

**BEFORE THE DIVISION BENCH, ODISHA SALES TAX TRIBUNAL,
CUTTACK.**

(Arising out of the orders of the learned Addl.CST(Appeal),
Commissionerate of CT & GST, Odisha in Appeal Case Nos. AA-
667/KJB/2016-17 & AA -666/KJB(ET)/2016-17 disposed of on
dated 18.04.2019)

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

S.A. No. 103(V) of 2019 & S.A. No. 60(ET) of 2019

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

- V e r s u s -

M/s. Serajuddin & Co.
Joda, Dist- Keonjhar. Respondent.

S.A. No.28(V) of 2021 & S.A. No.17(ET) of 2021

M/s. Serajuddin & Co.
Joda, Dist- Keonjhar. Appellant.

- V e r s u s -

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

For the State : : Mr. D. Behura, Id. S.C.(C.T.).
For the Dealer : : Mr. P.K. Jena, Id. Advocate.

Date of Hearing : 21.07.2023 * Date of Order :19.08.2023**

O R D E R

Both the State and the dealer-assessee have preferred
appeals under Section 78(1) of the Odisha Value Added Tax Act (in
short, 'OVAT Act') and under Section 17(1) Odisha Entry Tax Act (in
short, 'OET Act') challenging the orders of the learned Additional

Commissioner of Sales Tax Act (Appeal), Commissionerate of CT & GST, Odisha (at Cuttack) (in short, 'Id. FAA') passed on 18.04.2019 in Appeal Case Nos. AA667/KJB/2016-17 & AA-666/KJB(ET)/2016-17 on assessments passed by the Deputy Commissioner of Sales Tax, Barbil Circle, Barbil (in short, 'Id. Assessing Authority') under Section 43 of the OVAT Act and under Section 10 of the OET Act. Since the aforesaid four appeals relate to the same material period of the same assessee involving common question of facts and law, they are clubbed together for hearing and disposal by this composite order.

2. The facts, in nutshell, of the case are that M/s. Serajuddin & Co. Ltd., Joda, Keonjhar is a partnership firm engaged in mining and extraction of iron ore and manganese. The dealer was assessed under Section 43 of the OVAT Act and under Section 10 of the OET Act for the tax period from 01.04.2008 to 31.03.2010 on the basis of the Hon'ble Shah Commission Report which resulted in demand of ₹2,59,50,048.00 and ₹67,47,012.00 respectively inclusively of penalty. On being aggrieved, the dealer-assessee preferred first appeals against the aforesaid demands under both the Acts. The first appeals resulted in reduction of demand of ₹82,42,756.00 under OVAT Act and ₹21,43,117.00 under the OET Act. Both the State and the dealer-assessee being not satisfied the orders of the Id. FAA preferred these appeals before this Forum.

S.A. No. 103(V) of 2019 & S.A. No.60(ET) of 2019

3. The State in its grounds of appeal filed under OVAT Act points out that there was stock discrepancy in relation to physical stock of iron ore and iron ore fines detected by the Joint Physical Verification Team establishing shortage of 51,043.17 MTs and 1,06,996.00 MTs respectively. The Id. Assessing Authority treating the above shortages as sales suppression assessed the dealer to ₹2,59,50,048.00 including penalty of ₹1,73,00,032.00. It is alleged that the said demand of tax was reduced to ₹82,42,756.00 by the Id. FAA without assigning any valid reason. This is contrary to the provisions of the law and prejudicial to the interest of the Government Revenue. Similarly, the State disapproves reduction in demand in OET Act arguing that the Id. Assessing Authority has reasonably assessed the dealer-assessee under Section 10 of the OET Act raising demand of ₹67,47,012.00 which includes penalty of ₹44,98,008.00. This shortages of physical stocks of iron ore and iron ore fines as stated above determined by the Joint Physical Verification Team was not taken to account at first appellate stage without assigning any valid reasons. The State thus seeks interference of this forum for redressal.

