BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 413 (VAT) of 2015-16
&
S.A. No. 219 (ET) of 2015-16

(Arising out of orders of the learned JCST, Balasore Range, Balasore, in Appeal Nos. AA- 26/MBR-2012-13 (VAT) & AA- 27/MBR-2012-13 (Entry Tax), disposed of on 20.09.2014)

Present: **Shri G.C. Behera, Chairman**
Shri S.K. Rout, 2nd Judicial Member &
Shri B. Bhoi, Accounts Member-II

M/s. Lal Trades & Agencies Pvt. Ltd.,
Badampahar, Mayurbhanj ... Appellant

-Versus-

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

For the Appellant : Sri J.B. Sahoo, Sr. Advocate
Ms. Kajal Sahoo, Advocate
For the Respondent : Sri M.L. Agarwal, S.C. (CT)

Date of hearing : 23.02.2023 *** Date of order : 09.03.2023

O R D E R

Both the appeals relate to the same party and for the same period under different Acts. Therefore, they are heard analogously and disposed of by this composite order for the sake of convenience.

S.A. No. 413 (VAT) of 2015-16 :

2. Dealer assails the order dated 20.09.2014 of the Joint Commissioner of Sales Tax, Balasore Range, Balasore (hereinafter called as 'First Appellate Authority') in F A No. AA- 26/MBR-2012-13(VAT)

confirming the assessment order of Sales Tax Officer, Assessment Unit, Rairangpur (in short, 'Assessing Authority').

S.A. No. 219 (ET) of 2015-16 :

3. Dealer is also in appeal against the order dated 20.09.2014 of the First Appellate Authority in F.A. No. AA- 27/MBR-2012-13 (Entry Tax) confirming the assessment order of the Assessing Authority.

4. Briefly stated, the facts of the cases are that –

M/s. Lal Trades & Agencies Pvt. Ltd. is engaged in extraction of iron ore lumps from leased area and sells sized iron ores and fines in course of inter-State and intra-State trade and commerce. The assessment period relates to 01.04.2007 to 31.03.2010. The Dealer already assessed u/s. 42 Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') for the period 01.12.2006 to 31.10.2008 on 20.07.2009. Likewise, he also assessed u/s. 9C of the Odisha Entry Tax Act, 1999 (in short, 'OET Act') for the same period on 20.07.2009. The Assessing Authority raised tax and penalty of ₹36,71,645.00 u/s. 43 of the OVAT Act and ₹16,94,970.00 u/s. 10 of the OET Act on the basis of Tax Evasion Report (TER).

Dealer preferred first appeals against the orders of the Assessing Authority before the First Appellate Authority. The First Appellate Authority confirmed the tax demands and dismissed the appeals. Being aggrieved with the orders of the First Appellate Authority, the Dealer prefers these appeals. Hence, these appeals.

The State files cross-objections supporting the orders of the First Appellate Authority confirming the orders of assessment as just and proper.

5. The learned Counsel for the Dealer submits that the State imposed twice penalty on the allegation of excess collection of tax, but the Dealer has collected as per the admissible rate of tax and deposited the same to the State Exchequer. So, the Dealer is not liable to pay any penalty as the Dealer has not collected more tax than the required rate. He further submits that

Section 52(1)(b) of the OVAT Act is not applicable to the present facts and circumstances of the case.

The Dealer further takes a plea that the assessment period relates to 01.04.2007 to 31.03.2010, out of which the assessment u/s. 42 of the OVAT Act has been completed for the period 01.04.2007 to 31.10.2008. So, he submits that the Assessing Authority lacks jurisdiction for the period 01.11.2008 to 31.03.2010 in absence of any assessment u/s. 39, 40, 42 or 44 of the said Act. He further submits that the allegations of the TER relate to the period in which no self-assessed return has been accepted or acknowledged by the State. So, the Assessing Authority lacks jurisdiction over the same.

The second allegation regarding sale suppression does not disclose to any period. So, unless the same is specific the Dealer is not able to explain the same and the State cannot impose any penalty unless the period is specific. The learned Counsel for the Dealer further submits that the State imposed penalty on the Dealer basing on the information of the third party without supplying any document to enable the Dealer to explain the allegation.

