

**BEFORE THE JUDICIAL MEMBER-II:  
ODISHA SALES TAX TRIBUNAL: CUTTACK.**

**P r e s e n t:**           **Shri S.K. Rout,**  
   **2<sup>nd</sup> Judicial Member**

**S.A. No. 199(V) of 2018**

(Arising out of the order of the learned Joint Commissioner  
Sales Tax (Appeal), Cuttack II Range, Cuttack,  
in First Appeal Case No. AA/38/OVAT/CU II/17-18,  
disposed of on dtd.12.06.2018)

**S.A. No. 169(E) of 2018**

(Arising out of the order of the learned Joint Commissioner  
Sales Tax (Appeal), Cuttack II Range, Cuttack,  
in First Appeal Case No. AA/18/OET/CU II/17-18,  
disposed of on dtd.31.08.2018)

M/s. Jayadurga Engineer &  
Jayadurga Flyash Bricks &  
Jayadurga Traders,  
Bhairpur, Jagatpur, Cuttack.

... Appellant

**- V e r s u s -**

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

... Respondent

For the Appellant           ... Mr. Kamdev Mohanty, Advocate  
For the Respondent        ... Mr. D. Behura, S.C. &  
  Mr. S.K. Pradhan, A.S.C.

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Date of hearing: 02.08.2023   \*\*\*   Date of order: 09.08.2023  
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**ORDER**

Both these appeals are disposed of by this  
composite order as the same involve common question of fact

and law in between the same parties and for the same assessment period.

S.A. No. 199(V) of 2018

The dealer prefers this appeal challenging the order dtd.12.06.2018 passed by the learned Joint Commissioner Sales Tax (Appeal), Cuttack II Range, Cuttack (hereinafter referred to as, JCST/first appellate authority) in First Appeal Case No. AA/38/OVAT/CU II/17-18, thereby confirming the order of assessment passed by the learned Sales Tax Officer, Cuttack II Circle, Cuttack (hereinafter referred to as, STO/assessing authority) u/s.43 of the Orissa Value Added Tax Act, 2004 (in short, the OVAT Act) raising demand of ₹9,32,718.00 including penalty of ₹6,03,687.00 levied u/s.43(2) of the OVAT Act for the tax period 01.04.2013 to 31.03.2016.

S.A. No. 169(ET) of 2018

The dealer prefers this appeal challenging the order dtd.31.08.2018 passed by the learned Joint Commissioner Sales Tax (Appeal), Territorial Range, Cuttack II, Cuttack (hereinafter referred to as, JCST/first appellate authority) in First Appeal Case No. AA/18/OET/CU II/17-18, thereby enhancing the demand to ₹1,97,418.00 against the order of assessment dtd.26.09.2017 passed by the learned Sales Tax Officer, Cuttack II Circle, Cuttack (hereinafter referred to as, STO/assessing authority) raising demand of ₹98,709.00 including penalty of ₹65,806.00 u/s.10 of the Orissa Entry Tax Act, 1999 (in short, the OET Act) for the tax period from 01.04.2013 to 31.03.2016.

2. The case at hand is that, the dealer-appellant in the instant case is a manufacturer of fly ash bricks in the name and style of M/s. Jaydurga Engineering & Jaydurga Flyash Bricks & Jaydurga Traders having TIN021462600267. During process of manufacturing, the dealer utilizes raw materials like cement, fly ash, sand, lime. The firm purchases raw materials and consumables from inside as well as outside the State of Odisha and effected sales within the State of Odisha only. Pursuant to tax evasion report, assessment proceedings were initiated against the dealer u/s.43 of the OVAT Act and u/s.10 of the OET Act and the demands as mentioned above were raised against the dealer.

3. Against such tax demands, the dealer preferred first appeals before the learned first appellate authority who confirmed the demand in VAT case and enhanced the demand in ET case.

4. Being dissatisfied with the orders of 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 in these cases are filed by the State-respondents.

6. The learned counsel appearing for the dealer-assessee contended that the orders passed by the learned forums below are 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 1<sup>st</sup> October, 2015, the impugned orders of reassessment are liable to be

quashed for the period under challenge. Further contention on behalf of the dealer in ET case is that the return filed by way of self-assessment under Section 9(1) r/w Section 9(2) of the OET Act has not been accepted by the department by a formal communication which is against the principle of Ecmas Resin Pvt. Ltd. case as decided by the Hon'ble High Court of Orissa.

7. Per contra, the learned Standing Counsel appearing for the Revenue vehemently contended that the additional grounds raised by the dealer-appellant cannot be accepted at a belated stage. Further contention on behalf of the learned Standing Counsel is that the present second appeal in VAT case is against the order dtd.12.06.2018 passed by the learned first appellate authority in First Appeal Case No. AA/38/OVAT/CU II/17-18, wherein the issue raised by the appellant in the additional grounds was neither raised nor adjudicated nor it was an issue while disposing of the appeal under the OVAT Act. Learned Standing Counsel also argued stating that even when appeal is filed before the Odisha Sales Tax Tribunal no such grounds relating to the validity of reopening of the assessment has been raised and that the additional grounds are not pure question of law affecting the tax liability of the dealer. Further submission raised on behalf of the learned Standing Counsel is that the pure question of law affecting the tax liability of the appellant can be raised at any stage and not question of fact or mixed question of fact and law which are unrelated to the tax liability can be raised. Learned Standing Counsel also cited section 98 of the OVAT Act r/w. Rule 102 of the OVAT Rules and also relied upon the decision in 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 and as per section 98 of the OVAT Act r/w. Rule 102 of the OVAT Rules the additional grounds that "assessment u/s.43 of the OVAT Act without completing assessment either u/s.39, 40, 42 or 44 of the OVAT Act is bad in the eye of law is not maintainable".

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 1<sup>st</sup> 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 1<sup>st</sup> October, 2015 before the Department could form an opinion regarding escaped assessment or under assessment ....".

So the position prior to 1<sup>st</sup> 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 acknowledgement 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. In view of the above analysis, to my view, the orders of the fora below need interference to the extent as indicated above.



11. In the result, the appeal preferred by the dealer under the OVAT Act is partly allowed, whereas the appeal preferred under the OET Act is fully allowed. The assessment under the OVAT Act for the period from 01.04.2013 to 30.09.2015 is hereby quashed and the assessment for the period from 01.10.2015 to 31.03.2016 is hereby set aside. Likewise, assessment for the entire period i.e. 01.04.2013 to 31.03.2016 in OET Act is hereby fully quashed. The case is remanded to the learned assessing authority for reassessment of tax for the period from 01.10.2015 to 31.03.2016 in VAT case within a period of three months of receipt of this order. Cross objections are disposed of accordingly.

Dictated & corrected by me,

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

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