IN THE HIGH COURT OF ORISSA AT CUTTACK
W.P(C). No. 40849 of 2021

M/s. Vinayak Agro Industries .... ***Petitioner***
Mr. Kartik Kurmy, Advocate

-versus-

State of Odisha & Others .... ***Opposite Parties***
Mr. Sidharth Sankar Padhy, Advocate

CORAM:
JUSTICE JASWANT SINGH
JUSTICE M.S. RAMAN

ORDER

Order No.	**07.03.2022**
01.	**1.** This matter is taken up by virtual/physical mode. **2.** Assailing the order dated 30.07.2021 passed by the Additional Commissioner of Sales Tax (Appeal), Sundargarh Range, Rourkela (Opposite Party No. 3) in Appeal No. AA3(V)RL-I/2019-20 U/s 77 wherein the Assessment order dated 27.01.2016 passed U/s 43 of the Odisha Value Added Tax Act, 2004 (OVAT Act) for the tax periods from 01.04.2008 to 31.03.2014 has been confirmed. **3.** Mr. Kartik Kurmy, counsel for the Petitioner submits that though the impugned notice in Form VAT-307 for Assessment U/s 43 was issued on 25.08.2014 (Annexure-3), the Assessing Authority having not completed the assessment within the period as stipulated U/s 43(4) of the said Act (as amended with effect from 01.10.2015), the assessment is barred by limitation.

4. Counsel for the Petitioner also submits that the initiation of assessment proceeding under OVAT Act is based solely on investigation carried out by the Central Excise Authority. The learned Central Excise, Customs and Service Tax Appellate Tribunal by order dated 19.01.2021 has quashed and set aside the order passed by Excise Authorities on account of paucity of material to sustain the charge of clandestine removal of goods. Therefore, he submits that the impugned order in appeal sustaining the assessment under the OVAT Act cannot have legs to stand. On the query by this Court, counsel for the Petitioner fairly concedes that the Commissioner, Central Excise Customs and Service Tax has the remedy of filing appeal before this Court U/s 35(G) of the Central Excise Act, 1944 challenging the said order dated 19.01.2021 of CESTAT.

5. Mr. S.S. Padhy, Advocate appearing for the Opposite Parties submits that on an earlier occasion, the Petitioner challenging the very same assessment order approached this Hon'ble Court in W.P.(C) No. 5316 of 2016 which came to be dismissed on 15.05.2019. In the said order this Hon'ble Court observed as follows :-

> **"xxxx xxxx xxxx xxxx**
>
> By way of this writ petition, the Petitioner challenges the legality and validity of escaped assessment order dated 27.01.2016 bearing No. 729 passed by Deputy Commissioner of Sales Tax, Rourkela I Circle, Uditnagar U/s 43 of the Odisha Value Added Tax Act, 2004 for the tax periods 2008-09 to 2013-14.

In course of hearing, learned counsel for the Petitioner seeks to withdraw the writ petition with liberty to file appeal.

Accordingly, the writ petition is permitted to be withdrawn with liberty to file appeal. However, while considering petition for condonation of delay, period of pendency of the writ petition herein before this Court, that is 23.03.2016 till today shall be taken into consideration."

6. Mr. Padhy, counsel for the Opposite Parties submits that Vigilance Wing of CT & GST Organization also caused further independent inquiry and verified books of account and took physical stock which are taken care of in the assessment, apart from the investigation report of excise authorities.

7. Mr. Padhy also submits that since alternative remedy is available for the Petitioner U/s 78 of the Odisha Value Added Tax Act, 2004 (OVAT Act) to challenge the order passed in first appeal and the issues raised in the writ petition can very well be adjudicated upon by the Odisha Sales Tax Tribunal, the writ petition is not liable to be entertained.

8. Since question of limitation can be gone into by the learned Sales Tax Tribunal, while adjudicating the issues raised by way of second appeal, we are not inclined to entertain the writ petition.

9. At this stage, the counsel for the Petitioner seeks permission to withdraw the writ petition and to prefer second appeal.

10. Accordingly, the present writ petition is dismissed as withdrawn with aforesaid liberty to the Petitioner as prayed for by the Petitioner.

In order to enable the Petitioner to file an appeal before the Tribunal, the original order in first appeal vide Annexure-1 may be returned by retaining a photocopy thereof in the record.

Issue urgent certified copy as per rules.

(Jaswant Singh)
Judge

(M.S.Raman)
Judge

Laxmikant

March 7th, 2022
Cuttack