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

S.A. No.38 (ET) of 2021
&
S.A. No. 62(V) of 2021

(Arising out of the order of the learned Addl.CST(Appeal), Sundargarh Range, Rourkela First Appeal Nos. AA29(ET) DCST/2017-18 & AA 45 (V) DCST/2017-18, disposed of on 24.02.2021& 25.02.2021 respectively.)

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

M/s. Ambica Iron & Steel Ltd.,
Beldihi, Kalunga, Rourkela,
Sundargarh. ..... Appellant

-Vrs. –

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

For the Appellant : : Mr. R.S. Agarwal, ld. Advocate
For the Respondent : : Mr. D. Behura, S.C.(C.T.)

Date of Hearing : 19.06.2023 * Date of Order : 30.06.2023**

O R D E R

These two appeals have been filed by the dealer-assessee against the orders dated 24.02.2021 and 25.02.2021 of the learned Additional Commissioner of Sales Tax (Appeal), Sundargarh Range, Rourkela (in short, ld. FAA) passed in First Appeal Case No. AA29(ET) DCST/2017-18 & AA 45 (V) DCST/2017-18. 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. Ambica Iron & Steel Ltd., Beldihi, Kalunga, Rourkela is a manufacturer of M.S. Square, M.S. Angle, M.S. Channel etc. It utilizes raw material i.e. M.S. Ingot, Furnace Oil and Coal as consumable. The dealer-assessee effects purchase both from inside and outside the State of Odisha and effects sales inside the State of Odisha. The order of assessment denotes that after completion of self-assessment under section 39 of the OVAT Act, proceedings under section 43 of the OVAT Act and under section 10 of the OET Act have been initiated for the tax period 01.07.2015 to 30.11.2015 based on allegations contained in a Tax Evasion Report. The assessments resulted in demand of ₹6,49,28,761.00 and ₹2,61,21,665.00 respectively under OVAT Act and OET Act. On being aggrieved, the dealer-assessee preferred first appeals against the said demands raised at assessments under the both Acts. The first appeals were partly allowed causing reduction in demands of ₹6,47,73,508.00 under OVAT Act and ₹2,53,98,060.00 under the OET Act.

3. The dealer-assessee became again aggrieved against the orders of the ld. FAA and preferred second appeals at this forum endorsing grounds of appeals as well as additional grounds of appeals. The grounds of appeals/additional grounds are voluminous. Reliance has been placed by the learned Counsel of the assessee on decisions delivered in the Hon'ble High Court of Odisha and the Hon'ble Apex Court to fortify his stand. We, on going through the grounds of appeal/additional grounds of appeal, consider it ideal to put down herein the substance of the grounds of appeal/additional grounds for

better appreciation. Amongst the grounds submitted, the maintainability of initiation of the proceedings is the foremost. Mr. R.S. Agarwal, learned Advocate representing the dealer-assessee asserts that the decision delivered by the Hon'ble High Court of Odisha vide STREV No.64 of 2016 dated 01.12.2021 in case of ***M/s Keshab Automobiles vs. State of Odisha*** is undoubtedly applicable to this case. It is held by the Hon'ble High Court of Odisha that if the self-assessment under Section 39 of the OVAT Act for tax periods prior to 1st October, 2015 are not 'accepted' by a formal communication or an acknowledgement by the Department, then such assessment cannot be sought to be re-opened U/s. 43 of the OVAT Act and subject to fulfillment of other requirements of that provision as it stood prior to 1st October, 2015. For all the aforementioned reasons, the reopening of the assessment sought to be made in the present case under Section 43(1) of the OVAT Act is held to be bad in law. It is also submitted that the said decision of the Hon'ble High Court of Odisha has been affirmed by Hon'ble Apex Court in their order dated 13.07.2021 in SLP (Civil) No.9912 of 2022 in case of ***Deputy Commissioner of Sales Tax Vs. M/s Rathi Steel & Power Ltd Etc, and batch***.

