

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

S.A.No.79(V) of 2018.

(Arising out of the order of Ld. JCST, Bhubaneswar Range, Bhubaneswar,
in First Appeal Case No.AA-106221211000043/BH/12-13
disposed of on dated 27.6.2016)

&

S.A.No.34(ET) of 2018.

(Arising out of the order of Ld. JCST, Bhubaneswar Range, Bhubaneswar,
in First Appeal Case No.AA (ET) 108221211000044
disposed of on dated 27.06.2016)

Present:- Shri G.C.Behera & Shri S.K.Rout & Shri S.R.Mishra,
Chairman 2nd Judicial Member Accounts Member-III.

M/s.GET Power Private Ltd,
Plot No.1-A/3, 1st Floor, Lewis Road,
Bhubaneswar

. . . Appellant

- V e r s u s -

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

. . . Respondent.

For the Appellant
For the Respondent

. . . N o n e.
. . . Mr.D.Behura, SC(CT)&
Mr.S.K.Pradha,ASC(CT).

Date of Hearing : 04-08-2023

. . . Date of Order:01-09-2023.

ORDER

Both these appeals are disposed of by this composite order as the same involve common question of law and fact between the same parties for the same assessment period.

2. Instant appeals U/s.78(1) of the Odisha Value Added Tax Act 2004, (in short OVAT Act) and U/s.17(1) of the Odisha Entry Tax Act, 1999 (in short OET Act) are at the behest of the dealer-assessee assailing the impugned First Appeal Orders passed on 27.6.2016 by the Learned Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar (in short Ld. First Appellate Authority/ Ld.FAA) in confirming the orders of assessment U/s.43 of the OVAT Act and U/s.10 of the OET Act for the tax

period from 1.10.2008 to 31.1.2011 passed by the Learned Sales Tax Officer, Bhubaneswar I Circle, Bhubaneswar (in short Ld. STO).

3. The brief fact of the case is that the dealer-assessee which carries on business in execution of works contract i.e. electrification of work under "Rajiv Gandhi Garameena Vidyut Karan Yojana(RGGVY) and Railway Electrification was subjected to assessment U/s.43 of the OVAT Act and U/s.10 of the OET Act by the Ld. STO on the basis of adverse report received by him from the STO (Enforcement), Bhubaneswar Range, alleging irregular claim of exemption made by the assessee.

4. The STO Enforcement Range, while submitting the report has detected that the dealer's claim of "sale of goods in transit" by way of transfer of documents of title to another as defined U/s.3(b) of the CST Act was not in conformity to the provisions of CST Act and so also the claim of exemption U/s.6(2) of the CST Act.

5. After being prima facia convinced with the allegation of wrong claim of exemption, the Ld. STO initiated the escaped assessment proceeding which resulted in extra demand of tax and penalty of U/s.43 of the OVAT Act and U/s.10 of the OET Act to the tune of Rs.91,38,83,592.00 and Rs.11,28,10,752.00 respectively.

6. The dealer on being aggrieved with the aforesaid orders passed by the Ld. STO has preferred an appeal before the Ld. FAA who in his orders passed on 27.6.2016 on exparte basis has confirmed the same against which the dealer has preferred second appeal before this forum.

7. The dealer has filed the present appeal before this Tribunal, mainly on the following grounds:-

a) That, the Ld, FAA has committed an error of law in confirming the assessment order made U/s.43 of the OVAT Act, as no assessment has been made U/s.39 of the OVAT Act.

b) That, the appellant has been prevented by sufficient cause in not producing the declaration forms and certificates before the Ld. FAA by participating in appeal hearing due to closer of operation of "RGGVY

Scheme” and as such, the order passed exparte are against the principle of natural justice.

c) That, the appellant is now in possession of Declaration Forms/Certificates.

d) That, the imposition of penalty U/s.43(2) of the OVAT Act and U/s.10 (2) of the OET Act is not sustainable in law as the appellant’s transactions are not exigible to VAT or OET.

