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IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV No. 64 of 2016

M/s. Keshab Automobiles .... ***Petitioner***

-versus-

State of Odisha .... ***Opposite Party***

Advocates, appeared in this case:

For Petitioner : Mr. Jagabandhu Sahoo
Senior Advocate

For Opposite Party : Mr. Sunil Mishra
Additional Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE B. P. ROUTRAY

JUDGMENT
01.12.2021

Dr. S. Muralidhar, CJ.

1. This revision petition arises out of the order dated 5th April, 2016 passed by the Odisha Sales Tax Tribunal (Tribunal), Cuttack dismissing the Petitioner's/Assessee's S.A.No.64 (VAT) of 2014-15. By the said order, the Tribunal affirmed the order passed on 3rd February, 2014 by the Joint Commissioner (JCST), Jajpur Range, Jajpur Road dismissing the Petitioner's First Appeal Case No.AA-399/CUIII/13-14 and thereby confirming the order dated 19th December, 2012 passed by the Sales Tax Officer (STO),

Jajpur Circle, Jajpur Road raising a demand of Rs.3,92,434/- against the Petitioner for the period 1st April, 2010 to 31st March, 2011 under Section 43 of the Odisha Value Added Tax Act, 2004 (OVAT Act).

2. While admitting this revision petition on 13th November, 2017 following question was framed for consideration:

> "Whether in absence of completion of assessment under Sections 39, 40, 42 or 44 of the OVAT Act, reassessment under Section 43 of the said Act made by the authority below is sustainable in law?

3. On the same date, an interim order was passed by this Court to the effect that if the Petitioner deposits the balance tax dues within a period of four weeks, the penalty levied shall remain in abeyance till the disposal of the revision petition.

4. The background facts are that the Petitioner is a registered dealer carrying on business in automobiles parts of all types of vehicles and lubricants both on wholesale as well as retail basis.

5. The original return filed by the Petitioner for the aforementioned period was not acknowledged by the Department. Basing on a fraud case report received from the STO, Investigating Unit, Jajpur Road, the assessment for the above period was sought to be reopened under Section 43 of the OVAT Act. By an order dated 19th December, 2012 the STO made a reassessment and raised a demand of Rs. 3,92,434/- towards tax

and Rs.2,61,622.50 towards penalty under Section 43(2) of the OVAT Act. The JCST and the Tribunal also affirmed the aforementioned order. It is significant that before the Tribunal none appeared for the Assessee/Appellant.

6. This Court has heard the submissions of Mr. Jagabandhu Sahoo, learned Senior Advocate appearing for the Petitioner and Mr. Sunil Mishra, learned Additional Standing Counsel for the Department (Sales Tax).

7. In support of his contention that no reassessment can be made unless the assessment is completed.

8. Mr. J. Sahoo, learned Senior Advocate appearing for the Petitioner has placed reliance on the decision case of the Supreme Court of India in ***Ghanashyam Das v. Regional Assistant Commissioner of Sales Tax, Nagpur AIR 1964 SC 766***; the Full Bench of this Court in ***M/s. Jaynarayan Kedarnath v. Sales Tax Officer, Cuttack-I West Circle (1988) 68 STC 25*** and ***Balaji Tobacco Stores v. The Sales Tax Officer*** (decision dated 18th March, 2015 of this Court in W.P.(C) No.31251 of 2011). By referring to Sections 39, 40, 42, 43 and 44 of the OVAT Act, 2004 and the amendments made thereto with effect from 1st October, 2015 together with the pre and post amended Rules and in particular Rule 50, Mr. Sahoo submitted that during the relevant period when the reassessment proceedings commenced it was the unamended Section 43 that was to apply. It is submitted that

without there actually being an assessment under Section 39 of the OVAT Act, the provisions of Section 43 (1) of the OVAT Act could not have been invoked for the period prior to 1st October, 2015.

