BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

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

S.A. No. 23(V) of 2017-18
(Arising out of the order of the learned Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar, in First Appeal Case No. AA-106221522000182, disposed of on dtd.23.02.2017)

S.A. No. 8(ET) of 2017-18
(Arising out of the order of the learned Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar, in First Appeal Case No. AA-1082215220000183, disposed of on dtd.23.02.2017)

M/s. Sai Plyboards,
Plot No.B-13, Industrial Estate,
Rasulgarh, Bhubaneswar-751010. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. C.R. Das, Advocate
For the Respondent ... Mr. N.K. Rout, A.S.C.

Date of hearing: 27.07.2023 *** Date of order: 08.08.2023

O R D E R

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

2. The dealer prefers both these appeals challenging the order dtd.23.02.2016 passed by the learned Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (hereinafter referred to as, DCST/first appellate authority) in First Appeal Case No. AA-106221522000182 and AA-1082215220000183, thereby confirming the orders of assessment passed by the learned Sales Tax Officer, Bhubaneswar I Circle, Bhubaneswar (hereinafter referred to as, STO/assessing authority) u/s.43 of the Orissa Value Added Tax Act, 2004 (in short, the OVAT Act) raising demand of ₹39,90,639.00 for the period 01.04.2012 to 31.03.2015 in VAT case and ₹7,64,760.00 u/s.10 of the Orissa Entry Tax Act, 1999 (in short, the OET Act) for the period from 01.04.2012 to 31.03.2015 in ET case.

3. The case at hand is that, the dealer is a proprietorship firm engaged in trading of ply wood, laminates, flush door and adhesives on both wholesale and retail basis. Pursuant to tax evasion report, assessment proceedings were initiated against the dealer u/s.43 of the OVAT Act and u/s.10 of the OET Act and the demands as mentioned above were raised.

4. Against such tax demands, the dealer preferred first appeals before the learned first appellate authority who confirmed the demands.

5. Further, being dissatisfied with the orders of the learned first appellate authority, the dealer has preferred the present second appeals as per the grounds stated in the grounds of appeal.

6. Cross objections in these cases are filed by the State-respondent.

7. The learned counsel appearing for the dealer-assessee contended that the orders passed by the learned forums below are 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 orders of reassessment are liable to be quashed for the period under challenge. Further contention on behalf of the dealer in ET case is that the return filed by way of self-assessment under Section 9(1) r/w Section 9(2) of the OET Act has not been accepted by the department by a formal communication which is against the principle of Ecmas Resin Pvt. Ltd. case as decided by the Hon'ble High Court of Orissa.

8. Per contra, the learned Addl. Standing Counsel appearing for the Revenue argued that the learned first appellate authority has disposed of the appeals which are based on the provisions of law and factual position. Further contention raised on behalf of the learned Addl. Standing Counsel is that it reveals from the assessment order that the periodical returns filed by the dealer-assessee u/s.39 of the OVAT Act for the period under challenge were accepted as self-assessed and likewise the periodical returns filed by the dealer-assessee u/s.9(1) of the OET Act for the tax period under challenge were accepted as self-assessed u/s.9(2) of the Act. So the assessment of the dealer u/s.43 of the OVAT Act and u/s.10 of the OET Act are justified.

9. Heard the contentions and submissions of both the parties in this regard. The sole contention of the dealer-appellant is that the assessment orders are 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 an 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 verdicts of the Hon'ble Courts, we are of the view that the claim of the appellant deserves a merited acceptance.

12. In the result, both the appeals preferred by the dealer are allowed and orders of the forums below are hereby quashed. Cross objections are disposed of accordingly.

Dictated & corrected by me

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

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

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(B. Bhoi)
Accounts Member-II