8. By way of Cross Objection, State Respondent justified the action of the authorities below to be in accordance to the provisions of law. It has been averred that since the self assessment proceeding was completed U/s.39 of the OVAT Act by the dealer appellant stating that returns filed are true and correct, the same were accepted by the department and no communication to this effect is required as per statute. Similarly, it has been averred by the State Respondent that there is no violation of natural justice since the impugned orders passed by the Ld. FAA were passed after affording sufficient opportunities to the appellant.

9. Heard the case from the State Respondent in absence of the Dealer-Appellant. The LCR produced in course of hearing are also examined.

10. During the course of hearing the Ld. Counsel for the State-Respondent vehemently argued that since the assessee has been self assessed on the basis of the declarations made by it in the returns, there is no need for separate communication to this effect and as such there is no hindrance on the part of the Ld. STO in initiating the escape assessment proceeding on receiving the adverse report. The Learned Counsel of the Respondent has also justified the action of the Ld. FAA in passing the exparte order because of non-cooperation of the appellant.

11. Keeping in view the rival contentions of both the parties, the moot question that needs to be addressed first is whether the Ld. STO before initiating the escaped assessment proceedings has completed the statutory requirements U/s.39 of the OVAT Act and Section 9 of the OET Act or not ?

12. On examination of records produced before us, it is observed that the dealer was self assessed on 28.03.2011 U/s.39 of the OVAT Act U/s.9 of the OET Act on the basis of the return filed by it. Thereafter the escaped assessment proceedings were initiated on 3.5.2011 U/s. 43 of the OVAT Act and U/s.9 of the OET Act by the Ld. STO after receipt of an adverse report from the STO Enforcement. Since the claim of self assessments were completed by the Ld. STO on the declarations made by the dealer it-self the Ld. Counsel of the State has emphatically justified the escaped assessment proceedings made U/s.43 of the OVAT Act and U/s.10 of the OET Act. In stating so, it was also averred that no separate communication is required under the statute for the purpose.

13. In this regard, the Hon'ble High Court of Orissa, in case of M/s. Keshab Automobiles Vrs. State of Odisha in STREV No.64 of 2016 decided on 1.12.2021 have held that:-

“ From the above discussion, the picture that emerges is that if the self assessment U/s.39 of the OVAT Act for the 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 reopened U/s.43 (1) of the OVAT Act and further subject to the fulfilment of other requirement of that provisions as it stood prior to 1st October 2015”.

“ For all of the aforementioned reasons, the re-opening of the assessment sought to be made in the present case U/s.43(1) of the OVAT Act is held to be bad in law. The question framed is accordingly answered in the negative i.e. in favour of the assessee and against the department. It is accordingly held that in absence of the completion of assessment U/s.39,40,42 and 44, reassessment U/s.43(1) of the OVAT Act is unsustainable in law”.

14. The aforesaid judgement of Hon'ble High Court of Orissa was also affirmed by the Hon'ble Supreme Court of India in their order dated 13th July 2022 in SLP (Civil) No.9912 of 2020 in case of Deputy Commissioner of Sales Tax Vrs. Rathi Steel & Power Ltd & batch.

15. Further the Full Bench of Hon'ble High Court of Orissa in W.P.(C) No.7458 of 2015 in case of M/s. ECMAC Resins Pvt. Ltd., Vrs State of Odisha have been pleased to held that unless the returns filed by way of self assessment U/s.9 with section 9(2) of the OET Act is "accepted" by the Department by a formal communication, it can not trigger a notice of reassessment U/s.10(1) of the OET Act read with Rule 15(b) of the OET Act.

16. On examination of information available on record produced before us, we do not notice any formal communication or an acknowledgement by the Department regarding self assessment made U/s.39 of the OVAT Act and U/s.9 of the OET Act for the impugned period. As such, the assessment proceedings U/s. 43 of the OVAT Act and U/s.10 of the OET Act are not maintainable on the decisions relied upon as noted supra.

17. Therefore, we allow the appeals preferred by the appellant-dealer. Resultantly, the orders of Ld. FAA and Ld.STO under both the acts are hereby quashed. The cross-objections filed by the State-Respondent are disposed of accordingly.

Dictated and corrected by me,

(S.R.Mishra)
Accounts Member-III.

(S.R.Mishra)
Accounts Member-III.
I agree,

(G.C.Behera)
Chairman
I agree,

(S.K.Rout)
2nd Judicial Member.