BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 54 (VAT) of 2021
&
S.A. No. 33 (ET) of 2021

(Arising out of orders of the learned JCST (Appeal), Bhubaneswar Range, Bhubaneswar in Appeal Nos. AA- 21911109469 & AA- 331/OET/BH-III/2019-20, disposed of on 29.01.2021)

Present: **Shri G.C. Behera, Chairman**

M/s. Utkal Nirman,
Plot No. C-9, Chandaka Industrial Estate,
Bhubaneswar ... Appellant

-Versus-

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

For the Appellant : Sri C.R. Das, Advocate
For the Respondent : Sri D. Behura, S.C. (CT) &
Sri N.K. Rout, Addl. SC (CT)

Date of hearing : 23.11.2023 *** Date of order : 22.12.2023

O R D E R

Both the second appeals relate to the same party and for the same period involving common question of facts and law, but under different Acts. Therefore, they are taken up for disposal in this common order for the sake of convenience.

S.A. No. 54 (VAT) of 2021 :

2 Dealer assails the order dated 29.01.2021 of the Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (hereinafter called as 'First Appellate Authority') in F A No. AA-

219111094690 confirming the assessment order of the Sales Tax Officer, Bhubaneswar-III Circle, Bhubaneswar (in short, 'Assessing Authority').

S.A. No. 33 (ET) of 2021 :

3. Dealer is also in appeal against the order dated 29.01.2021 of the First Appellate Authority in F A No. AA- 331/OET/BH-III/2019-20 confirming the assessment order of the Assessing Authority.

4. The facts of the cases, in short, are that –

M/s. Utkal Nirman is engaged in manufacturing and selling of fly ash bricks. The assessments relate to the period 01.04.2013 to 31.03.2016. The Assessing Authority assessed the Dealer u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') and u/s. 10 of the Odisha Entry Tax Act, 1999 (in short, 'OET Act') on 29.06.2019 on the basis of Tax Evasion Report (TER). Accordingly, he raised tax and penalty of ₹10,61,957.00 under the OVAT Act and ₹1,52,806.00 under the OET Act.

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 additional cross-objections supporting the impugned orders of the First Appellate Authority confirming the orders of assessment to be just and proper in the facts and circumstances of the case.

5. The learned Counsel for the Dealer files additional grounds of appeal and submits that the Assessing Authority was not justified in assessing the Dealer u/s. 43 of the OVAT Act for the pre-amended period, i.e. 01.04.2013 to 30.09.2015 without completing the assessment u/s. 39, 40, 42 or 44 of the OVAT Act. He further submits that in absence of acceptance of return as self-assessed by way of formal communication, the initiation of

escape assessment proceeding u/s. 43 of the OVAT Act for the pre-amended period is without statutory provision and thus, not sustainable in law. He also submits that under the OET Act the Assessing Authority directly completed assessment u/s. 10 without completing an assessment u/s. 9(1) and (2) of the said Act. Moreover, he contends that the demand raised solely on the basis of a balance sheet, which was prepared for the purpose of Bank, and no other iota of evidences brought into record to substantiate the alleged sale suppression and, therefore, the entire proceeding is without any application of mind. So, he urges that the orders of the First Appellate Authority and the Assessing Authority under the OVAT Act and OET Act are liable to be set aside in the ends of justice.

He relies on the decisions of the Hon'ble Court in cases of ***M/s. Keshab Automobiles v. State of Odisha***, reported in [**2023] 111 GSTR 317 (Orissa)** and ***M/s. ECMAS Resins Pvt. Ltd. and other v. State of Odisha & others***, reported in [**2023] 112 GSTR 333 (Orissa)[FB]**.

6. On the contrary, the learned Standing Counsel (CT) for the State submits that the Dealer was self-assessed u/s. 39 of the OVAT Act by way of filing returns. He submits that the Dealer did not raise the issue regarding acceptance of self-assessment return either at the time of assessment or before the First Appellate Authority. He contends that if the Dealer did not raise the issue in the earliest opportunity, he is precluded to take such ground before the second appellate authority for the first time by way of additional grounds of appeal. He further submits that communication/ acknowledgement of the order of acceptance of self-assessed return is a matter of fact and the same cannot be objected at this belated stage before this forum. He also submits that the assessment periods include the position of both pre-amendment and post-amendment periods. So, he avers that the whole proceeding cannot be quashed in the aid of the decisions of the cases

cited supra. Therefore, he urges that the orders of the First Appellate Authority require interference in appeal to that extent only.