S.A. No. 28(V) of 2021 & S.A. No.17(ET) of 2021

4. The dealer-assessee in its appeals preferred under both the Acts besides harping on grounds of appeals submitted at the time of filing appeal has submitted additional grounds of appeal. The

additional grounds of appeals are on maintainability of initiation of proceedings under Section 43 of the OVAT Act and under Section 10 of the OET Act in absence of assessment completed under Section 39(1) of the OVAT Act and 9(2) of the OET Act. It is submitted by the learned Counsel of the dealer-assessee that in the instant case assessment under section 43 of the OVAT Act and under section 10 of the OET Act has been completed basing on the report of the shah Commission without completion of assessment either under Section 39, 40 or 42 of the OVAT Act and under Section 9(2) of the OET Act. The learned Counsel of the dealer-assessee places reliance of the decisions rendered by the Hon'ble High Court of Odisha passed on 01.12.2021 in case of ***Keshab Automobiles Vs. State of Odisha*** in STREV No.64 of 2016 and order passed on 05.01.2022 in case of ***M/s ECMAC Resins Pvt. Limited Vs. State of Odisha*** in W.P. (C) No.7458 of 2015 and in case of ***M/s Shyam Metalics & Energy ltd. Vs. Commissioner of Commercial Taxes, Odisha*** in W.P.(C) No.7296 of 2016. Since it engulfs substantial points of law of sustainability of the initiation of proceedings which strikes the root of the case, we, rather feel it pertinent to look into this substantial issue before we dwell upon concentrating on other issues on merits. The State on the other hand has filed additional cross objection in defence of the contentions taken on additional grounds of appeal.

5. The State in defence of the additional cross objection/additional grounds holds that the returns filed by the dealer-assessee being in order are accepted as self-assessed under Section 39(1) of the OVAT Act and the same has been communicated vide notice No.1618 in VAT-307 dated 24.04.2015. Accordingly, it is asserted that as the assessment completed under Section 39 of the OVAT Act and communication thereof has been brought about, the ratio of the decision in **M/s. Keshab Automobiles** case is of little application. So also is the case with re-assessment framed under Section 10 of the OET Act. Communication of assessment under section 9(1) of the OET Act is said to have been made to the dealer-assessee vide notice No.1621 in Form E-32 dated 22.4.2015. It is also contended by the State that the issue of maintainability as raised in the additional grounds was neither raised nor adjudicated while disposing of the first appeal. It is also urged placing reliance upon the decision in the case of **Lakhoo Vajarang reported in (1961) 12 STC 162** wherein Hon'ble Apex Court specifically observes that the Tribunal may allow additional evidence subject to the questions that were pending before the Tribunal. The State has thus prayed for dismissal of the appeals filed by the dealer-assessee.

6. The substantial issues put forth by both the rival parties are looked into in accordance with the provision of laws. It is felt

pertinent to go through the verbatim provided in Form VAT 307 and Form E32. The verbatim provided in Form VAT-307 is as under:-

‘You have been assessed under Section 39/Section 40/Section 42/Section 44 of the Orissa Value Added Tax, 2004 for the tax period(s) _____ to _____ on _____

X

X

In the event of your failure to comply with all the terms of this notice, I shall proceed to assess you under Section 43 of the said Act, to the best of my judgment, without any further reference to you.’

Identical verbatim appears in Form E32 which is reproduced below:-

‘You have been assessed under Section ____-of the Orissa Entry Tax Act, 1999 for tax period(s) _____ to _____ on _____

X

X

In the event of your failure to comply with all the terms of this notice, I shall proceed to assess you under sub-section (1) of Section 10 of the said Act, to the best of my judgment, without any further reference to you.’

On a plain reading of Form VAT-307 and Form E32, it becomes clear that these are statutory notices upon the dealer who has been assessed under Section 39, 40, 42 and 44 of the OVAT Act and under Section 9(2) of the OET Act prior to taking up reassessment proceedings under Section 43 of the OVAT Act and Section 10(1) of the OET Act. Assumption of communication of self-assessments to the dealer-assessee upon issuance of Form VAT 307 and Form E32 is far from truth. Accordingly, the arguments

placed by the State in this regard are not acceptable. Besides this, the contention as to raising of the maintainability issue at the stage of second appeal for the first time before being raised earlier in the lower forums, it is brought out that the dealer assessee had agitated the issue at the first appellate stage stating that the condition precedent to initiation of proceeding for turnover escaping assessment under section 43 of the OVAT Act is lacking. The Id.FAA turned down this substantial point of law. Notwithstanding anything contained to the contrary, it is inferred that the Tribunal has discretion to consider the question of law arising in assessment proceedings although not raised earlier. The additional grounds submitted before this forum become available on account of change of circumstances or law. This find support in the decision of the Hon'ble Apex Court in case of **Commissioner of Sales Tax, U.P. – Vrs.- Sarjoo Prasad Ram Kumar [1976] reported in 37 STC 533 (S.C.)** wherein it is observed that:

