BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No.227(ET) of 2015-16

(Arising out of the order of the learned JCST, Balasore Range, Balasore in first appeal case No.AA-12/MBR-2014-15(ET), disposed of on 16.01.2016)

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

M/s. Omm Shree Agency, Karanjia,
Dist- Mayurbhanj, TIN-21641505329. ..... Appellant.

-Vrs. –

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

For the Appellant : : Mr. N.K. Das, ld. Advocate
: Mr. K.R. Mahapatra, ld. Advocate
For the Respondent : : Mr. D. Behura, ld.S.C.(C.T.)
: Mr. S.K. Pradhan, ld. ASC (C.T.)

Date of Hearing : 01.06.2023 * Date of Order :12.06.2023**

O R D E R

The dealer-assessee is in appeal against the order dated 16.01.2016 of the Joint Commissioner of Sales Tax, Balasore Range, Balasore (hereinafter called as 'ld. FAA') in first appeal case No. AA-12/MBR-2014-15(ET) confirming the order of assessment passed by the Sales Tax officer, Assessment Unit,

Rairangpur (in short, 'learned Assessing Authority) under Rule 10 of the Odisha Entry Tax Act, 1999.

2. It is felt worthwhile to provide a brief fact of the case that M/s. Omm Shree Agency, Karanjia, Dist- Mayurbhanj having TIN-21641505329 carries on business in Cement of different varieties, Iron and Steel goods such as M.S. Rod, Angle, Flat, A.C. Sheets/ G.C. Sheets, Hardware goods and Visakha Asbestos on wholesale cum retail basis inside the State of Odisha. The dealer-assessee was assessed under Rule 10 of the of the OET Act for the tax period from 01.07.2007 to 31.10.2010 raising extra demand of ₹43,22,212.00 which includes penalty of ₹28,81,475.00 The ld. FAA confirmed the order of assessment in the first appeal as preferred by the dealer-assessee.

3. On being aggrieved, the dealer-assessee preferred this second appeal before this forum adducing the grounds of appeal and additional grounds of appeal. The additional grounds furnished by the Learned Counsel Mr. K.R. Mohapatra are accepted and reproduced as under:-

(i) That the learned Counsel for the dealer-appellant has, inter alia, agitated the validity of initiation of proceeding under section 10 of the OET Act covering the tax period from

01.07.2007 to 31.10.2010 which is the preliminary issue touching the very root of the case by triggering Ground No.1 of the Grounds of Appeal and so also vide additional grounds filed for redressing the grievance more specifically.

(ii) That it is further submitted that the law has already been set at rest by the decision of the Hon'ble High Court of Odisha in case of **Keshab Automobiles Vrs State of Odisha decided on 1.12.2021 in STERV No.64 of 2016** wherein the Hon'ble High Court has categorically held the legislative intent of Section 43(1) of the OVAT Act and its applicability with reference to 'deemed self-assessment' as contemplated under Section 39 of the OVAT Act for the post tax period of OVAT Act (Amendment) Act,2015 which has came into force w.e.f. 1st of October,2015.

(iii) That the above being the situation as pari-materia with that of Section 43 of the OVAT Act, which is made applicable to the provision of Section 10 of the OET Act. Therefore the contention laid by the revenue is that the dealer have been self-assessed prior to initiation of this proceeding under Section 10 of the OET Act is not maintainable.

(iv) That in the instant case neither the Assessing Authority nor the First appellate authority has ever thought it proper to

address the above issue in the right prospective of the case that the dealer has never been assessed under any of the provision of OET Act for the impugned tax period prior to the present assessment under Section 10. It is therefore at the outset, the appellant-dealer submits that the very initiation of assessment made by the ld. assessing authority, which is illegal and not sustainable in law and thereby taxing the estimated transaction on presumption and assumption by reassessment proceeding is illegal and fatal.