He further submits as regards the fourth allegation relating to discrepancy of physical stock with reference to books of account, the Vigilance officials have not verified the total stock available in the premises as compared to the stock of books of account to rule out if the stock of the iron ore of 5.18 mm is included in the total stock iron ore of 10.40 mm mentioned in the books of account. The Vigilance Officials should have verified the stock of 5.18 mm and 10.40 mm size of iron ore available at the premises and the total quantity of iron ore of 10.40 mm size as mentioned in the books of account.

As regards the last allegation, there is no bill relates to any period 01.10.2008 to 31.10.2008 and for the other periods, no self-assessed return

of the Dealer has been accepted or acknowledged by the State as per the decision in the case of ***M/s. Keshab Automobiles***. He further submits that the finding of the First Appellate Authority and the Assessing Authority are otherwise bad in law and the same requires interference in appeal.

The learned Counsel for the Dealer also advances same argument in respect of the appeal preferred under the OET Act relying on the ECMAS's case.

He relies on the decisions of the Hon'ble Court in the cases of ***M/s. Keshab Automobiles v. State of Odisha*** in **STREV No. 64 of 2016** decided on 01.12.2021; ***M/s. ECMAS Resins Pvt. Ltd. v. State of Odisha and others*** in **WP (C) Nos. 7458 of 2015 and 7296 of 2013** decided on 05.08.2022; ***M/s. General Traders, Berhampur v. State of Odisha*** in **STREV No. 64 of 2017** decided on 08.12.2022; ***State of Gujarat v. Secretary, LSW and TD Dept***, **1982 GLH 55**; and ***Commissioner of Income Tax v. Godavaridevi Saraf***, **(1978) 113 ITR 589 (Bombay)**.

6. Per contra, the learned Standing Counsel (CT) for the State submits that the Dealer is liable to pay penalty for excess collection of tax as per the provision of Section 52(1)(b) of the OVAT Act. He further submits that the assessment has already been accepted for the entire period. So, he submits that the decision of ***M/s. Keshab Automobiles's*** case is not applicable to the present facts and circumstances of the case. He further submits that the Dealer has suppressed the despatch of 2535.900 MT and has not properly maintained the books of account. So, he submits that the Assessing Authority and the First Appellate Authority rightly assessed the tax as per the best judgment principles.

As regards the allegation of suppression of sale of 73.170 MT, it relates to the assessment period 2007-08 to 2008-09, so the same cannot be said that the period is not specific. He further submits that the Dealer was confronted with the third party information and the Dealer did not challenge

the same and had not sought for any prayer to summon the witness or to supply the copy of the document. Therefore, the Dealer is estopped to raise the same before this forum. He further submits when the Dealer admits the quantity of sale suppression of iron ore of 3500 MT, the same is not required for weighment and the same cannot be disbelieved on the ground of eye estimation. He further submits that the orders of the Assessing Authority and the First Appellate Authority are well reasoned orders and the same require no interference in appeal.

Learned Standing Counsel (CT) for the State also submits that the assessment has already been completed prior to this proceeding. So, he submits the proceeding u/s. 10 of the OET Act cannot be held to be without jurisdiction of the Assessing Authority.

He relies on the decisions in cases of ***Dharmendra Textiles***, **18 VST 180 (SC)** and ***Jindal Stainless Ltd.***, **54 VST 1 (Orissa)**.

7. Having heard the rival submissions and on going through the materials on record, it transpires from the assessment order that the proceeding relates to assessment period 01.04.2007 to 31.03.2010. It further transpires that for the tax period 01.12.2006 to 31.10.2008, a proceeding u/s. 42 of the OVAT Act has been completed, but the rest of the period, i.e. 01.11.2008 to 31.03.2010, the record is silent regarding completion of any assessment u/s. 39, 40, 42 or 44 of the said Act.

