BEFORE THE JUDICIAL MEMBER-I: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 10(V) of 2018

(Arising out of the order of the ld. JCST (Appeal), Jajpur Range, Jajpur Road, in First Appeal Case No. AA 568 CUIII 14-15 (OVAT), disposed of on dtd.31.05.2017)

P r e s e n t: **Shri S. Mohanty,**
1st Judicial Member

M/s. Shree Durga Ispat Udyog,
Ranigoda, Jajpur. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2007 to 31.03.2009

For the Appellant ... Mr. D.K. Hazra &
Mr. M.V.S.R. Pantulu, Advocates

For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 03.07.2019 ******** Date of order: 03.07.2019

O R D E R

Legal sustainability of an order of assessment u/s.43 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) is questioned in this second appeal by the dealer as appellant. It is preferred against the confirming order of escaped assessment of the first appellate authority, thereby confirming the demand of tax and penalty raised against the dealer to the tune of Rs.2,37,757.00.

2. Originally the dealer was subjected to assessment u/s.43 of the OVAT Act on the basis of investigation report from Sales Tax Officer, Vigilance with three nos. of allegations. As the details of the allegations and proof thereon before the assessing authority or before the first

appellate authority are not pertinent for discussion in this appeal, they are not mentioned in detail. However, for sake of brevity it is mentioned that, in the escaped assessment, learned assessing authority calculated the tax due from the dealer at Rs.79,252.26. Besides the tax due, penalty u/s.43(2) of the OVAT Act i.e. twice of the tax due at Rs.1,58,504.52 was also imposed, thereby the total demand against the dealer was raised at Rs.2,37,756.00. In the appeal before first appellate authority the dealer did not get any relaxation, hence the demand raised by the assessing authority remained undisturbed.

3. On this backdrop, the dealer challenged the impugned order of the first appellate authority in this appeal. The sole contention of the dealer in this appeal is, the proceeding u/s.43 of the OVAT Act as initiated in this case is not maintainable in the eye of law as the proceeding was not preceded by any kind of assessment u/s.39, 40 or 42 of the OVAT Act.

4. The appeal is heard with cross objection from the side of the Revenue. In the cross objection Revenue has supported the findings of both the fora below.

5. The only question struck for decision in this appeal arised from the grounds taken by the appellant-dealer is, whether the first appellate authority is wrong in confirming the order of assessing authority in raising the demand of tax when the initiation of assessment u/s.43 of the OVAT Act in the case in hand is not sustainable in law.

6. In the argument, learned Counsel for the dealer vehemently harped on the question of maintainability of the proceeding with the plea that, the escaped assessment u/s.43 of the OVAT Act should have been initiated only when there was any kind of assessment u/s.39, 40 or 42 of the OVAT Act which is done in this case. As a result, when the escaped assessment has no legs to stand then it cannot withstand in law. In support of his argument, learned Counsel placed reliance on a decision of Division Bench of this Tribunal in S.A. No.145(VAT) of 2015-16, order dtd.03.09.2016. Learned Counsel also advanced the certified copy of the

order-sheet of the assessing authority which indicates the assessing authority has not spelt anything about self-assessment or other kind of assessment before initiation of escaped assessment u/s.43 of the OVAT Act. To appreciate the question of law, the relevant provision u/s.43 of the OVAT Act is reproduced below:

> "(1) Where, after a dealer is assessed under Section 39, 40, 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-
> (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 beset of his judgment the amount of tax due from the dealer."

The provision as it mandates for initiation of an escaped assessment, there must have been proceeding for any kind of assessment u/s.39, 40 or 42 of the OVAT Act.

7. Learned Standing Counsel appearing for the Revenue argued that, the orders of the learned assessing authority though silent but it can definitely be presumed that, the dealer was self-assessed u/s.39 of the OVAT Act. He also argued that, once the dealer has filed a return, it is treated that the dealer's return was accepted. So, initiation of proceeding u/s.39 is not bad in the eye of law.

8. Gone through the impugned order. It is found that, though the dealer has taken the same plea before the first appellate authority but the first appellate authority has not discussed the ground raised before him by the dealer. It is a trite in law that, the authority is under obligation to answer the grounds taken by the litigants before him. Once

the appeal was admitted, the grounds were taken for consideration but not answered, then it can safely be said that, the authority has failed to exercise the jurisdiction vested on him. Present one is an example of that, the first appellate authority has not whispered a single word about the ground touching the maintainability of the assessment in the case in hand.

9. Be that as it may, it is believed that, this is a fit case where the matter should be remitted back to the first appellate authority to enquire if the dealer was self-assessed or faced any kind of assessment u/s.39, 40 or 42 of the OVAT Act before initiation of escaped assessment u/s.43 of the OVAT Act. The first appellate authority is to form opinion of its own how the escaped assessment stands on any kind of assessment u/s.39, 40 or 42 of the said Act as preceded to it, unless the escaped assessment will not be maintainable. The duty is also caste upon the first appellate authority to give finding that, whether the dealer has raised this question at the initiation of the reassessment proceeding or not.

10. To sum up, it is held as follows. The impugned order cannot withstand in law as the first appellate authority has not answered the questions raised before him. So, in consequence thereof, the matter should be remitted back to the first appellate authority for reappraisal.

In the result, it is ordered.

The appeal is allowed on contest. The impugned order is set aside. The matter remitted back to the first appellate authority to give finding on the sole question that, the present proceeding is maintainable in the eye of law or not.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

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