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

S.A. No.221(ET) of 12-13
&
S.A. No.337(V) of 12-13

(Arising out of the order of the learned JCST, Jajpur Range, Jajpur Road First Appeal Nos. AA-274 KJB (ET) 2010-11 & AA-273 KJB-2010-11, disposed of on 15.09.2012)

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

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

-Vrs. –

M/s. Thakur Prasad Sao & Sons Pvt. Ltd., Joda, Keonjhar, TIN- 2145140019. ..... Respondent.

For the State : : Mr. D. Behura, S.C.(C.T.)
For the Dealer : : Mr. J.K. Das, ld. Advocate
: : Ms. S. Mohanty, ld. Advocate

Date of Hearing : 23.03.2023 * Date of Order : 27.03.2023**

O R D E R

The State is in appeal in S.A. No. 221(ET) of 12-13 and S.A. No. 337(V) of 12-13 challenging the order dated 15.09.2012 passed by the Joint Commissioner of Sales Tax, Jajpur Range, Jajpur Road (in short, Ld.FAA) in Appeal Case Nos. AA-274 KJB (ET) 2010-11 & AA-273 KJB 2010-11 pertaining to the first appeal order passed U/s. 10 of the OET Act and U/s. 43 of the OVAT Act respectively for having both the first appeal orders remanded to the learned assessing authority for assessment afresh. 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 T.P. Sao & Sons, Barbil carries on business in mining of iron ore at Barbil in the district of Keonjhar and manufactures sponge iron and M.S. ingots at his plants located at Rourkela in the district of Sundargrh. The dealer-assessee was assessed U/s. 43 of the OVAT Act by the Assistant Commissioner of Sales Tax, Barbli Circle, Barbil (in short, learned assessing authority) for the tax period from 01.04.2007 to 31.03.2009 basing on the Fraud Case Report submitted by the ACCT, Vigilance, Balasore and another Fraud Case Report submitted by the Sales Tax Officer, Sambalpur Enforcement Range which resulted in demand of ₹12,84,20,355.00 including penalty of ₹8,10,51,166.00. Aggrieved, the dealer-assessee preferred first appeal. The ld.FAA on examination of the order of the learned assessing authority and materials on record detected certain defects/deficiencies specifically on disallowance of export sales, allegation of sale suppression, disallowance of ITC, imposition of penalty etc and remanded the case back to the learned assessing authority for reassessment. Similarly, as for the assessment passed U/s. 10 of the OET Act for the said material period which emerged from the aforesaid Fraud Case Reports, the Ld FAA remanded back the case to the learned assessing authority for fresh assessment owing to certain deficiencies apparent on the face of the assessment order.

3. The State being not satisfied with the orders of the ld. FAA preferred these second appeals urging that the ld. FAA has erred in opining imposition of penalty as wrong under law. It is also submitted that the ld. FAA being the extended forum of assessment ought to have assessed the dealer at his level with all the relevant records having been available on record without remanding back the case to the learned assessing authority. It is prayed to set aside the order of the ld. FAA and to uphold the order of the learned assessing authority under OVAT Act and OET Act.

4. Mr. J.K. Das, learned Advocate representing the dealer-assessee, submits additional cross objection in addition to the cross objection furnished earlier holding that the judgment of the Hon'ble High Court of Odisha vide STREV No.64 of2016 dated 01.12.2021 in case of ***M/s Keshab Automobiles vs. State of Odisha*** is squarely applicable in this case, as the instant case is similarly situated. 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 asserts 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.

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 case of maintainability whether in absence of any communication of assessment either U/s. 39, 40, 42 or 44 of the OVAT Act and U/s. (9(2) of the OET Act to the dealer-assessee, the assessment passed U/s. 43 of the OVAT Act and U/s. 9(2) of the OET Act are sustainable. In the

present case, the learned assessing authority while initiating the 43 proceeding and 9(2) proceeding has recorded simply in the orders of assessment to the effect that the dealer was self-assessed U/s. 43 of the OVAT Act and U/s. 9(2) of the OET Act for the tax period from1.4.2007 to 31.3.3009. There is no evidence available on record as to communication of the assessment made U/s.39 of the OVAT Act or U/s. 9(2) of the OET Act to the dealer-assessee. The ld.FAA in his turn has without going into the maintainability of the case has accepted the orders of assessment unilaterally relying that the dealer-assessee was originally assessed U/s. 39 of the OVAT Act and U/s. 9(2) of the OET Act.

6. The contention taken by the learned Advocate representing the dealer-assessee is substantially acceptable in view of the decision of the Hon'ble High Court of Odisha pronounced in case of ***M/s. Keshab Automobiles Vs. State of Odisha*** as referred as aforesaid in Para 22 of the said verdict which 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."

7. Furthermore, as far as the re-assessment U/s.10(1) of the OET Act is concerned, it is relevant to rely on the judgment passed by 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*** which in Para 43 of the judgment provides as under:

> "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 view of the clear mandates given by the Hon'ble High Court as discussed supra, the forums below lack authority to assess the dealer-assessee either U/s.43 of the OVAT Act or U/s. 9(2) of the OET Act without having jurisdiction and maintainability of the case.

8. In view of the foregoing discussions, the second appeals filed by the State under the OVAT Act and the OET Act are dismissed. The impugned orders of the forums below are hereby set aside. The cross objections are 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