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-II

S.A. No. 44 (V) of 2016-17
(Arising out of order of the learned Joint Commissioner of Sales Tax (Appeal), Sundargarh Range, Rourkela, in First Appeal Case No. AA V 37(RL-I) of 2009-10, disposed of on dated 20.04.2016)

S.A. No. 23 (ET) of 2016-17
(Arising out of order of the learned Joint Commissioner of Sales Tax (Appeal), Sundargarh Range, Rourkela, in First Appeal Case No. AA V 21 ET of 2009-10, disposed of on dated 20.04.2016)

S.A. No. 45 (V) of 2016-17
(Arising out of order of the learned Joint Commissioner of Sales Tax (Appeal), Sundargarh Range, Rourkela, in First Appeal Case No. AA V 20 of 2009-10, disposed of on dated 20.04.2016)

M/s. Vikram Private Limited,
S3 H 1-02, Kalinga Vihar,
Rourkela-769015. ... Appellant

-Versus-

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

S.A. No. 83 (V) of 2017-18
(Arising out of order of the learned Joint Commissioner of Sales Tax (Appeal), Sundargarh Range, Rourkela, in First Appeal Case No. AA V 20 of 2009-10, disposed of on dated 20.04.2016)

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

-Versus-

M/s. Vikram Private Limited,
S3 H 1-02, Kalinga Vihar,
Rourkela-769015. ... Respondent

For the Dealer : Mr. S.C. Agarwal, Advocate
For the State : Mr. D. Behura, S.C. &
Mr. S.K. Pradhan, A.S.C.

Date of hearing:01.06.2023 *** Date of order: 17.06.2023

O R D E R

For the sake of convenience and brevity, all these four appeals are disposed of by this composite order as the same involve common question of fact and law in between the same parties challenging the order dtd.20.04.2016 passed by the same authority.

S.A. No.44(V) of 2016-17

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S.A. No.23(ET) of 2016-17

The dealer has preferred these two appeals i.e. S.A. No.44(V) of 2016-17 and S.A. No.23(ET) of 2016-17 challenging the order dtd.20.04.2016 passed by the learned Joint Commissioner of Sales Tax (Appeal), Sundargarh Range, Rourkela (hereinafter referred to as,

JCST/first appellate authority) in First Appeal Case No. AA V 37(RL-I) of 2009-10 and First Appeal Case No. AA V 21 ET of 2009-10, thereby remitting the cases to the learned assessing officer for reassessment after setting aside the assessments against the order of assessments passed by the learned Asst. Commissioner of Sales Tax, Rourkela I Circle, Uditnagar (hereinafter referred to as, ACST/AO) for the period from 01.04.2006 to 31.03.2007 u/s.42 of the Orissa Value Added Tax Act, 2004 (in short, the OVAT Act) and u/s.9C of the Orissa Entry Tax Act, 1999 (in short, OET Act) raising demand of ₹1,30,99,065.00 comprising tax amount of ₹40,00,300.00, interest of ₹10,98,165.00 u/s.34(1) and penalty of ₹80,00,600.00 imposed u/s.42(5) of the OVAT Act in VAT case and ₹38,44,574.00 in ET case.

S.A. No.45(V) of 2016-17

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S.A. No.83(V) of 2016-17

S.A. No.45(V) of 2016-17 is preferred by the dealer, whereas S.A. No.83(V) of 2016-17 is preferred by the State and in both these appeals challenge is the order dtd.20.04.2016 passed by the learned Joint Commissioner of Sales Tax (Appeal), Sundargarh Range, Rourkela (hereinafter referred to as, JCST/first appellate authority) in First Appeal Case No. AA V 20 of 2009-10, thereby allowing the appeal in part and reducing the demand to

₹33,97,554.00 against the order of assessment passed by the learned Asst. Commissioner of Sales Tax, Rourkela I Circle, Uditnagar (hereinafter referred to as, ACST/AO) u/s.42 of the OVAT Act raising demand of ₹37,36,199.00 comprising tax amounting to ₹11,86,126.00, interest of ₹1,77,821.00 u/s.34(1) and penalty of ₹23,72,252.00 u/s.42(5) of the said Act for the tax from 01.04.2007 to 31.12.2007.

2. The case at hand is that, the dealer-assessee in the instant case is a private limited company having a manufacturing unit. The dealer-assessee is engaged in manufacturing and trading of sponge iron manufactured out of the raw materials such as iron ore, dolomite and coal, etc. This unit has started its commercial production of sponge iron w.e.f. 05.03.2016. The installed capacity of the unit for production of sponge iron is found to be 100 M.T. per day. The unit has got the first kiln operating from 01.04.2006 and another kiln operating from 26.10.2006, the installed capacity of production of sponge iron of each kiln being 100 T.P. per day. The dealer-assessee effects purchase of raw materials and consumable from inside the State of Odisha. It effects intra state sales and sales in course of interstate trade and commerce. Pursuant to Audit Visit Report (in short, AVR), the demands as mentioned above were raised against the dealer-assessee.

3. Against such tax demands the dealer preferred first appeals before the learned Joint Commissioner of

Sales Tax (Appeal), Sundargarh Range, Rourkela who remitted S.A. No.44(V) of 2016-17 and S.A. No.23(ET) of 2016-17 to the learned assessing officer for reassessment after setting aside the assessments and in S.A. No.45(V) of 2016-17 and S.A. No.83(V) of 2016-17 reduced the demands to ₹33,97,554.00.