(v) That in this connection, reference of the earlier decision of the High Court of Orissa in the case of **M/s. Neelachal Ispat Nigam, -Vrs- State of Odisha in W.P.(C) No.22343 of 2015** is placed wherein the Hon'ble Court while dealing with an identical provision as provided under Section 9 of the Orissa Entry Tax Act, 1999 relating to self assessment of the dealer decided on 07.12.2016 now held to be **per in curiam** by the Hon'ble Court in as much as it fails to discuss the amended provision of OET Act which have a direct bearing on the issue adjudicated by the court. That apart, the Full Bench of Hon'ble High Court of Orissa in a reference made by the Order dated 31st March 2022 of the Division Bench of the High Court in the case of **W.P.(C) No.7458 of 2015, in the case of M/s. ECMAS Resins Pvt.**

Ltd. –vrs- State of Orissa and in the case of M/s. Shyam Metalics & Energy Ltd. –Vrs- The Commissioner of Commercial Taxes, Odisha vide Order dated 19th July, 2022 in W.P. (C) No.7296 of 2013, wherein a common question of law arises under the Orissa Entry Tax Act, 1999 (OET Act), for consideration as to "whether a formal communication of the acceptance of the return filed by way of self-assessment under Section 9(2) of the OET Act is a pre-requisite to the reopening of an assessment under Section 10(1) of the OET Act". This question of law has been set at rest by answering affirmatively, the Hon'ble High Court at para-43 of the judgment cited supra with the following observation:

> **"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 15B of the OET Rules."**

(vi) That the appellant-dealer in the instant case has respectfully drawn the kind attention of this Hon'ble Tribunal to the decision of the Full Bench of Hon'ble High Court in M/s. ECMAS Resins Pvt. Ltd. (supra), wherein it is held that **"in absence of any written communication or acknowledgement as to completion of assessment U/s. 9(2) of the OET Act r/w Rule 15 of OET Rules, the reassessment U/s.10 of the OET Act is not sustainable"** and accordingly the present appeal may please be allowed in the interest of justice.

(vii) That it is pertinent to mention here that this Hon'ble Tribunal has already decided the above issue in S.A. No.4236(V) of 2015-16 on dtd.27.03.2023 of the appellant under the OVAT Act for the impugned tax period which is sought to be taken into consideration in the context of the present case.

4. The State has filed cross objection supporting the orders passed by the forms below.

5. Heard the contentions and submissions of both the parties in this regard. The order of assessment and the order of the ld. FAA coupled with the materials on record are gone through. It is a fact that the dealer-assessee at the time of filing of this second appeal has not taken the ground of maintainability in the grounds of appeal. The dealer-assessee

took the plea of maintainability in the additional grounds of appeal. This is accepted. It is not denying a fact that the maintainability issue in respect of OVAT Act in case of the instant dealer-assessee for the impugned tax period has been decided in S.A. No.426(V) of 2015-16 on dated 27.3.2023 by this Tribunal setting aside the orders of the forums below. The submission of the learned Counsel representing the dealer-assessee as stated supra is elaborative and exhaustive relying verdicts pronounced by the Hon'ble High Court of Odisha in case of **M/s. Neelachal Ispat Nigam, -Vrs- State of Odisha in W.P.(C) No.22343 of 2015, M/s Keshab Automobiles Vrs State of Odisha decided on 1.12.2021 in STERV No.64 of 2016, M/s. ECMAS Resins Pvt. Ltd. –vrs- State of Orissa and in the case of M/s. Shyam Metalics & Energy Ltd. –Vrs- The Commissioner of Commercial Taxes, Odisha.** We find no justification to reiterate the same. We are inclined to accept the averments of the learned Counsel of the dealer-assessee in the present case. Accordingly, the assessment passed under Section 10 of the OET Act in the instant case is without jurisdiction in absence of any assessment under Section 9(2) of the said Act. So, the orders of the learned Assessing Authority and the ld.

FAA are not sustainable in the eyes of law as the same are without jurisdiction. Hence, it is ordered.

6. Resultantly, the appeal stands allowed and the orders of the learned Assessing Authority and the ld. FAA are hereby set-aside. As a necessary corollary thereof, the assessment order is hereby quashed. The cross-objection is disposed of accordingly.

Dictated and corrected by me.

Sd/-

(Bibekananada Bhoi)
Accounts Member-II

Sd/-

(Bibekananda Bhoi)
Accounts Member-II

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

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