument that the proceeding U/s. 43 of the 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.

8. 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 or 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 assess 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.”

Keeping view the principle as settled above, adverting to the case in hand it can safely be said that when there was no intimation to the dealer as per Seciton-38 of the Act or as per Rule-40 of the OVAT Rule then, definite presumption under law is, the self-assessment U/s.39 was completed. In that event, there is no impediment for initiation of proceeding U/s.43 of the Act. More to say, when the detection of escaped turnover found established and during the proceedings before both the fora below, the dealer has not claimed that he has not filed periodical return then by necessary implication, it is held that the dealer was self-assessed on the basis of periodical return and the detection by the vigilance wing is nothing but an escapement in relation to the assessment under Seciton-39 of the Act. With the observation made, it is held that the argument laid by learned Counsel for the dealer has no force both in law and facts.

Coming to the next point for the determination like penalty u/s.43 (2) of the OVAT Act, it is found that the dealer has not pressed this point in the hearing. Keeping in view the fact that, suppression is established the penalty imposed U/s.43(2) of Act is not illegal. Resultantly, avoiding further discussion on this point which is not even pressed during hearing it is held that, the penalty as imposed is need not be disturbed.

In the wake of above it is held that the impugned order under challenge calls for no interference. Hence, ordered.

ORDER

The appeal is dismissed on contest as of no merit.

Dictated and Corrected by me,

(Subrat Mohanty)
Judicial Member-II.

(Subrat Mohanty)
Judicial Member-II.

I agree,

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