Hon'ble Court in the case of ***M/s. Keshab Automobiles*** cited supra have been pleased to observe in para-22 as follows :-

> "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 acknowledgement 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 fulfilment of other requirements of that provision as it stood prior to 1st October, 2015."

In view of the ratio laid down by the Hon'ble Court, the Department is required to communicate a formal communication or acknowledgment regarding the acceptance of the self-assessment u/s. 39 of the OVAT Act. In this case, the State has not filed any materials to show that the acceptance of the self-assessment has been communicated to the Dealer.

8. In view of the decision of the Hon'ble Court in ***M/s. Keshaba Automobiles's*** case cited supra, the assessment proceeding u/s. 43 of the OVAT Act for the period 01.11.2008 to 31.03.2010 is without jurisdiction in absence of any assessment u/s. 39, 40, 42 or 44 of the said Act. So, the orders of the Assessing Authority and the First Appellate Authority are not sustainable in the eyes of law as the same are without jurisdiction.

9. It is not in dispute that previously a proceeding u/s. 42 of the OVAT Act was completed in respect of the period 01.12.2006 to 31.10.2008 including a part of the present assessment period, i.e. 01.04.2007 to 31.10.2008. So, this period shall not be covered by the decision of the Hon'ble Court cited supra.

Learned Counsel for the Dealer has raised the maintainability of proceeding u/s. 43 of the OVAT Act on the ground that the 43 proceeding is only maintainable in limited circumstances in a case where the assessment has been completed u/s. 42 of the said Act, i.e. if only the conditions of (a) escaped assessment; (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.e. wrongly any deduction from his turnover; or (ii) input tax credit to which he is not eligible, of Section 43(1) are satisfied.

10. In the present case, the assessment order shows that proceeding u/s. 43 of the OVAT Act has been initiated on the strength of TER submitted by the ACCT, Vigilance Division, Balasore alleging suppression.

So, the submission of the learned Counsel for the Dealer regarding maintainability of 43 proceeding for the period 01.04.2007 to 31.10.2008 on the ground of completion of assessment u/s. 42 of the Act is not accepted.

11. The Assessing Authority imposed twice penalty, i.e. ₹1,08,379.00 on excess collection of tax of ₹54,189.72. The State has taken a plea that the Dealer is liable to pay penalty as per the provision of Section 52(1)(b) of the OVAT Act for unauthorized and excess collection of tax by the Dealer. The relevant provision is quoted herein below for better appreciation :-

> "52. Unauthorized and excess collection of tax by the dealer,-
> (1) Any person who, -
> (a) xx xx xx
> (b) being a registered dealer, collects any amount by way of tax in excess of the tax payable by him,
> shall be liable to pay in addition to the tax for which he may be liable, a penalty equal to twice the sum so collected by way of tax."

The learned Counsel for the Dealer raises the point of jurisdiction of the Assessing Authority on the ground of lack of jurisdiction for non-acceptance or acknowledgment of the self-assessed return of the Dealer. So, the same shall be taken for adjudication at the outset. It is not in dispute that a proceeding u/s. 42 of the OVAT Act has been completed for the period 01.04.2007 to 31.10.2008. When the Dealer takes a plea that the revenue has not accepted or acknowledged the return of the Dealer for the rest period out of the assessment period excluding 01.04.2007 to 31.10.2008, the revenue is duty bound to show the material before this forum that the return of the Dealer has been accepted or acknowledged. The State fails to produce any material before this forum or the record does not disclose that the return of the Dealer has been accepted or acknowledged. So, in such circumstances, this Tribunal has got no alternative than to record a finding that the Assessing Authority lacks jurisdiction over the period 01.11.2008 to 31.03.2010 for non-acceptance or acknowledgement of the return of the

Dealer. Therefore, we cannot decide the matter on merit as the same has already answered in negative in favour of the revenue on preliminary issue.

12. The first allegation of the TER relates to the discrepancy of despatch of ore for 2535.900 MT. It relates to 08.07.2009 to 11.08.2009, i.e. in the inclusion period 01.11.2008 to 31.03.2010. As such, the amount of sale suppression of ₹38,03,850.00 @ ₹1,500.00 per MT for 2535.900 MT is not sustainable and the same bounds to fail for having no jurisdiction.

