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

S.A. No.23(VAT) of 2020

&

S.A. No.23(ET) of 2020

(Arising out of the order of the learned CT & GST, Territorial Range, Sundargarh, in First Appeal case No. AAV. 117 & 95 ET of 2018-19) disposed of on 31.12.2019)

P r e s e n t: **Sri. S.K.Rout**
Judicial Member-II

M/s. Dipson India,
Rajgangpur,
Dist:Sundargarh. ... 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.C.Agarwal, Advocate.
Mr.P.S.Patra, Advocate.
For the Respondent ... Mr. D.Behura, SC(CT).

Date of hearing: **17.12.2022** * * * Date of Order:**28.12.2022**

O R D E R

Both these appeals are preferred by the dealer challenging the orders dated 30.11.2019 and 31.12.2019 passed by the learned Joint Commissioner CT & GST (Appeal), Sundargarh Territorial Range, Rourkela (in short, FAA) and hence being heard together are disposed of by this common order as the facts and laws and the parties are same.

2. The case at hand is that the dealer appellant is engaged in trading of iron and steel goods. The Additional Commissioner of Central Excise, Custom and Service Tax Rourkela visited the business premises

and found some incriminating documents called as “Katcha Chitha” which supposed to be unaccounted sale relating to the period from 01.07.2015 to 30.11.2015. The list of the dealers who had purchased goods from the dealer appellant has been transmitted by the Commissioner of Commercial Taxes, Odisha, Cuttack directing to cause necessary investigation into the business activities of the purchasing dealers. Accordingly, the investigating officials, Jharsuguda in order to verify the books of accounts with reference to transaction recorded in the “Katcha Chitha”, issued Form VAT 401. In response to said notice, the dealer appeared before the investigating officials with books of accounts for verification. After verification, the STO, Investigating Unit, Jharsuguda submitted a tax evasion/fraud case report vide No.02/CT-2017-18. The said report contained stating that during course of investigation the I.O. found discrepancies in the books of accounts which the appellant had not accounted for purchase of 136.02 MT of iron and steel goods from M/s.Ambica Iron and Steel Pvt. Ltd.(dealers business). The Investigating Officer estimated the average sale price of the product at Rs.30,869.00 per MT and observed the total purchase value of the goods would be to Rs.41,98,801.00 and suggested for payment of tax. In S.A.No.23(v) of 2020, pursuant to the tax evasion/ fraud case report, the learned assessing officer initiated the assessment proceeding under Section 43 of the OVAT Act. The learned assessing officer took 10% of the suppression value estimated by the investigating officials and determined the sales suppression at Rs.46,18,681.00 and calculated tax @5% on the above sales which calculated to Rs.2,30,934.00. Likewise, in S.A.No.23(ET) of 2020, the learned assessing officer initiated assessment proceeding under section 10(1) of the OET Act and completed the assessment. The learned assessing officer took the purchase suppression value estimated by the investigating officials at Rs.41,98,801.00 and calculated tax @1% on the above purchase which calculated to Rs.41,988.00. Penalty of Rs.83,976.00 was also imposed and in toto the demanded tax and penalty calculated to Rs.1,25,964.00.

3. Against such tax demands, the dealer preferred first appeals before the learned Joint Commissioner CT & GST (Appeal), Sundargarh Range, Rourkela (FAA) who confirmed the assessment orders.

4. Further being dis-satisfied with the orders of the learned first appellate authority, the dealer has preferred the present second appeals as per the grounds stated in the grounds of appeal.

5. Cross objections are filed in both the appeals by the state respondent.

6. Learned Counsel appearing for the dealer assessee contended that the orders passed by the fora below are not sustainable in the eyes of law, the same being illegal and arbitrary. The dealer has also adduced additional evidence before this Tribunal raising the plea that no assessment under Section 39,40,42 or 44 was made before initiation of proceeding under Section 43 of the OVAT Act and as such the impugned orders of assessment are liable to be quashed for the period under challenge.

7. Per contra, the learned Standing Counsel for the revenue argued that when a ground was not taken earlier before the assessing authority and the first appellate authority, new ground cannot be pleaded before this Tribunal. But it is the settled proposition of law that law point can be raised at any time. In view of such, the contention raised by the Standing Counsel for revenue holds not good.

8. Heard the contentions and submissions of both the parties in this regard. The sole contention of the dealer-appellant is that the assessment order is not maintainable. It was vehemently urged by the learned Counsel for the dealer-assessee that the initiation of proceeding u/s.43 of the OVAT Act was illegal and bad in law in absence of formation of independent opinion by the assessing authority as required u/s.43(1) of the Act. The escaped turnover assessment could not have been initiated u/s.43 of the OVAT Act when the dealer-assessee was not self-assessed

u/s.39 of the Act. Further contention of the dealer-assessee is that the initiation of such proceeding by the assessing authority u/s.43 of the OVAT Act without complying the requirement of law and in contravention to the principles laid down by the Hon'ble High Court of Orissa in case of M/s. Keshab Automobiles v. State of Odisha (STREV No.64 of 2016 decided on 01.12.2021) is bad in law. He vehemently urged that there is nothing on record to show that the dealer-assessee was self-assessed u/s.39 of the OVAT Act after filing the return and it was communicated in writing about such self-assessment. So when the initiation of proceeding u/s.43 of the OVAT Act is bad in law, the entire proceeding becomes nullity and is liable to be dropped.