As far as assessment passed U/s.10 of the OET Act, the learned Advocate of the dealer-assessee pleads that the initiation of proceeding U/s. 10 of the OET Act in absence of completion of assessment U/s. 9(2) of the OET Act and communication thereof to the dealer-assessee is without jurisdiction and, thus not maintainable. The learned Advocate relies on the judgment of the Hon'ble High Court of

Odisha passed in case of ***M/s. ECMAS Resins Pvt. Ltd. Vs. State of Odisha and others*** and ***M/s Shyam Metallic & Energy Ltd Vs. The Commissioner of Commercial Taxes, Odisha and others*** vide WP(C) No.7458 of 2015 and 7296 of 2013.

Under the above backdrop, it is argued that in absence of any undisputed facts of completion of assessment U/s.39 of the OVAT Act or 9(2) of the OET Act and communication thereof to the dealer-assessee, the assessment order and the first appeal order passed under both the Acts are liable to be quashed.

4. The State files cross objection supporting the orders of the ld.FAA and the Assessing Authority.

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. 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. Decision of the Hon'ble High Court of Odisha pronounced in case of ***M/s. Keshab Automobiles Vs. State of Odisha*** in Para 22 of the said verdict lays down as under.:-

> "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."

The aforesaid decision of the Hon'ble High Court of Odisha has been upheld by the Hon'ble Supreme Court of India in SLP (C) No.9823-9824/2022 dated 13.7.2022 which reads as follows:-

> "We have gone through the impugned order(s) passed by the High Court. The High Court has passed the impugned order(s) on the interpretation of the relevant provisions, more particularly Section 43 of the Odisha Value Added Tax Act, 2004, which was prevailing prior to the amendment. We are in complete agreement with the view taken by the High Court. No interference of this Court is called for in exercise of powers under Articles 136 of the Constitution of India. Hence, the Special Leave Petitions stand dismissed"

In the present case, it is revealed that the assessment framed under the OVAT Act relate to the tax period 01.07.2015 to 30.11.2015 which engulfs pre-amendment period from 01.07.2015 to 30.09.2015 and post amendment period from 01.10.2015 to 30.11.2015. As to the pre-amendment period i.e. 01.07.2015 to 30.09.2015, the learned assessing authority while initiating the 43 proceeding has recorded simply in the order of assessment to the effect that the dealer was self-assessed U/s. 39 of the OVAT Act. There is no evidence available on record as to communication of the assessment made U/s.39 of the OVAT Act to the dealer-assessee. The ld.FAA in his turn has without going into the maintainability of the case has accepted the order of assessment unilaterally relying that the dealer-assessee was originally

assessed U/s. 39 of the OVAT Act. In view of the above principles of law, we are constraint to infer that the assessment prior to 1st October, 2015, say, from 01.07.2015 to 30.09.2015 is not maintainable in law and as such, the same is liable to be quashed.

Reassessment proceeding U/s. 43 of the OVAT Act can be invoked in respect of the post amendment period ranging from 01.10.2015 to 30.11.2015. Segregation of assessment is required to be made. We feel it pertinent to remit the matter back to the learned assessing authority for segregation of the assessment for the post amendment period and compute the tax liability in accordance with law in force. The dealer-assessee is at liberty to raise all the material evidence in support of its defence before the learned assessing authority.

6. The Hon'ble High Court in case of ***M/s. ECMAS Resins Pvt. Ltd. and other v. State of Odisha*** in ***WP(C) No. 7458 of 2015*** observes in Para 43 of the judgment as under in respect of maintainability of reassessment under section 10 of the OET Act:

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

In the present case, the dealer-assessee was assessed under section 10 of the OET Act for the tax period 01.07.2015 to 30.11.2015 without any self-assessment defined under section 9(2) of the OET Act as mandated in the aforesaid decision of the Hon'ble Court. Accordingly,

the impugned order of reassessment and the first appeal order are not sustainable being devoid of jurisdiction.

7. In view of the foregoing discussions, the second appeals filed by the dealer-assessee under the OVAT Act and the OET Act are allowed and the impugned orders of the ld. FAA are set-aside. The assessment for the period 01.07.2015 to 30.09.2015 under the OVAT Act is hereby quashed but, the assessment for the post amendment period i.e. from 01.10.2015 to 30.11.2015 is hereby remitted back to the learned assessing authority for disposal afresh as per law in keeping with the observation made supra. The order of reassessment passed under the OET Act for the entire tax period in question is quashed. The cross objections are disposed of accordingly.

Dictated & 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