BEFORE THE JUDICIAL MEMBER-II:
ODISHA SALES TAX TRIBUNAL: CUTTACK.

P r e s e n t: **Shri S.K. Rout,**
2nd Judicial Member

S.A. No. 80(V) of 2019
(Arising out of the order of the learned JCST (Appeal), Territorial Range, Cuttack II, Cuttack, in First Appeal Case No. AA/15/OVAT/CU II/2018-19, disposed of on dtd.22.02.2019)
&
S.A. No. 71 (ET) of 2019
(Arising out of the order of the learned JCST (Appeal), Territorial Range, Cuttack II, Cuttack, in First Appeal Case No. AA/04/OET/CU II/2018-19, disposed of on dtd.26.04.2019)

M/s. Sanjay Concrete Pipes & Products,
Plot No.127 & 130, Padmanava Nagar,
Bhahmanigaon, Dist.- Cuttack. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. K.R. Mohapatra, Advocate
For the Respondent ... Mr. D. Behura, S.C.

Date of hearing: 03.12.2022 *** Date of order: 07.12.2022

O R D E R

Both these appeals are disposed of by this composite order as similar question of facts and law are involved.

2. Challenge in these appeals are the orders dated 22.02.2019 and 26.04.2019 passed by the learned Joint

Commissioner of Sales Tax (Appeal), Territorial Range, Cuttack II, Cuttack (in short, first appellate authority) in First Appeal Case No. AA/15/OVAT/CU II/2018-19 and AA/04/OET/CU II/2018-19 against the assessment order passed by the learned Sales Tax Officer, Cuttack II Circle, Cuttack (in short, assessing authority). In First Appeal Case No. AA/15/OVAT/CU II/2018-19, a demand was raised u/s.43 of the Orissa Value Added Tax Act, 2004 (in short, the OVAT Act) for Rs.9,78,158.00 for the tax period 01.04.2012 to 31.03.2017 which includes penalty amounting to Rs.6,18,925.00 u/s.43(2) of the OVAT Act. Likewise, in First Appeal Case No. AA/04/OET/CU II/2018-19 a demand was raised u/s.10 of the Orissa Entry Tax Act, 1999 (in short, the OET Act) for the same tax period i.e. 01.04.2012 to 31.03.2017 for Rs.1,10,501.00 including penalty of Rs.73,534.00.

3. The case in nutshell is that the appellant M/s. Sanjay concrete Pipe & Products bearing TIN-21351300479 is a proprietorship concern which is engaged in manufacturing of Fly-ash bricks. For the purpose of manufacturing, the dealer utilizes fly ash, sand and cement as raw materials. The learned assessing authority initiated the assessment proceedings on the basis of the tax evasion report No.03/2017 dtd.31.05.2017 received from the Deputy Commissioner of Sales Tax (Vigilance), Cuttack Division, Cuttack for the tax period 01.04.2012 to 31.03.2017 and completed the

assessment u/s.43 of the OVAT Act. As per the tax evasion report, the Vigilance Team observed that the dealer has effected purchase of sand amounting to Rs.73,53,400.00 from unregistered sources and utilized the same in manufacturing of fly-ash bricks which is exempted from levy of VAT. The Vigilance Team suggested for demand of VAT of Rs.3,54,560.00 along with penalty on the above purchase of sand as per Sec.12 of the OVAT Act. Basing on the report, the assessing authority initiated assessment proceeding u/s.43 of the OVAT Act and issued notice to the dealer in form VAT-307 vide letter No.5328 dtd.29.07.2017 which was duly served on the dealer. In response to the notice issued, the dealer appeared before the assessing authority and produced the books of account for necessary verification. The assessing authority completed the assessment basing on the materials available in the tax evasion report and periodic returns filed by the dealer for the period under challenge. Likewise, in First Appeal Case No. AA/04/OET/CU II/2018-19 the Sales Tax Officer completed the assessment u/s.10 of the OET Act. The Vigilance Team suggested for demand of entry tax @ 1% of Rs.73,53,400.00 along with penalty on the above purchase of sand effected from outside the local area treating as scheduled goods. The assessing authority raised demand of Rs.1,10,501.00 towards tax and penalty on the above purchase of sand treating it as minor

minerals as per entry in Sl. No.59 of Part-I of the Schedule to the Act.

4. Being aggrieved by the order of assessment, the dealer-appellant preferred the first appeal before the learned Joint Commissioner of Sales Tax (Appeal), Territorial Range, Cuttack II, Cuttack who confirmed the order of assessment and in ET case the order of assessment was enhanced to Rs.2,20,602.00.

5. Further being dissatisfied with the order of the first appellate authority, the dealer has preferred both these second appeals as per the grounds stated in the grounds of appeal.

6. In both these cases State-respondent has filed cross objections.

7. Heard the contentions and submissions of both the parties in this regard. The learned counsel appearing for the dealer-assessee contended that the order passed by the learned forum below is illegal and arbitrary. No assessment u/s.39, 42 or 44 was made before initiation of proceeding u/s.43 of the OVAT Act. Since the concept of deemed assessment of the return has been introduced for the first time since 1st October, 2015, the impugned order of reassessment is liable to be quashed for the period from 01.04.2012 to 30.09.2015. As such the impugned order of reassessment for the period from 01.04.2012 to 30.09.2015 may be quashed and the reassessment for the period from 01.10.2015 to 31.03.2017 may be set aside

with a direction to the assessing authority for reassessment afresh for the period from 01.10.2015 to 31.03.2017 in accordance with law.

8. Per contra, the learned Standing Counsel appearing for the Revenue argued that the learned first appellate authority has completed the appeal based on the provision of law and factual position.

