BEFORE THE DIVISION BENCH-I, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 196 (VAT) of 2014-15
&
S.A. No. 110 (ET) of 2014-15

(Arising out of orders of the learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur in Appeal Nos. AA (VAT) 60/2013-14 & AA (ET) 47/ 2013-14, disposed of on 30.07.2014 & orders dated **06.12.2022** of the Hon'ble Court passed in **STREV Nos. 43 & 42 of 2015**)

Present: **Shri G.C. Behera, Chairman**
&
Shri M. Harichandan, Accounts Member-I

M/s. Bata Furniture,
At- Red Cross Road, Puri ... Appellant

-Versus-

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

For the Appellant : Sri B.R. Panda, Advocate
For the Respondent : Sri M.L. Agarwal, S.C. (CT)

Date of hearing : 23.03.2023 *** Date of order : 27.03.2023

O R D E R

Both these 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 disposed of by this composite order.

Pursuant to the orders dated 06.12.2022 of the Hon'ble Court passed in **STREV Nos. 42 & 43 of 2015** relating to the instant Dealer, these two appeals are taken up for hearing and disposal afresh.

S.A. No. 196 (VAT) of 2014-15 :

2. Dealer is in appeal against the order dated 30.07.2014 of the Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (hereinafter called as 'First Appellate Authority') in F A No. AA (VAT) 60/2013-14 confirming the assessment order of the Deputy Commissioner of Sales Tax, Puri Circle, Puri (in short, 'Assessing Authority').

S.A. No. 110 (ET) of 2014-15 :

The Dealer also assails the order dated 30.07.2014 of the First Appellate Authority in F.A. No. AA (ET) 47/ 2013-14 confirming the assessment order of the Assessing Authority.

3. Briefly stated, the facts of the case are that –

M/s. Bata Furniture is engaged in trading of wooden and steel furniture etc. on retail sale basis. The assessments relate to the period 01.04.2012 to 31.03.2013. The Assessing Authority raised tax and penalty of ₹3,52,989.00 in assessment proceeding u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') basing on the Tax Evasion Report (TER). Likewise, the Assessing Authority raised tax and penalty of ₹52,178.00 in assessment u/s. 10 of the Odisha Entry Tax Act, 1999 (in short, 'OET Act').

Dealer preferred first appeals against the orders of the Assessing Authority before the First Appellate Authority. The First Appellate Authority confirmed the assessment orders and dismissed the appeals. Being aggrieved with the orders of the First Appellate Authority, the Dealer preferred second appeals and the Tribunal vide orders dated 30.07.2015 dismissed the appeals and confirmed the first appellate orders.

The matter was challenged before the Hon'ble Court in **STREV Nos. 43 & 42 of 2015**, wherein the Hon'ble Court vide order dated 06.12.2022 have been pleased to remand the cases for hearing afresh by

setting aside the orders of this Tribunal. Pursuant to such orders of the Hon'ble Court, the appeals are taken up for hearing and disposal afresh.

The State files 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.

4. Learned Counsel for the appellant files a petition dated 01.02.2023 for acceptance of additional grounds of appeal with regard to maintainability of proceeding u/s. 43 of the OVAT Act in absence of proceeding u/s. 39, 40, 42 or 44 of the OVAT Act. He further submits that there is no communication of acceptance of self-assessment return to the Dealer before passing reassessment order u/s. 10 of the Act. He relies on the decisions of the Hon'ble High Court in the case of ***M/s. Keshab Automobiles v. State of Odisha*** in **STREV No. 64 of 2016** decided on 01.12.2021 and ***M/s. ECMAS Resins Pvt. Ltd. and other v. State of Odisha*** in **WP(C) Nos. 7458 of 2015 & 7296 of 2013** decided on 05.08.2022. He also relies on the decision of the Hon'ble Apex Court in the case of ***National Thermal Power Co. Ltd. v. Commissioner of Income-tax***, reported in **[1998] 229 ITR 383 (SC)**.

Learned Standing Counsel (CT) for the State objects the additional grounds of appeal on the ground that the appellant has not taken such ground at the outset and submits that the appellant is precluded to raise the same at this stage of second appeal as per the provision of Section 98 of the OVAT Act. He further submits that communication or acknowledgment of acceptance of self-assessed return is a matter of fact and the same cannot be taken at this belated stage for the first time. He relies on the decision of the Hon'ble Court in the case of ***State of Orissa v. Lakhoo Varjang***, reported in **[1961) 12 STC 162 (Orissa)**.

