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

S.A. No.157(VAT) of 2016-17
&
S.A. No.65(ET) of 2016-17

(Arising out of the order of the learned JCST(Appeal), Sundargarh Range, Rourkela in First Appeal Case Nos. AA V 34 of 2010-11 & AA V 16 ET of 2010-11 disposed of on 29.03.2016)

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

M/s. Pooja Sponge (P) Ltd.,
Plot No-214, IDCO, I/E, Kalunga,
Dist-Sundargarh. ..... Appellant.

-Vrs –

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

For the Appellant : : Mr. J.K. Das, ld. Advocate
: Mrs. S. Mohanty, ld. Advocate
For the Respondent : : Mr. D. Behura, ld. S.C.(C.T.)

Date of Hearing : 09.10.2023 * Date of Order: 08.11.2023**

O R D E R

The dealer-assessee is in appeals against the orders dated 29.03.2016 of the Joint Commissioner of Sales Tax (Appeal), Sundargarh Range, Rourkela (in short, 'ld. FAA') passed in First Appeal Case Nos. AA V 34 of 2010-11 & AA V 16 ET of 2010-11 confirming the order passed under Section 43 of the OVAT Act and under Section 10 of the OET Act respectively by the learned Sales

Tax Officer, Rourkela-II Circle, Panposh (in short, ld. STO). Since the aforesaid two appeals relate to the same material period involving common question of facts and law, they are taken up together for hearing and disposal made by this composite order.

2. The summary of the case is that M/s. Pooja Sponge (P) Ltd., Plot No-214, IDCO, I/E, Kalunga, Dist-Sundargarh carries business in manufacturing and sale of sponge iron. The dealer-assessee was assessed under Section 43 of the OVAT Act and under Section 10 of the OET Act for the tax period from 01.04.2007 to 31.12.2007 basing on the Fraud Case Report No.3 dated 28.06.2008 submitted by the Sales Tax Officer, Investigation Unit, Rourkela. The assessment taken up under Section 43 of the OVAT Act resulted in demand of ₹1,28,12,065.00 comprising tax of ₹38,59,051.00, penalty of ₹77,18,102.00 and interest of ₹12,34,912.00. Further, the assessment made under Section 10 of the OET Act resulted in demand of ₹35,14,641.00 comprising tax for ₹9,64,763.00, penalty of ₹19,29,526.00 and interest of ₹6,20,352.00. The first appeals preferred in both the cases by the dealer-assessee culminated in affirmation of the orders of assessment.

3. Aggrieved, the dealer-assessee preferred these two second appeals before this forum. In addition to grounds of appeal submitted at the time of filing second appeals, Mr.J.K.Das, Learned Advocate appearing on behalf of the dealer-assessee placed

additional grounds of appeal in both the cases under the OVAT Act and the OET Act. Before we dwell upon considering other grounds of appeal on merits, we find it essential to look into the additional grounds that speak of the aspect of maintainability of the proceedings initiated under Section 43(1) of the OVAT Act and under Section 10 of the OET Act. The learned Counsel of the dealer-appellant advocates that the learned Assessing Authority has initialed the proceedings under Section 43 of the OVAT Act as well as that of under Section 10 of the OET Act merely on the basis of the Fraud Case Report. Therefore, it is argued that the learned Assessing Authority has exceeded his statutory jurisdiction to initiate the escaped turnover assessment without ascertaining the facts whether there was any return acceptance order of the above tax period under section 39 of the OVAT Act and under Section 9(2) of the OET Act and the same have duly been communicated to the assessee with valid acknowledgement. The learned Counsel cited the verdict of the Hon'ble High Court of Odisha passed in case of ***M/s Keshab Automobiles vs. State of Odisha*** in STREV No.64 of 2016 dated 01.12.2021 relating to non-sustainability of the proceeding under Section 43 of the OVAT Act in absence of assessment under section 39 of the OVAT Act and the decision of the said Court passed in case of M***/s. ECMAS Resins Pvt. Ltd. Vs. State of Odisha and others*** in W.P.(C) No.7458 of 2015 dated 05.08.2022 pertaining to

non-sustainability assessment passed under Section 10 of the OET Act in absence of assessment made under Section 9(2) of the OET Act.

4. The State represented by Mr. D.Behura, learned Counsel(C.T.) besides harping the arguments filed in the cross objection submits additional cross objections defending that the additional ground preferred by the tax payer is not justified, since it is completely new justifying the after-thought action to avoid payment of due tax. He holds that in case of **State of Orissa vs. Lakhoo Varjang 1960 SCC OnLine Ori 110 : (1961) 12 STC** 162, the following observations were made by the Hon'ble Apex Court:

"....The tribunal may allow additional evidence to be taken, subject to the limitations prescribed in Rule 61 of the Orissa Sales Tax Rules. Bu this additional evidence must be limited only to the questions that were then pending before the Tribunal...

With the above arguments, the learned Counsel of the State pleads for turning down the additional grounds filed by the dealer-assessee.

5. Heard the contentions and submissions of both the parties in this regard. The orders of assessment and the orders of the ld. FAA coupled with the materials on record are gone through. The averments made by the learned Counsel of the State and the case law relied upon are not applicable in the present facts and the

circumstances of the case. The additional grounds submitted by the learned Counsel of the dealer-assessee are on account of change of circumstance or law. The statute speaks of the base law upon which, initiation of any proceeding hinges. If a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible. The averments made by the learned Counsel in this regard are substantive. It is apt to mention here that 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. The decisions delivered by the Hon'ble of High Court of Odisha in cases of ***M/s Keshab Automobiles vs. State of Odisha*** and **M*/s. ECMAS Resins Pvt. Ltd. Vs. State of Odisha and others*** (supra) are relevant in the present cases which in Para 22 and 43 of the respective decisions lay down as under:-

> Para 22 of the judgment in case of ***M/s Keshab Automobiles vs. State of Odisha***
>
> "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."

Para 43 of the judgment in case of ***M/s. ECMAS Resins Pvt. Ltd. and other v. State of Odisha:***

" 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."

6. In the present case, it is revealed that the assessment framed under the OVAT Act relates to the tax period from 01.04.2007 to 31.12.2007 which entirely covers the pre-amendment period. The learned Assessing Authority is learnt to have not attended to the perquisites set forth under section 39 of the OVAT Act and under Section 9(2) of the OET Act for initiation of proceedings under section 43 of the OVAT Act and under Section 10 of the OET Act. He has reopened the assessments simply on the basis of the Fraud Case Report. There is no evidence available on

record as to communication of the assessment made U/s.39 of the OVAT Act and under Section 9(2) of the OET Act to the dealer-assessee. The ld.FAA has also ignored the aspect of maintainability of the cases. In view of the above principles of law, we are constraints to infer that the assessments made in the impugned cases are not sustainable in law and as such, the same are liable to be quashed. Accordingly, other issues raised in the grounds of appeal become redundant. Hence, it is ordered.

7. In view of the foregoing discussions, the second appeals filed by the dealer-assessee under the OVAT Act and under the OET Act are allowed. The impugned orders of the ld.FAA are set aside. As a necessary corollary thereof, the orders of the learned STO are hereby quashed. The cross objections/additional cross objections are hereby disposed of accordingly.

Dictated and corrected by me.

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

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