9. Heard the contentions and submissions of both the parties in this regard. The sole contention of the dealer-appellant is that the assessment order is not maintainable. It was vehemently urged by the learned Counsel for the dealer-assessee that the initiation of proceeding u/s.43 of the OVAT Act was illegal and bad in law in absence of formation of independent opinion by the assessing authority as required u/s.43(1) of the Act. The escaped turnover assessment could not have been initiated u/s.43 of the OVAT Act when the dealer-assessee was not self-assessed u/s.39 of the Act. Further contention of the dealer-assessee is that the initiation of such proceeding by the assessing authority u/s.43 of the OVAT Act without complying the requirement of law and in contravention to the principles laid down by the Hon'ble High Court of Orissa in case of M/s. Keshab Automobiles v. State of Odisha (STREV No.64 of 2016 decided on 01.12.2021) is bad in law. He vehemently urged that there is nothing on record to show that the dealer-assessee was self-assessed u/s.39 of the OVAT Act

after filing the return and it was communicated in writing about such self-assessment. So when the initiation of proceeding u/s.43 of the OVAT Act is bad in law, the entire proceeding becomes nullity and is liable to be dropped.

10. After a careful scrutiny of the provisions contained u/s.43 of the OVAT Act, one thing becomes clear that only after assessment of dealer u/s.39, 40, 42 or 44 for any tax period, the assessing authority, on the basis of any information in his possession, is of the opinion that the whole or any part of the turnover of the dealer in respect of such tax period or tax periods has escaped assessment, or been under assessed, or been assessed at a rate lower than the rate at which it is assessable, then giving the dealer a reasonable opportunity of hearing and after making such enquiry, assess the dealer to the best of his judgment. Similar issue also came up before the Hon'ble High Court in case of M/s. Keshab Automobiles (supra) wherein the Hon'ble Court interpreting the provisions contained u/s.43 of the OVAT Act, in paras 13 to 16 of the judgment observed that "the dealer is to be assessed under Sections 39, 40, 42 and 44 for any tax period". The words "where after a dealer is assessed" at the beginning of Section 43(1) prior to 1st October, 2015 pre-supposes that there has to be a initial assessment which should have been formally accepted for the periods in question i.e. before 1st October,

2015 before the Department could form an opinion regarding escaped assessment or under assessment ….".

So the position prior to 1st October, 2015 is clear. Unless there was an assessment of the dealer u/s.39, 40, 42 or 44 for any tax period, the question of reopening the assessment u/s.43(1) of the OVAT Act did not arise. The Hon'ble Court in para-22 of the judgment has categorically observed that if the self-assessments u/s.39 of the OVAT Act for the tax periods prior to 01.10.2015 are not accepted either by a formal communication or an acknowledgment by the Department, then such assessment cannot be sought to be reopened u/s.43(1) of the OVAT Act. In the instant case, the impugned tax relates to pre-amended provisions of Section 43 of the OVAT Act i.e. prior to 01.10.2015. This apart the returns filed by the appellant were also not accepted either by a formal communication or an acknowledgement issued by the Department. The similar matter has also been decided by the Full Bench of OSTT in various cases such as M/s. Swati Marbles v. State of Odisha, S.A. No.209(V) of 2013-14 (Full Bench dtd.06.06.2022), State of Odisha v. M/s. Jaiswal Plastic Tubes Ltd., S.A. No.90(V) of 2010-11 (Full Bench dtd.06.06.2022), M/s. Jalaram Tobacco Industry v. State of Odisha, S.A. No.35(V) of 2015-16 (Full Bench dtd.16.08.2022), M/s. Eastern Foods Pvt. Ltd. v. State of Odisha, S.A. No.396 (VAT) of 2015-16 (Full Bench

dtd.23.08.2022) and M/s. Shree Jagannath Lamination and Frames v. State of Odisha, S.A. No.25(VAT) of 2015-16 (Full Bench dtd.15.10.2022).

11. In view of the law expounded by the Hon'ble High Court in case of M/s. Keshab Automobiles (supra) and subsequently confirmed by the Hon'ble Apex Court, the proceeding u/s.43 of the OVAT Act has been initiated by the assessing authority without complying with the requirement of law and without giving any finding that the dealer-assessee was formally communicated about the acceptance of self-assessed return, the proceeding itself is not maintainable. Likewise, the present petition concerns the assessment under the OET Act for the same period. The position under the OET Act stands covered by the judgment of the Full Bench of the Hon'ble Court dtd.05.08.2022 in W.P.(C) No.7458 of 2015 (M/s. ECMAS Resins Pvt. Ltd. v. State of Orissa) in which it was held by the Hon'ble Court that unless the return filed by way of self-assessment u/s.9(1) r/w. section 9)2) of the OET Act is "accepted" by the department by a formal communication, it cannot trigger a notice of reassessment u/s.10(1) of the OET Act r/w. Rule 15(b) of the OET Rules. So in view of the above analysis and placing reliance to the verdict of the Hon'ble Courts, the claim of the appellant deserves a merited acceptance.

12. In the result, for the reasons assigned above, the appeals filed by the dealer-assessee are allowed and

the impugned orders of the forums below are hereby set aside. As a corollary the impugned orders of reassessment for the period from 01.04.2012 to 30.09.2015 are hereby quashed and the reassessment for the period from 01.10.2015 to 31.03.2017 are hereby set aside and the cases are remanded back to the learned assessing authority with a direction to complete the reassessment afresh for the period from 01.10.2015 to 31.03.2017 in accordance with law pursuant to the observations made above after giving a reasonable opportunity to the dealer-assessee of being heard. Accordingly, the cross objections are disposed of.

Dictated & corrected by me,

Sd/-
(S.K. Rout)
2nd Judicial Member

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