5. At the outset, we feel it proper to deal with the preliminary issue raised on behalf of the Dealer regarding maintainability of the proceeding, which strikes the root of the case.

On perusal of record, it reveals that the Dealer has not taken the ground of maintainability in the grounds of appeal. The Dealer took the plea of maintainability in the additional grounds of appeal. State objects the additional grounds of appeal on maintainability on the ground that the same was taken for the first time in second appeal, which is not permissible as per the provision of Section 98 of the OVAT Act.

Section 98 of the OVAT Act provides that the service of any notice, order or communication shall not be called in question if the notice, order or communication, as the case may be, has already been acted upon by the dealer or person to whom it is issued or where such service has not been called in question at or in the earliest proceedings commenced, continued or finalised pursuant to such notice, order or communication. In the instant case, it is not the case that the Dealer has acted upon on the notice of the Assessing Authority regarding acceptance of self-assessed return. So, the said provision is not applicable to the present facts and circumstances of the case.

6. In the case of ***National Thermal Power Co. Ltd.*** cited supra, the Hon'ble Apex Court have been pleased to observe that the Tribunal has jurisdiction to examine the question of law which arises from the fact.

In the case of ***State of Gujarat v. Gandhi Cold Drink House***, reported in **[1999] 116 STC 333 (Gujarat)**, Hon'ble Gujarat High Court have been pleased to observe that as follows :-

> "(i) that the Tribunal had power to entertain fresh questions of law or fresh mixed question of law and facts raised for the first time before it;
>
> (ii) that new grounds which affect the very jurisdiction of the sales tax authorities to levy tax, can be raised before the Tribunal; and

(iii) that if the subject-matter remains the same, the matter can be argued from a different approach by raising new grounds also. The subject-matter of the second appeal was the entire assessment order and reassessment order passed by the Assistant Commissioner of Sales Tax in the first appeals. Therefore, the new ground sought to be raised by the dealer had been rightly allowed to be raised by the Tribunal and did not in any way change the subject-matter of the appeals pending before the Tribunal."

7. Section 43 of the OVAT Act provides that there shall be no reassessment unless assessment u/s. 39, 40, 42 or 44 of the said Act is completed. Hon'ble Court in the case of ***M/s. Keshab Automobiles*** cited supra have been pleased to observe in para-22 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 acknowledgement 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 provision as it stood prior to 1st October, 2015."

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."

Keeping in view the ratios laid down by the Hon'ble Court in the cited cases, the Dealer has taken the additional grounds of appeal on the point of jurisdiction and maintainability of the assessment proceeding, which strikes the root. So, the same cannot be brushed aside merely on the ground that the Dealer took the same belatedly before this forum.

8. Regarding maintainability of assessment proceedings under OVAT Act, reassessment u/s. 43 of the OVAT Act can only be made after the assessment is completed u/s. 39, 40, 42 or 44 of the said Act. In view of the ratio laid down by the Hon'ble Court, the Department is required to communicate a formal communication or acknowledgment regarding the acceptance of the self-assessment u/s. 39 of the OVAT Act. In this case, the State has not filed any materials to show that the acceptance of the self-assessment has been communicated to the Dealer.

9. In view of the decision of the Hon'ble Court in case of ***M/s. Keshab Automobiles*** cited supra, the assessment proceeding u/s. 43 of the OVAT Act is without jurisdiction in absence of any assessment u/s. 39, 40, 42 or 44 of the said Act. So, the orders of the Assessing Authority and the First Appellate Authority under the OVAT Act are not sustainable in the eyes of law as the same are without jurisdiction.

10. So far as assessment under the OET Act is concerned, it is settled law 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.

In view of the ratio laid down above by the Hon'ble Court, we are of the considered view that the assessment for the impugned period 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.

11. We have already rendered our views on preliminary issue regarding maintainability of proceedings u/s. 43 of the OVAT Act and u/s.

10 of the OET Act holding that the Assessing Authority is without jurisdiction in absence of acceptance of self-assessed return. So, it is not required to discuss other issues on merit. Hence, it is ordered.

12. Resultantly, both the appeals under the OVAT Act and OET Act are allowed. The impugned orders of the First Appellate Authority are set aside and the assessments orders of the Assessing Authority are quashed. Cross-objections are disposed of accordingly.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(M. Harichandan)
Accounts Member-I