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

S.A. No.5(V) of 2016-17
&
S.A. No.4(ET) of 2016-17

(Arising out of the order of the learned Addl.CST, Central Zone in Appeal Nos.AA-Angul-195/11-12 & AA-Angul-196/11-12 disposed of on 24.05.2013)

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

M/s. Ganesh Sponge (P) Ltd.,
Krushnachandrapur,
Golabandha, Angul. ..... Appellant.

-Vrs. –

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

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

Date of Hearing : 28.08.2023 * Date of Order : 27.09.2023**

O R D E R

These two appeals have been preferred by the dealer-assessee against the orders dated 24.05.2013 of the Additional Commissioner of Sales Tax, Central Zone, Cuttack (in short, 'ld. FAA') passed in Appeal Nos. AA-Angul-195/11-12 & AA-Angul-196/11-12 confirming the orders of assessment passed under Section 43 of the Odisha Value Added Tax Act (in short, 'OVAT Act') and under Section 10 of the Odisha Entry Tax Act (in short, 'OET Act') by the learned Joint Commissioner of Sales Tax Act, Angul Range, Angul (in short, 'ld. Assessing Authority'). Since the aforesaid two appeals relate to the same material period of the same assessee involving

common question of facts and law, they are clubbed together for hearing and disposal by this composite order.

2. The facts, in nutshell, of the case are that M/s. Ganesh Sponge Pvt. Ltd., At-Krushnachandrapur, P.O.-Golabandha, Dist-Angul is a manufacturer and trader in sponge only. 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 01.04.2009 to 31.07.2010 on the basis of a Tax Evasion Report (TER) No.56/SIT dated 08.11.2010 of the Special Investigation Team (SIT) received from the Additional Commissioner of Commercial Taxes (Vigilance), Cuttack which resulted in demand of ₹1,66,01,451.00 and ₹43,36,446.00 respectively inclusively of penalty. On being aggrieved, the dealer-assessee preferred first appeals against the aforesaid demands under both the Acts. The first appeals resulted in confirmation of the demands raised at assessments. The dealer-assessee being not satisfied with the orders of the ld. FAA preferred these appeals before this Forum.

3. The dealer-assessee has endorsed grounds of appeal as well as the additional grounds of appeals. The additional grounds of appeals are on maintainability of initiation of proceedings under Section 43 of the OVAT Act and under Section 10 of the OET Act in absence of assessment completed under Section 39(1) of the OVAT Act and 9(2) of the OET Act. It is submitted by the learned Counsel of the dealer-assessee that in the instant case assessments under section 43 of the OVAT Act and under section 10 of the OET Act have been completed basing on the allegations contained in the Tax Evasion Report without completion of assessment either under Section 39, 40, 42 or 44 of the OVAT Act and under Section 9(2) of the OET Act. The learned Counsel of the dealer-assessee places reliance on the decisions rendered by the Hon'ble High Court of Odisha passed on 01.12.2021 in case of ***Keshab Automobiles Vs.***

State of Odisha in STREV No.64 of 2016 and order passed on 05.01.2022 in case of ***M/s ECMAC Resins Pvt. Limited Vs. State of Odisha*** *in W.P.(C) No.7458 of 2015* and in case of ***M/s. Sambalpur Roller Flour Mills (p) Ltd., Vs. State of Odisha,*** in S.A. No.120(ET) of 2016-17 dated 08.08.2023 & ***the State of Maharashtra Vs. M.M. Sales Corporation,*** reported in MANU/MH/3089/2022. Since it engulfs substantial points of law of sustainability of the initiation of proceedings which strikes the root of the case, we, rather feel it pertinent to look into this substantial issue before we dwell upon concentrating on other issues on merits.

5. The State, on the other hand, has filed additional cross objection in defence of the contentions taken on additional grounds of appeal. The State holds that the returns filed by the dealer-assessee being in order are accepted as self-assessed under Section 39(1) of the OVAT Act and the same has been communicated vide notice in VAT-307 dated 19.11.2010. Accordingly, it is asserted that as the assessment completed under Section 39 of the OVAT Act and communication thereof has been brought about, the ratio of the decision in **M/s. Keshab Automobiles** case is of little application. So also is the case with re-assessment framed under Section 10 of the OET Act. Communication of assessment under section 9(1) of the OET Act is said to have been made to the dealer-assessee vide notice in Form E-32 dated 19.11.2010. It is also contended by the State that the issue of maintainability as raised in the additional grounds was neither raised nor adjudicated while disposing of the first appeal. It is also urged placing reliance upon the decision in the case of **Lakhoo Vajarang reported in (1961) 12 STC 162** wherein Hon'ble Apex Court specifically observes that the Tribunal may allow additional evidence subject to the questions

that were pending before the Tribunal. The State has thus prayed for dismissal of the appeals filed by the dealer-assessee.

