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

S.A. No.424(VAT) of 15-16
&
S.A. No.226(ET) of 15-16

(Arising out of the order of the learned Addl.CST(Appeal), South Zone, Berhampur First Appeal Nos. AA(VAT)-47/2014-15 & AA(ET)-23/2014-15, disposed of on 28.12.2015)

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

M/s. Om Refrigeration,
At/Po- OWT Road, Berhampur,
Ganjam, TIN-21511904992. ..... Appellant

-Vrs.–

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

For the Appellant : Mr. S.K. Patel, ld. Advocate
For the Respondent : Mr. S.K. Pradhan, ld. A.S.C.(C.T.)

Date of Hearing : 30.06.2023 * 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 28.12.2015 of the learned Additional Commissioner of Sales Tax (Appeal), South Zone, Berhampur (in short, ld. FAA) passed in First Appeal Case Nos. AA(VAT)-47/2014-15 & AA (ET)-23/2014-15. 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. Om Refrigeration, TIN-21511904992, One Way Traffic Road, Berhampur deals in Refrigerator and AC spare parts on retail sale basis. The order of assessment denotes that for the tax period 01.04.2011 to 31.03.2013, the dealer has filed self assessed tax returns as per Section 33 of the OVAT Act and under section 7 of the OET Act which has been accepted as per sub-section (2) of Section 39 of the OVAT Act and under Section 9(2) of the OET Act. Proceedings under Section 43 of the OVAT Act and under Section 10 of the OET Act have been initiated for the tax period under appeal based on allegations contained in a Tax Evasion Report No.55 dated 08.03.2013 received from STO, Vigilance, Berhampur Division, Berhampur. The assessments resulted in demand of ₹16,21,399.00 and ₹2,22,063.00 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 orders of assessment passed under both the Acts were confirmed by the ld.FAA.

3. The dealer-assessee became again aggrieved against the orders of the ld. FAA preferred second appeals at this forum endorsing grounds of appeals to the effect that the assessment order under Section 43 of the OVAT Act and that of under Section of 10 of the OET Act are not valid without assessment framed under Section 39 of the OVAT Act and under Section 9(2) of the OET Act.

4. The State files cross objections 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 or 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 01.04.2011 to 31.03.2013 which entirely encompasses pre-amendment period. 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 01.04.2011 to 31.03.2013 is not maintainable in law and as such, the same is liable to be quashed.

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:-

> " 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 01.04.2011 to 31.03.2013 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 above discussion, the appeals filed by the dealer-assessee under both the Acts as referred to above are allowed. The orders of the assessing authority and that of the ld.FAA are set aside. As a necessary corollary thereof, the order of assessment is hereby 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