

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

S.A. No. 77 (V) of 2016-17

&

S.A. No. 132 (ET) of 2018

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

& **Shri B.Bhoi,**
Accounts Member-II.

S.A. No. 77(V) of 2016-17

(Arising out of the order of the learned JCCT
Bhubaneswar Range, Bhubaneswar, in First Appeal Case No.
AA.106221422000071, disposed of on dtd.30.07.2015)

&

S.A. No. 132 (ET) of 2018

(Arising out of the order of the learned CT & GST
Territorial Range, Bhubaneswar, in First Appeal Case No.
AA-108221622000206(OET), disposed of on dtd.29.06.2018)

M/s. Lingaraj Electricals,
Plot No.85/A, Bapuji Nagar,
Bhubaneswar, Dist:Khurda.

... Appellant

- V e r s u s -

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

... Respondent

For the Appellant
For the Respondent

... Mr. K.R.Mohapatra, Advocate
... Mr. M.L.Agarwal, S.C.

Date of hearing: **04.02.2023** *** Date of order: **09.02.2023**

ORDER

Both these appeals are disposed of by this composite order as the same involve common question of law and facts and in between the same parties and for the same assessment period.

2. Dealer preferred both these appeals challenging the order dated 30.07.2015 and 29.06.2018 passed by the learned Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (in

short, JCST/FAA) in first appeal case no.AA.106221422000071/OVAT/BH-IV dated 30.07.2015 and in first appeal case No.AA.108221622000206 (OET) dated 29.06.2018, thereby confirming the orders of assessment passed by the learned Sales Tax Officer, Bhubaneswar IV Circle, (in short, STO/AO) under Section 43 of the OVAT Act and under Section 10 of the OET Act for the tax period from 01.04.2013 to 30.06.2013 raising demand of Rs.2,75,274.00 including penalty of Rs.1,83,516.00 imposed under Section 43(2) of the OVAT Act and Rs.36,552.00 under Section 10(1) of the OET Act including penalty of Rs.24,368.00 imposed under Section 10(2) of the OET Act respectively.

3. The case at hand is that the dealer appellant is a registered dealer under the OVAT Act, 2004 having TIN No.21791117101 who is engaged in the business of trading of electrical goods, equipments etc. The dealer petitioner filed its return regularly with payment of admitted tax wherever the output tax exceeds input tax credit. Pursuant to tax evasion report, the learned assessing officer completed the assessment under section 43 of the OVAT Act, 2004 and under Section 10 of the OET Act raising the tax demands as mentioned above.

3. Against such tax demand, the dealer preferred first appeals before the learned JCST (Appeal), Bhubaneswar Range, Bhubaneswar who confirmed the tax demands.

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 these cases by the state respondent.

6. The learned counsel appearing for the dealer-assessee contended that the order passed by the learned forum below is illegal and arbitrary. No assessment u/s.39, 42 or 44 was made before initiation of proceeding u/s.43 of the OVAT Act. Since the concept of deemed assessment of the return has been introduced for the first time since 1st October, 2015, the impugned orders of reassessment are liable to be quashed for the period under challenge.

7. Per contra, the learned Standing Counsel appearing for the Revenue argued that the learned first appellate authority has completed the appeal based on the provision of law and factual position.

8. Heard the contentions and submissions of both the parties in this regard. The sole contention of the dealer-appellant is that the assessment orders are 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.

9. 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 acknowledgment 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).

10. 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. Likewise, 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, we are of the view that the claim of the appellant deserves a merited acceptance.

11. In the result, for the reasons assigned above, the appeals filed by the dealer-assessee are allowed and the impugned orders of the forums below are hereby quashed. Accordingly, the cross objections are disposed of. Dictated and Corrected by me,

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

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

I agree,

(Shri B. Bhoi)
Accounts Member-II