6. The contentions taken by both the rival parties are looked into in accordance with the provision of laws. It is felt pertinent to go through the verbatim provided in Form VAT-307 and Form E-32. The verbatim provided in Form VAT-307 is as under:-

> 'You have been assessed under Section 39/Section 40/Section42/Section 44 of the Orissa Value Added Tax, 2004 for the tax period(s) _____ to _____ on _____
> X X X
> X X X
> In the event of your failure to comply with all the terms of this notice, I shall proceed to assess you under Section 43 of the said Act, to the best of my judgment, without any further reference to you.'

Identical verbatim appears in Form E32 which is reproduced below:-

> "You have been assessed under Section____-of the Orissa Entry Tax Act, 1999 for tax period(s)_____to _____on_____
> X X X
> X X X
> In the event of your failure to comply with all the terms of this notice, I shall proceed to assess you under sub-section (1) of Section 10 of the said Act, to the best of my judgment, without any further reference to you."

On a plain reading of Form VAT-307 and Form E-32, it becomes clear that these are statutory notices upon the dealer who has been assessed under Section 39, 40, 42 or 44 of the OVAT Act and under Section 9(2) of the OET Act prior to taking up reassessment proceedings under Section 43 of the OVAT Act and Section 10(1) of the OET Act. Assumption of communication of self-assessments to the dealer-assessee upon issuance of Form VAT-307 and Form E-32 is far from truth. Accordingly, the arguments placed by the State in this regard are not acceptable. Besides this,

the contention as to raising of the maintainability issue at the stage of second appeal for the first time before being raised earlier in the lower forums, it is inferred that the Tribunal has discretion to consider the question of law arising in assessment proceedings although not raised earlier. The additional grounds submitted before this forum become available on account of change of circumstances or law. This find support in the decision of the Hon'ble Apex Court in case of **Commissioner of Sales Tax, U.P. – Vrs.- Sarjoo Prasad Ram Kumar [1976] reported in 37 STC 533 (S.C.)** wherein it is observed that:

> ".....Unless there is some provision either in the Act or in the Rules framed which precludes the assessee from raising any objection as to jurisdiction, if the same is not raised before the assessing authority, the assessee cannot be precluded from raising that objection at a later stage. An objection as to jurisdiction goes to the root of the case."

Under the above settled principle of law, since the substantial question of law strikes the root of the case, the contention of the State is turned down in entirety. On the other hand, the additional grounds placed by the ld. Counsel of the dealer-assessee bear justification for consideration.

7. 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*** (Supra) 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"

Further, as regards completion of assessment under Section 10 of the OET Act in absence of assessment under Section 9(2) of the OET Act is not sustainable in view of the judgment of the Hon'ble High Court of Odisha rendered 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 which in para 43 of the said judgment observes as under:-

" 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, it is revealed that the assessments framed under the OVAT Act and OET Act relate to the tax period from 01.04.2009 to 31.07.2010 which entirely cover the pre-amendment period. The learned Assessing Authority is learnt to have not complied pre-conditions as required under section 39(1) of the OVAT Act and under Section 9(2) of the OET Act for initiation of proceedings under section 43(1) of the OVAT Act and under Section 10(1) of the OET Act. He has reopened the assessments simply on the basis of the Tax Evasion 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. In view of the above principles of law, we are constraint to infer that the assessments as well as the first appeal orders made in the impugned cases are not sustainable in law and as such, the same are liable to be quashed. All other points raised by the dealer-assessee in the grounds of appeal are hereby rendered redundant.

8. Resultantly, under the facts and in the circumstances of the cases as observed above, it is ordered that the appeals filed by the dealer-assessee under both the Acts are allowed. Cross objections are disposed of accordingly.

Dictated & 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