9. On the other hand, Mr. Sunil Mishra, learned Additional Standing Counsel for the Opposite Party (Department) submitted that the first level change was brought about in the OVAT Act in 2010 when all the returns had to be filed only online. Therefore, the actual "acceptance" of the return in physical mode was no longer possible. If the return was defective, notice would be issued to the Assessee to rectify the defects. Otherwise, the returns filed under Section 39 of the Act by way of 'self assessment' was 'deemed' to be accepted. He placed reliance on certain portions of the 'White Paper on State Level Value Added Tax' brought out by the Empowered Committee of the State Finance Commissions on 17th January, 2005.

10. According to Mr. Mishra, the amendments brought with effect from 1st October, 2015 to Sections 39 and 43 of the OVAT Act and Rule 50 of the OVAT Rules were "clarificatory" of the existing legal position that in order to reopen the assessment, there need not be a formal acceptance of the return originally filed by way of self-assessment. Reliance is placed on the decision dated 7th December, 2016 of this Court in W.P.(C) No.22343 of 2015 ***(M/s. Nilachal Ispat Nigam Ltd. v. State of Odisha)***. It was submitted that in the said decision this Court had negatived a

similar plea that there could be no reopening of the assessment without a formal acceptance of the original return filed by the Assessee by way of self-assessment.

11. The above submissions have been considered. Undoubtedly, by the amendment brought out with effect from 1st October, 2015 the scheme of filing of tax returns, their scrutiny and the manner of invoking Section 43 of the OVAT Act for reopening the assessment underwent significant changes. In Section 39, to begin with, sub-section (2) was substituted with effect from 1st October, 2015 in the following manner:

Section 39(2) after 1.10.2015	Section 39(2) prior to the amendment with effect from 01.10.2015
If a registered dealer furnishes the return in respect of any tax period, it shall be deemed to be self-assessed.	If a registered dealer furnishes the return in respect of any tax period within the prescribed time and the return so furnished is found to be in order, it shall be accepted as self assessed subject to adjustment of any arithmetical error apparent on the face of the said return.

The concept of 'deemed' self assessment was introduced only with effect from 1st October, 2015. Prior thereto, if such return filed by the dealer under Section 39 of the OVAT Act and was "found to be in order" and within the prescribed time, then it was to be accepted as self assessed subject to adjustment of arithmetical errors.

12. Now turning to Section 43(1) the changes again are stark.

Section 43(1) after 1.10.2015	Section 43(1) prior to 1.10.2015
Where, the assessing authority, on the basis of any information in his possession which indicates that the whole or any part of the turnover of the dealer in respect of any 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.	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 best of his judgment the amount of tax due from the dealer.

13. It is significant that prior to its amendment with effect from 1st October, 2015 the trigger for invoking Section 43 (1) of the

OVAT Act required a dealer to be assessed under Sections 39, 40, 42 and 44 for any tax period. The words "where, after a dealer is assessed" at the beginning of Section 43 (1) prior to 1st October, 2015 pre-supposes that there has to be an initial assessment which should have been formally accepted for the periods in question i.e. before 1st October, 2015 before the Department could form an opinion regarding escaped assessment or under assessment or the accused taking the benefit of a lower rate or being wrongly allowed deduction from his turnover or input tax credit to which he is not eligible.

14. However, under Section 43(1) of the OVAT Act, after its amendment with effect from 1st October, 2015 the Assessing Authority can form an opinion about the whole or part of the turnover of the dealer escaping assessment or being under assessed "on the basis of any information in his possession". In other words, it is not necessary after 1st October, 2015 for the Assessee's initial return having to be 'accepted' before Section 43(1) could be invoked.

15. Therefore, the position prior to 1st October, 2015 is clear. Unless there was an assessment of the dealer under Sections 39, 40, 42 and 44 for any tax period, the question of reopening the assessment under Section 43 (1) of the OVAT Act did not arise.

16. While the 'White Paper on State Level Value Added Tax' brought out in 17th January, 2005 does envisage in para 2.12 that

the "dealer will be deemed to have been self assessed on the basis of before the returns submitted by him" such an observation is at the highest recommendatory in nature. It cannot be elevated to the status of law.