4. Being dissatisfied with the orders of the learned first appellate authority, the dealer has preferred three second appeals viz. S.A. No.44(V) of 2016-17, S.A. No.23(ET) of 2016-17 and S.A. No.45(V) of 2016-17 and the State preferred S.A. No.83(V) of 2016-17 before this Tribunal as per the grounds stated in their grounds of appeal.

5. In all these cases both the State and the dealer-assessee being the respondents have filed their cross objections.

6. During course of argument, learned Counsel for the dealer-assessee contended that the first appellate authority has grossly erred in allowing the appeal in part and not quashing in its entirety. This apart, the contention on behalf of the dealer-assessee is that the first appellate authority has committed mistake of law by not accepting the fact that the aforesaid assessment orders were bad in law and not maintainable in view of the judgment of the Hon'ble High Court of Orissa decided in the case of ***Jindal Stainless Ltd. v. State of Odisha, reported in [2012] 54 VST 1 (Orissa)***. Learned Counsel

for the dealer-assessee vehemently contended that the notice u/s.42 of the OVAT Act in form VAT-306 and in form E-30 were served on the dealer on 06.08.2009 fixing the date to 12.08.2009 and completed the assessments on 12.08.2009 which were served on the dealer on 05.09.2009. This is gross error of law in view of sec.42(2) of the OVAT Act as the assessing authority was duty bound to provide 30 days time or more to comply with such notices. So when only seven days time was allowed, the present assessments both under the OVAT Act and the OET Act are invalid. On the other hand, learned Standing Counsel for the Revenue argued that there is no reasonable merit in the second appeals preferred by the dealer which are not sustainable in the eyes of law. This apart, learned Standing Counsel also contended that the assessing officer has rightly completed assessments basing on the statutory provisions under the Acts and Rules. That the dealer has failed to produce the books of account before the authorities. This apart, learned Standing Counsel forcefully argued that even if when a notice is issued to a dealer, he shall be allowed time for a period not less than 30 days for production of relevant books of account and documents but in view of the verdict of the Hon'ble Supreme Court in the case of Ashik Lenka v. Rishi Dixit reported in AIR 2005, 2821, it has been held that the period stipulated is always directory not mandatory. Learned Standing Counsel also relied upon

another decision of the Hon'ble Apex Court in the case of Commissioner Custom v. Tullow India Operating Ltd., reported in 5 RC 684 in which it is held that when a public functionary is required to discharge a public function within a time specified thereof, the same should be construed directory in nature and not mandatory.

7. Heard the contentions and submissions of both the parties in this regard wherefrom it reveals that the sole point of adjudication is the maintainability. On perusal of the case record, it becomes quite clear that the notices u/s.42 of the OVAT Act in form VAT-306 and in form E-30 were served on the dealer-assessee on dtd.06.08.2009 fixing the date to 12.08.2009 and assessments were completed on 12.08.2009 and served on the dealer on 05.09.2009. So, it is evident that a time of seven days was extended to the dealer-assessee. If this being so, let us have a glance to the language of sec.42 of the OVAT Act which is as follows:- Audit Assessment

> "(1) Where the tax audit conducted ..... in corroborated in the audit visit report,
>
> (2) **Where a notice is issued to a dealer under sub-section (1), he shall be allowed time for a period of not less than thirty days for production of relevant books of account and documents.**"

Likewise, the dealer challenged the assessment order on the ground of invalid notice as per the provisions u/s.9C(2) of the OET Act. Sec.9C(2) of the OET Act are extracted herein below for better appreciation:-

> "Sec.9C(2)-
>
> Where a notice is issued to a dealer under sub-section(1), he shall be allowed time for a period not less than thirty days for production of relevant books of account and documents."

Bare reading of sec.9C(2) of the OET Act shows that where a notice is issued to the dealer under sub-section (1), he shall be allowed time minimum thirty days for production of relevant books of account and documents. The word 'shall be allowed time' so that the dealer should be allowed time not less than thirty days. The word 'shall' used in the provision shows it is mandatory.

8. In the instant case, it becomes quite evident with regard to issuance of notice which can certainly be told that it is a clear violation of the mandatory provision of sec.9C(2) of the OET Act. This apart in the case of ***Patitapabana Bastralaya v. Sales Tax Officer & Others*** in W.P.(C) No.14696 of 2009 decided on 24th September, 2014, the Hon'ble Court have been pleased to observe that minimum time of thirty days as provided u/s.9C(2) of the OET Act if has not been provided to the

petitioner and thus it is a clear case of violation/infraction for mandatory provisions of sec.9C(2) of the Act and proceedings initiated by the assessing officer in pursuance of such invalid notice would be illegal and void. The provision u/s.9C(2) of the OET Act is the *pari materia* provision u/s.42(2) of the OVAT Act. This Tribunal has already held the same view in the appeals filed under the OVAT Act keeping in view the decisions of the Hon'ble Court in the case of ***Jindal Stainless Ltd. v. State of Odisha (supra)*** and ***Delhi Foot Wear v. STO, Vigilance, Cuttack & others, reported in [2015] 77 VST 146 (Orissa)***. In view of such, the decisions relied upon by the State are not applicable to the present facts and circumstances of the case. So when there is violation of the mandatory provisions of the settled law then it can certainly be told that the principle of natural justice is buried. In view of the above observations, we have no hesitation to remand the cases to the Assessing Officer for de novo assessment by declaring the assessments as invalid.

9. In the result, the appeals preferred by the dealer are allowed, whereas the appeal preferred by the State is dismissed. The orders of the fora below are hereby set aside. The matters are remanded to the Assessing Authority for de novo assessment keeping in view the observations made above within a period of three months

from the date of receipt of this order. Cross objections are 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-II