13. The second allegation relates to sale suppression of 73.170 MT relates to the period 2008-09 including the period 01.11.2008 to 31.03.2009 in which the return filed u/s. 39 of the OVAT Act alleged to have not been accepted, but it is not in dispute that for the period 01.04.2008 to 31.10.2008, proceeding u/s. 42 of the OVAT Act has been completed.

Therefore, the Assessing Authority will examine the tax liability for the audit assessment period 01.04.2008 to 31.10.2008 and the rest period is held to be without jurisdiction.

14. The third allegation relates to despatch of 847.380 MT of iron ore without supported TP for which the Assessing Authority estimated the sales suppression of ₹12,71,070.00 @ ₹1,500.00 per MT. The alleged sales suppression relates to 06.11.2007 to 06.12.2007, which was detected on the information obtained from the despatch figure of firm- M/s. Jay Jagannath Transport, Badampahar.

Learned Counsel for the Dealer contends that when the Dealer refutes the charges, the State should prove it by adducing material evidence of third party. The Dealer takes the plea of natural justice. In the case of ***Pramila Dei v. Secretary, Board of Secondary Education, Orissa, Cuttack***, **ILR 1972 Cuttack 469**, wherein the Hon'ble Court observed that (i) the assessee has to be informed about the materials against him together with a statement of the allegations on which they were based; (ii) he should be given a reasonable opportunity of stating his own case; (iii) if the assessee

demands that the witness reporting against him should be cross-examined by him, ordinarily such opportunity has to be granted; and (iv) the taxing authority would consider the entire material placed on the record and complete the assessment in good faith. There is no material on record to show that the petitioner demanded an opportunity to verify the third party document, to summon the witness for examination and to get a copy of the document. Likewise, the record does not disclose if the documents were collected from third party source and copy of the same were provided to the Dealer to defend the allegation. Clause (i) of the decision cited supra mandates that the Assessing Authority should inform the Dealer along with the statement of the allegations. The assessment order does not disclose the Assessing Authority had issued the statements and copy of third party document to the Dealer. Clause (ii) mandates that the Assessing Authority should have given a reasonable opportunity of stating of his case. Unless, the statement of the third party has been given to the Dealer to defend his case, the Dealer shall be prejudiced and natural justice shall not be done to the Dealer. Therefore, the Assessing Authority shall provide a copy of statement of third party along with material document to the Dealer and shall proceed to assess the tax liability as per law after giving opportunity of hearing to him.

15. The fourth allegation regarding physical verification of stock with respect to mining document for iron ore of 10.40 mm size for 40,388.135 MT and iron ore fines for 88,693.605 MT as on 11.09.2009. The assessment order reveals that sales suppression of 3500 MT of 5.18 mm size of iron ore, the Assessing Authority estimated ₹5,25,000.00 @ ₹1,500.00 per MT. So, the Assessing Authority raised sales suppression of ₹52,50,000.00 @ ₹1,500.00 per MT. As the allegation of suppression relates to 11.09.2009, i.e. date of inspection, which is within the inclusion period of 01.11.2008 to

31.10.2010, the State cannot saddle the liability of the Dealer for lack of jurisdiction.

16. The last allegation relates to export sale for the periods 2007-08 to 2009-10. The Assessing Authority found that the allegation of not furnishing 'H' forms for the period 2007-08 to 2008-09 (upto 30.09.2008) has not sustained. As regards the period from 01.10.2008 to 31.03.2010 is including 01.11.2008 to 31.03.2010 wherein we have already observed that the assessment is not maintainable on the point of without jurisdiction as per the decision in case of ***M/s. Keshab Automobiles*** cited supra. The only one month, i.e. 01.10.2008 to 31.10.2008, requires adjudication for export sales. The assessment order reveals that there is no bill relates to such period. So, the allegation on this score regarding liability to pay VAT on the export sale of ₹1,92,59,263.00 is not sustainable in the eyes of law and, therefore, the same is deleted.