After a careful scrutiny of the provisions contained u/s.43 of the OVAT Act, one thing becomes clear that only after assessment of dealer u/s.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 escaped assessment, or been under assessed, or been assessed at a rate lower than the rate at which it is assessable, then giving the dealer a reasonable opportunity of hearing and after making such enquiry, assess the dealer to the best of his judgment. Similar issue also came up before the Hon'ble High Court in case of M/s. Keshab Automobiles (supra) wherein the Hon'ble Court interpreting the provisions contained u/s.43 of the OVAT Act, in paras 13 to 16 of the judgment observed that "the dealer is 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 ….".

So the position prior to 1st October, 2015 is clear. Unless there was an assessment of the dealer u/s.39, 40, 42 or 44 for any tax period, the question of reopening the assessment u/s.43(1) of the OVAT Act did not arise. The Hon'ble Court in para-22 of the judgment has

categorically observed that if the self-assessments u/s.39 of the OVAT Act for the tax periods prior to 01.10.2015 are not accepted either by a formal communication or an acknowledgment by the Department, then such assessment cannot be sought to be reopened u/s.43(1) of the OVAT Act. In the instant case, the impugned tax relates to pre-amended provisions of Section 43 of the OVAT Act i.e. prior to 01.10.2015. This apart the returns filed by the appellant were also not accepted either by a formal communication or an acknowledgement issued by the Department. The similar matter has also been decided by the Full Bench of OSTT in various cases such as M/s. Swati Marbles v. State of Odisha, S.A. No.209(V) of 2013-14 (Full Bench dtd.06.06.2022), State of Odisha v. M/s. Jaiswal Plastic Tubes Ltd., S.A. No.90(V) of 2010-11 (Full Bench dtd.06.06.2022), M/s. Jalaram Tobacco Industry v. State of Odisha, S.A. No.35(V) of 2015-16 (Full Bench dtd.16.08.2022), M/s. Eastern Foods Pvt. Ltd. v. State of Odisha, S.A. No.396 (VAT) of 2015-16 (Full Bench dtd.23.08.2022) and M/s. Shree Jagannath Lamination and Frames v. State of Odisha, S.A. No.25(VAT) of 2015-16 (Full Bench dtd.15.10.2022).

9. In view of the law expounded by the Hon'ble High Court in case of M/s. Keshab Automobiles (supra) and subsequently confirmed by the Hon'ble Apex Court, the proceeding u/s.43 of the OVAT Act has been initiated by the assessing authority without complying with the requirement of law and without giving any finding that the dealer-assessee was formally communicated about the acceptance of self-assessed return, the proceeding itself is not maintainable.

10. Moreover, the Hon'ble Court has clearly observed that the corresponding provisions of the OVAT Act namely Section 39(2) of the OVAT Act as it stood prior to 1st. October, 2015 is in pari materia with Section 9(2) of the OET Act.

11. The present petition concerns the assessment under the OET Act for the same period. The position under the OET Act stands covered by the judgment of the Full Bench of the Hon'ble Court dtd.05.08.2022 in W.P.(C) No.7458 of 2015 (M/s. ECMAS Resins Pvt. Ltd. v. State of Orissa) in which it was held by the Hon'ble Court that unless the return filed by

way of self-assessment u/s.9(1) r/w. section 9)2) of the OET Act is "accepted" by the department by a formal communication, it cannot trigger a notice of reassessment u/s.10(1) of the OET Act r/w. Rule 15(b) of the OET Rules. So in view of the above analysis and placing reliance to the verdict of the Hon'ble Courts, the claim of the appellant deserves a merited acceptance.

12. In the result, for the reasons assigned above, the appeals filed by the dealer-assessee are partly allowed and the impugned orders of the forums below are hereby set aside. As a corollary, the impugned orders of assessment for the period from 01.07.2015 to 30.09.2015 are hereby quashed and the assessment for the period from 01.10.2015 to 30.11.2015 are hereby set aside and the cases are remanded back to the learned assessing officer with a direction to complete the re-assessment afresh for the period from 01.10.2015 to 30.11.2015 in accordance with law pursuant to the observations made above after giving a reasonable opportunity to the dealer assessee of being heard. Accordingly, the cross objections are disposed of.

Dictated and Corrected by me,

Sd/-
(Shri S.K.Rout)
Judicial Member-II

Sd/-
(Shri S.K.Rout)
Judicial Member-II