“.....Unless there is some provision either in the Act or in the Rules framed which precludes the assessee from raising any objection as to jurisdiction, if the same is not raised before the assessing authority, the assessee cannot be precluded from raising that objection at a later stage. An objection as to jurisdiction goes to the root of the case.”

Under the above settled principle of law, since the substantial question of law strikes the root of the case, the contention of the State is turned down in entirety. On the other

hand, the additional grounds placed by the Id. Counsel of the dealer-assessee bear justification for consideration.

7. Section 39(2) of the OVAT Act has been amended introducing the concept of 'deemed' self assessment only with effect from 1st October, 2015. 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. Decision of the Hon'ble High Court of Odisha pronounced in case of ***M/s. Keshab Automobiles Vs. State of Odisha*** (Supra) in Para 22 of the said verdict lays down as under.:-

“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 fulfillment of other requirements of that provision as it stood prior to 1st October, 2015.”

The aforesaid decision of the Hon'ble High Court of Odisha has been upheld by the Hon'ble Supreme Court of India in **SLP (C) No.9823-9824/2022 dated 13.7.2022** which reads as follows:-

“We have gone through the impugned order(s) passed by the High Court. The High Court has passed the impugned order(s) on the interpretation of the relevant provisions, more particularly Section 43 of the Odisha Value Added Tax Act, 2004, which was prevailing prior to the amendment. We are in complete agreement with the view taken by the High Court. No interference of this Court is called for in exercise of powers

under Articles 136 of the Constitution of India. Hence, the Special Leave Petitions stand dismissed”

Further, as regards completion of assessment under Section 10 of the OET Act in absence of assessment under Section 9(2) of the OET Act is not sustainable in view of the judgment of the Hon'ble High Court of Odisha rendered in case of **M/s. ECMAS Resins Pvt. Ltd. Vs. State of Odisha and others** in W.P.(C) No.7458 of 2015 dated 05.08.2022 which in para 43 of the said judgment observes as under:-

“ 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 re-assessment under Section 10(1) of the OET Act read with 15B of the OET Rules. This answers the question posed to the Court.”

In the present case, it is revealed that the assessments framed under the OVAT Act and OET Act relate to the tax period from 01.04.2008 to 31.03.2010 which entirely cover the pre-amendment period. The learned Assessing Authority is learnt to have not complied pre-conditions as required under section 39(1) of the OVAT Act and under Section 9(2) of the OET Act for initiation of proceedings under section 43(1) of the OVAT Act and under Section 10(1) of the OET Act. He has reopened the assessments simply on the basis of the Shah Commission Report. There is no evidence available on record as to communication of the assessment made

U/s.39 of the OVAT Act and under Section 9(2) of the OET Act to the dealer-assessee. The Id.FAA is learnt to have turned down the plea taken by the dealer assessee as regards maintainability of the proceedings. In view of the above principles of law, we are constraint to infer that the assessments as well as the first appeal orders made in the impugned cases are not sustainable in law and as such, the same are liable to be quashed. All other points raised by both the parties in the grounds of appeal are rendered redundant.

8. Resultantly, under the facts and in the circumstances of the cases as observed above, it is ordered that the S.A. 103(V) of 2019 & S.A. No. 60 (ET) of 2019 filed by the State are dismissed and the S.A. No. S.A. No. 28(V) of 2021 & S.A. No.17 (ET) of 2021 filed by the dealer-assessee are allowed. Cross objections are disposed of accordingly.

Dictated and corrected by me.

**Sd/-
(Bibekananda Bhoi)
Accounts Member-II**

I agree,

**Sd/-
(Bibekananda Bhoi)
Accounts Member-II**

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