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

S.A. No. 221(V) of 2016-17
&
S.A. No.106 (ET) of 2016-17

(Arising out of the order of the learned Addl.CST(Appeal), South Zone, Berhampur First Appeal Nos. AA(VAT) 27/2014-15 & AA(ET)16/2014-15 disposed of on 05.07.2016)

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

M/s. Anmol Resources (P) Ltd.,
At- Plot No.20, Ashok Nagar,
Bhubaneswar. ..... Appellant

-Vrs. –

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

For the Appellant : : Mr. B.B. Panda, ld. Advocate
For the Respondent: : Mr. S.K. Pradhan, ld.ASC.(C.T.)

Date of Hearing : 11.07.2023 * Date of Order :27.07.2023**

O R D E R

The dealer is in appeals against the orders dated 05.07.2016 of the Additional Commissioner of Sales Tax (Appeal), South Zone, Berhampur (in short, ld.FAA) passed in Appeal Case Nos. AA (VAT)-27/ 2014-15 & AA (ET) 16/2014-15 confirming the orders passed under Section 43 of the OVAT Act and under

Section 10 of the OET Act by the Deputy Commissioner of sales Tax, Bhubaneswar-II Circle, Bhubaneswar (in short, Assessing Authority). Since the aforesaid two appeals relate to the same material period of the same assessee involving common question of facts and law, they are taken up together for hearing and disposal by this composite order.

2. Briefly stated the facts of the case reveal that M/s Anmol Resources (P) Ltd, Plot No.20, Ashok Nagar, Bhubaneswar, TIN-2192110667 trades in Iron Ore and Manganese Ore. The dealer-assessee was assessed under Section 43 of the OVAT Act for the tax period 01.04.2008 to 31.03.2010 basing on the Tax Evasion Report submitted by the sales Tax officer (Vigilance), Bhubaneswar Division, Bhubaneswar which resulted in demand of ₹45,13,994.00 including penalty of ₹30,09,329.00. Similarly, as for the assessment passed under Section 10 of the OET Act for the said material period which emerged from the aforesaid Tax Evasion Report, the learned Assessing Authority assessed the dealer-appellant to tax for an amount of ₹4,40,650.00 including penalty of ₹2,29,766.00. The first appeals as preferred by the dealer-assessee in both the cases turned out to be in affirmation of the demands raised at assessments.

3. On being aggrieved against the orders of the ld.FAA as discussed supra, the dealer-appellant approached this forum for

redressal. In addition to grounds of appeal submitted at the time of filing second appeal, the learned Counsel appearing on behalf of the dealer-assessee placed additional grounds of appeal in both the cases under the OVAT Act and the OET Act. Before we dwell upon other grounds of appeal pertaining to the merits of the grounds, we find it essential to look into the additional grounds that speak of the aspect of maintainability of the proceedings initiated under Section 43(1) of the OVAT Act and under Section 10 of the OET Act. The learned Counsel of the dealer-appellant advocates that the learned Assessing Authority has initialed the proceedings under Section 43 of the OVAT Act as well as that of under Section 10 of the OET Act merely on the basis of the Tax Evasion Report. Therefore, it is argued that the learned Assessing Authority has exceeded his statutory jurisdiction to initiate the escaped turnover assessment without ascertaining the facts whether there was any return acceptance order of the above tax period under section 39 of the OVAT Act and under Section 9(2) of the OET Act and the same have duly been communicated to the assessee with valid acknowledgement. The learned Counsel cited the verdicts of the Hon'ble High Court of Odisha passed in case of ***M/s Keshab Automobiles vs. State of Odisha*** in STREV No.64 of 2016 dated 01.12.2021 in respect of issue relating to sustainability of proceeding under Section 43 of the OVAT Act and

in case of M***/s. ECMAS Resins Pvt. Ltd. Vs. State of Odisha and others*** in W.P.(C) No.7458 of 2015 dated 05.08.2022 that of Section 10 of the OET Act in absence of assessment under Section 39 of the OVAT Act and 9(2) of the OET Act.

4. The State represented by Mr. S. K. Pradhan, learned Counsel(C.T.) besides harping the arguments filed in the cross objection submits additional cross objections defending that the additional grounds preferred by the tax payer is not justified since it is completely new justifying the after-thought action to avoid payment of due tax. He holds that in case of **State of Orissa vs. Lakhoo Varjang 1960 SCC OnLine Ori 110 : (1961) 12 STC** 162, 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. Bu 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…."

It is also contested that the additional grounds taken by the appellant may not be taken into consideration in view of Rule 102 of the OVAT Act which has prescribed for restrictions to adduce fresh evidence before this Tribunal.

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. The averments made by the learned Counsel of the State and the case law relied upon is not applicable in the present facts and the circumstances of the case. The additional grounds submitted by the learned Counsel of the dealer-assessee are on account of change of circumstance or law. The statute speaks of the base law upon which, initiation of any proceeding hinges. If a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following

other course is not permissible. The averments made by the learned Counsel in this regard are substantive. It is apt to mention here that Section 39(2) of the OVAT Act has been amended introducing the concept of 'deemed' self assessment only with effect from 1st October, 2015. It is significant that prior to its amendment with effect from 1st October, 2015 the trigger for invoking section 43(1) of the OVAT Act required a dealer to be assessed under sections 39,40,42 and 44 for any tax period. The decisions delivered by the Hon'ble of High Court of Odisha in cases of ***M/s Keshab Automobiles vs. State of Odisha*** and M***/s. ECMAS Resins Pvt. Ltd. Vs. State of Odisha and others*** (supra) are relevant in the present cases which in Para 22 and 43 of the respective decisions lay down as under:-

Para 22 of the judgment in case of ***M/s Keshab Automobiles vs. State of Odisha***

> "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 fulfillment of other requirements of that provision as it stood prior to 1st October, 2015."

Para 43 of the judgment in case of ***M/s. ECMAS Resins Pvt. Ltd. and other v. State of Odisha:***

> " 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. This answers the question posed to the Court."

6. In the present case, it is revealed that the assessments framed under the OVAT Act and OET Act relate to the tax period from 01.04.2008 to 31.03.2010 which entirely cover the pre-amendment period. The learned Assessing Authority is learnt to have not adhered to the requirement of pre-conditions as required under section 39 of the OVAT Act and under Section 9(2) of the OET Act for initiation of proceedings under section 43 of the OVAT Act and under Section 10 of the OET Act. He has reopened the assessments simply on the basis of the Tax Evasion Report. There is no evidence available on record as to communication of the assessment made U/s.39 of the OVAT Act and under Section 9(2) of the OET Act to the dealer-assessee. The ld.FAA has also ignored the aspect of maintainability of the cases. In view of the above principles of law, we are constraint to infer that the assessments made in the impugned cases are not sustainable in law and as such, the same are liable to be quashed. Hence, it is ordered.

7. In view of the foregoing discussions, the second appeals filed by the dealer appellant under the OVAT Act and the OET Act are allowed. The impugned orders of the forums below are hereby set aside. The cross objection/additional cross objection are hereby disposed of accordingly.

Dictated and corrected by me.

Sd/-
(Bibekananda 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