17. A perusal of the decision of this Court in ***Nilachal Ispat Nigam Ltd.*** (*supra*) reveals that it was in the context of the Orissa Entry Tax Act (OET Act). Secondly, this Court had no occasion in the said decision to discuss the effect of more or less similar amendments effected to the provisions of the OET Act which were brought into effect from 1st October, 2015. This is despite the fact that the decision is dated 7th December, 2016. The amendments did bring about a significant change to the OET Act and therefore had a direct bearing on the issues discussed in the said decision. Consequently, this Court finds that the decision in ***Nilachal Ispat Nigam Ltd.*** is *per in curiam* inasmuch as it fails to discuss the amended provisions of the OET Act which have a direct bearing on the issues adjudicated by this Court.

18. In ***Balaji Tobaco Store*** (*supra*) this Court accepted the plea of the Petitioner that unless there was a completion of the assessment of the initial state, reassessment proceeding under Section 43 of the OVAT Act not been triggered.

19. To the same effect, in the decision in ***Ghanshyam Das*** *(supra)* it was observed by the Supreme Court as under:

> "…if a return was duly made, the assessment could be made at any time unless the statute prescribed a time limit. This can only be for the reason that the proceedings duly initiated in time will be pending and can, therefore, be completed without time limit. A proceeding is said to be pending as soon as it is commenced and until it is concluded. On the said analogy, the assessment proceedings under the Sales-tax Act must be held to be pending from the time the said proceedings were initiated until they were terminated by a final order of assessment. Before the final order of assessment, it could not be said that the entire turnover or a part thereof of a dealer had escaped assessment, for the assessment was not completed and if, completed, it might be that the entire turnover would be caught in the net."

20. This Court in order dated 29th February, 2008 in W.P.(C) No. 2777 of 2008 (***M/s. Jayshree Chemicals Ltd. v. State***) observed as under:

> "Apart from that, the concept of escaped assessment under Section 43 of the Orissa Value Added Tax Act comes into play only when the assessment has been made and completed.
>
> In the instant case, without assessment being complete, the notice of escaped assessment is misconceived and as such the said notice under Annexure-1 is quashed."

21. A comparison of the language used in the amended Section 43 (1) of the OVAT Act with its version prior to 1st October, 2015 makes it clear that a new system has been put in place as far as reopening of returns filed as "self-assessment" is concerned. Now such reopening is permitted even if there was no formal

acceptance of the return originally filed. The concept of a "deemed" acceptance of the return has been introduced for the first time since 1st October, 2015. This is not a mere procedural change. Further, the amending statute itself makes it clear that the amendments are with effect from 1st October, 2015 and not with retrospective effect from an earlier date. Therefore, the Court is precluded from presuming that the amendment to Sections 39 (2) and 43 (1) of the OVAT Act and correspondingly to Rule 50 of the OVAT Rules are either merely clarificatory or retrospective.

22. From the above discussion, the picture that emerges is that if the self-assessment under Section 39 of the OVAT Act for tax periods prior to 1st October, 2015 are not 'accepted' either by a formal communication or an acknowledgment by the Department, then such assessment cannot be sought to be re-opened under Section 43 (1) of the OVAT Act and further subject to the fulfillment of other requirements of that provision as it stood prior to 1st October, 2015.

23. For all of the aforementioned reasons, the reopening of the assessment sought to be made in the present case under Section 43 (1) of the OVAT Act is held to be bad in law. The question framed is accordingly answered in the negative i.e. in favour of the Assessee and against the Department. It is accordingly, held that in the absence of the completion of the assessment under Sections 39, 40, 42 and 44, reassessment under Section 43 (1) of the OVAT Act is unsustainable in law.

24. The impugned order of the Tribunal and the corresponding orders of the JCST and STO are hereby set aside.

25. The revision petition is disposed of in the above terms.

(S. Muralidhar)
Chief Justice

(B.P. Routray)
Judge

S.K. Jena/PA