17. The assessment under the OET Act relates to 01.04.2007 to 31.03.2010. Record reveals that a proceeding u/s. 9C of the OET Act has been completed for the period 01.12.2006 to 31.10.2008. The record does not disclose any assessment proceeding u/s. 9C excluding the aforesaid period. In the case of ***M/s. ECMAS Resins Pvt. Ltd.*** cited supra, the Hon'ble Court have been pleased to observe as under :-

> "26. As far as OET Act is concerned, the relevant provisions i.e. Section 9(2) and Section 10 correspond exactly to Section 39(2) and Section 43 respectively of the OVAT Act as those provisions stood prior to the amendment in 1st October, 2015. The same legal position as above would, therefore, hold good for the provisions of the OET Act as well."
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> xx xx xx
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> 43. The sum total of the above discussion is that as far as a return filed by way of self assessment under Section 9(1) read with Section 9(2) of the OET Act is concerned, unless it is 'accepted' by the Department by a formal communication to the dealer, it cannot be said to be an assessment that has been accepted and without such

acceptance, it cannot trigger a notice for reassessment under Section 10(1) of the OET Act read with 15 B of the OET Rules. This answers the question posed to the Court."

In view of the above settled position of law, as the State fails to show acceptance of self-assessment u/s. 9(1) read with Section 9(2) of the OET Act for the period 01.11.2008 to 31.03.2010, the same is without jurisdiction.

18. Now, we shall proceed to examine the dispute raised under the OET Act for the period 01.04.2007 to 31.10.2008. The assessment order reveals that the Assessing Authority had verified the sale and purchase for the period 01.11.2008 to 31.03.2010.

The Assessing Authority also found purchase of a machine for ₹34,01,935.00 from M/s. Minerals Technology, Australia by using Govt. Waybill bearing No. AH-2691617 dated 31.10.2009 and purchase of spare parts to the tune of ₹4,75,000.00 from M/s. Jharsamya Logistics Ltd., Mumbai by utilizing Govt. Waybill bearing No. AH-2691616 dated 04.12.2009. The above transactions relate to the period wherein the State fails to show any communication of acceptance of self-assessed return, so the Assessing Authority lacks jurisdiction to assess the tax liability.

The Assessing Authority also added an amount of suppression of ₹1,04,34,675.00 towards purchase and sale suppression and ₹1,92,59,263.00 towards sale of scheduled goods as export sale as discussed under the OVAT Act. The observations rendered under OVAT Act in the preceding paragraphs shall equally hold good under the OET Act.

19. As the assessment period relates to 01.04.2007 to 31.03.2010 and out of the same, in absence of formal communication of acceptance of self-assessed return u/s. 9(1) and 9(2) of the OET Act for the period 01.11.2008 to 31.03.2010 by the State and the sale and purchase figure mentioned in the assessment order relates only to the period 01.04.2008 to 31.03.2010, the

same is held to be without jurisdiction. But the assessment order transpires that some transactions relating to the period 01.04.2007 to 31.10.2008 is part of the assessment, so, the Assessing Authority shall segregate the above period and shall proceed for reassessment as per law for the period 01.04.2007 to 31.10.2008.

20. So, for the foregoing discussions, we are of the unanimous view that the period of assessment for both OVAT Act and OET Act, i.e. 01.11.2008 to 31.03.2010 are without jurisdiction and for the period 01.04.2007 to 31.10.2008 requires further adjudication by the Assessing Authority keeping in view our above observations in the preceding paragraphs by allowing due opportunity to the Dealer. Therefore, we feel it proper to remit the matters to the Assessing Authority for reassessment in accordance with law. Hence, it is ordered.

21. Resultantly, the appeals under both the Acts are allowed in part and the impugned orders of the First Appellate Authority confirming the assessment orders are hereby set aside. The matters are remitted to the Assessing Authority for fresh assessment as per law keeping in view the observations made supra within a period of three months from the date of receipt of this order. Cross-objections are disposed of accordingly.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member

I agree,

Sd/-
(B. Bhoi)
Accounts Member-II