7. Having heard the rival submissions of the parties and on going through the orders of both the Assessing Authority and the First Appellate Authority vis-a-vis the materials on record, it transpires that the assessment period relates to 01.04.2013 to 31.03.2016, which includes the pre-amendment period, i.e. 01.04.2013 to 30.09.2015, and post-amendment period, i.e. 01.10.2015 to 31.03.2016 under OVAT Act.

The point of maintainability of proceedings u/s. 43 of the OVAT Act and u/s. 10 of the OET Act in absence of any prior assessment is a question of law and touches the root of the matter, which requires preliminary adjudication, so, the same is taken up at the outset as preliminary issue.

As regards the assessment for pre-amendment period under the OVAT Act, i.e. 01.04.2013 to 30.09.2015, it is no more *res integra* that it pre-supposes that there has to be an initial assessment which should have been accepted for the period in question, i.e. before 1st October, 2015, before the Department could form an opinion regarding escaped assessment or under assessment or the Dealer taking the benefit of a lower rate or being wrongly allowed deduction from his turnover or ITC to which is not eligible. On such circumstances, in the case of ***Keshab Automobiles*** cited supra, Hon'ble Court have been pleased to observe 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 acknowledgment 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 provisions as it stood prior to 1st October, 2015."

The Department fails to produce any material regarding acceptance/acknowledgment of self-assessed return u/s. 39 of the OVAT

Act or any assessment of the Dealer u/s. 40, 42 or 44 of the said Act prior to 1st October, 2015.

In view of the above principles of law, I am of the considered view that the assessment prior to 1st October, 2015 (01.04.2013 to 30.09.2015) u/s. 43 of the OVAT Act is not maintainable in law and as such, the same is liable to be quashed.

8. As regards the assessment relating to the post-amendment period, i.e. 01.10.2015 to 31.03.2016, Hon'ble Court in the above cited case have been pleased to observe categorically as follows :-

> "14. However, under Section 43(1) of the OVAT Act, after its amendment with effect from 1st October, 2015 the Assessing Authority can form an opinion about the whole or part of the turnover of the dealer escaping assessment or being under assessed "on the basis of any information in his possession". In other words, it is not necessary after 1st October, 2015 for the Assessee's initial return having to be 'accepted' before Section 43(1) could be invoked."

In view of the ratio laid down above by the Hon'ble Court, I am of the considered opinion that the assessment relating to the post-amendment period, i.e. 01.10.2015 to 31.03.2016, the escaped assessment u/s. 43(1) of the OVAT Act can be invoked and the same cannot be said to be invalid as claimed by the Dealer.

9. Now coming to the dispute relating to the assessment for the post-amendment period, it is settled law that the same requires segregation and assessment afresh. At this stage, I feel it proper to remit the matter to the Assessing Authority for segregation of the assessment for the post amendment period and compute the tax liability in accordance with law without expressing my opinion on its merit. The Dealer is at liberty to raise all the material evidences in support of its defence before the Assessing Authority.

10. In the case of ***M/s. ECMAS Resins Pvt. Ltd. and other*** cited supra, Hon'ble Court have been pleased to observe that unless the self

assessment is accepted by the Department by a formal communication to the dealer, it cannot trigger a notice for reassessment u/s. 10(1) of the OET Act r/w. Rule 15B of the OET Rules. The relevant portion of the order of the Hon'ble Court is reproduced herein below for better appreciation :-

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

11. In view of the ratio laid down above by the Hon'ble Court, I am of the considered view that the assessment for the impugned period, i.e. 01.04.2013 to 31.03.2016, is not sustainable in the eyes of law in absence of acceptance of return of self assessment u/s. 9(1) r/w Section 9(2) of the OET Act.

Further adjudication on merit of the matter is redundant as nothing is left to decide after adjudication of preliminary issue on the point of maintainability. Hence, it is ordered.

12. Resultantly, the appeal under the OVAT is allowed in part and the appeal under the OET Act stands allowed. The impugned orders of the First Appellate Authority under the OVAT Act & OET Act are hereby set aside. The assessment under the OVAT Act for the pre-amendment period 01.04.2013 to 30.09.2015 and the assessment under the OET Act are hereby quashed. But, the assessment under the OVAT Act for the post amendment period, i.e. 01.10.2015 to 31.03.2016, is hereby remitted to the Assessing Authority for reassessment as per law keeping in view the observations made supra. The reassessment under the OVAT Act (post amendment period) should be completed within three months from the date of receipt of this order.

Excess tax paid, if any, shall be refunded to the Dealer as per law.

Cross-objections and additional cross-objections are disposed of accordingly.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

Sd/-
(G.C. Behera)
Chairman