BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

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

S.A. No. 227(ET) of 2014-15

(Arising out of the order of the learned Addl. Commissioner of Sales Tax (North Zone), in Appeal Case No. AA-SA-141/14-15 (OET), disposed of on dtd.05.01.2015)

M/s. Hindalco Industries Ltd.,
Hirakud Complex, Hirakud,
Sambalpur, Odisha. ... Appellant

- V e r s u s -

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

For the Dealer ... Mr. U. Behera, Advocate
For the State ... Mr. D. Behura, S.C. &
Mr. N.K. Rout, A.S.C.

Date of hearing: 26.02.2024 *** Date of order: 14.03.2024

O R D E R

The dealer prefers this appeal challenging the order dtd.05.01.2015 passed by the learned Addl. Commissioner of Sales Tax (North Zone) (hereinafter referred to as, ACST/first appellate authority) in Appeal Case No. AA-SA-141/14-15 (OET), thereby confirming the order of learned Deputy Commissioner of sales Tax, Sambalpur II Circle, Sambalpur (hereinafter referred to as, DCST/assessing authority) u/s.10

of the Orissa Entry Tax Act, 1999 (in short, the OET Act) raising demand of ₹24,02,49,153.00 including tax of ₹8,00,83,051.00 and penalty of ₹16,01,66,102.00 for the tax period from 01.04.2007 to 31.03.2011.

2. The case at hand is that, the dealer-appellant in the instant case is engaged in production of aluminum ingot at Hirakud, Sambalpur and brought coal from its captive coal mine at Talabira. The industry also purchased coal from open market apart from receipt of coal from the captive mines. The coal mining is located outside the local area of industry and the appellant pays Entry Tax on coal. The fact in dispute is that in respect of receipt of coal from captive mines, the dealer-appellant pays the Entry Tax stating to be on raising cost and also pays ET at concessional rate of 0.5% (50% of usual rate of 1%). The learned DCST observed that the price on which Entry Tax was paid was on very low price and the concessional rate of 0.5% was not applicable as the coals were used in generation of electricity, for which he reassessed the dealer-appellant u/s.10 of the OET Act and raised the demand as mentioned above.

3. Against such tax demand, the dealer preferred first appeal before the learned first appellate authority who confirmed the tax demand.

4. Further being dissatisfied with the order of the learned first appellate authority, the dealer has preferred the present second appeal as per the grounds stated in the grounds of appeal.

5. Cross objection in this case is filed by the State-respondent.

6. During pendency of this appeal, the dealer took the additional grounds raising the plea of maintainability stating that in absence of completion of assessment u/s.9C of the OET Act and communication thereof to the dealer, no reassessment u/s.10 of the OET Act is sustainable in the eyes of law. This apart, learned Counsel for the dealer also vehemently contended that as far as a return filed by way of self assessment u/s.9(1) read with sec.9(2) of the OET Act is concerned, unless it is "accepted" by the department by a formal communication to the dealer, it cannot trigger a notice of reassessment u/s.10(1) of the OET Act r/w. Rule 15(b) of the OET Rules. To support such contention, the dealer has relied upon the case of **M/s. ECMAS Resins Pvt. Ltd. v. State of Orissa** reported in **AIR 2022 Ori. 169** case as decided by the Hon'ble High Court of Orissa.

Per contra, the learned Standing Counsel appearing for the Revenue vehemently opposed to such claim of the dealer. This apart, learned Standing Counsel for the Revenue also contended stating that the additional ground raised by the dealer cannot be accepted at a belated stage as the issue raised by the dealer in its additional cross objection was neither raised nor adjudicated nor it was the issue while disposing of the appeal under the OET Act. Further contention raised on behalf of the Revenue is that the pure question of law affecting the tax liability of the dealer can be raised at any stage and not question of fact or mixed question of fact and law which is not related to the tax liability can be raised. To support such claim, Revenue has relied upon the case of ***State of Orissa v. Lakhoo Varjang 1960 SCC***

OnLine Ori 110: (1961) 12 STC 162 in which the following observations were made by the Hon'ble Apex Court:

> *"… The tribunal may allow additional evidence to be taken, subject to the limitations prescribed in Rule 61 of the Orissa Sales Tax Rules. But this additional evidence must be limited only to the questions that were then pending before the Tribunal …*
> *… The Assistant Collector's order dealt solely with the question of penalty and did not go into the question of the liability of the assessee to be assessed because that question was never raised before him. The Member, Sales Tax Tribunal should not therefore have allowed additional grounds to be taken or additional evidence to be led in respect of a matter that had been concluded between the parties even at the first appellate stage. If the aggrieved party had kept the question of assessment alive by raising it at the first appellate stage and also in the second appellate stage, the Member, Sales Tax Tribunal would have been justified in admitting additional evidence on the same and in relying on the aforesaid decision of the Supreme Court in Gannon Dunkerley's case, for setting aside the order of assessment. No subsequent change in case law can affect an order of assessment which has become final under the provisions of the Sales Tax Act …"*

So in view of the above judgment the additional ground preferred by the dealer is not maintainable.

7. At this juncture in the case of **M/s. National Thermal Power Co. Ltd, Vrs. Commissioner of Income Tax (1997) 7 Supreme Court Cases 489**, the Hon'ble Apex Court have been pleased to observe that :-

> *"The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the*

> *Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner of Income-Tax (Appeal). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier".*

8. In view of the above settled principle of law, we are of the opinion that the additional ground raised by the dealer-assessee can be accepted at this stage since the same involves the question of law.

9. Heard the contentions and submissions of both the parties in this regard. The sole contention of the dealer-assessee is that the assessment order is not maintainable. So, first we have to adjudicate upon the point of maintainability treating the same as preliminary issue without delving into the merit of the case.

10. In the present scenario, first after have a glance to the position under the OET Act which stands covered by the judgment of the Full Bench of the Hon'ble Court dtd.08.08.2022 in W.P.(C) No.7458 of 2015 (**(M/s. ECMAS Resins Pvt. Ltd. v. State of Orissa)**, it is evident that in this case, it was held by the Hon'ble Court that unless the return filed by way of self assessment u/s.9(1) read with sec.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 read with 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, the appeal preferred by the dealer is allowed and the orders of the fora below are hereby quashed. Cross objection is disposed of accordingly.

Dictated & corrected by me

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

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

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

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