BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 62 (VAT) of 2023
&
S.A. No. 23 (ET) of 2023

(Arising out of orders of the learned Addl. CST (Appeal), South Zone, Berhampur in Appeal Nos. AA (VAT) 52/2014-15 & AA (ET) 31/2014-15, disposed of on 30.06.2023)

Present: **Shri G.C. Behera, Chairman**

M/s. Ramya Enterprises,
Swarnamayee Nagar, Hatibandha Sahi,
Berhampur, Dist. Ganjam ... Appellant

-Versus-

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

For the Appellant : Sri B.B. Panda, Advocate
For the Respondent : Sri N.K. Rout, Addl. SC (CT)

Date of hearing : 11.03.2024 *** Date of order : 19.03.2024

O R D E R

Both the second appeals relate to the same party and for the same period involving common question of facts and law, but under different Acts. Therefore, they are taken up for disposal in this common order for the sake of convenience.

S.A. No. 62 (VAT) of 2023 :

2. Dealer assails the order dated 30.06.2023 of the Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (hereinafter called as 'First Appellate Authority') in F A No. AA (VAT) 52/2014-15

confirming the assessment order of the Deputy Commissioner of Sales Tax, Ganjam-I Circle, Ganjam (in short, 'Assessing Authority').

S.A. No. 23 (ET) of 2023 :

3. Dealer also assails the order dated 30.06.2023 of the First Appellate Authority in F A No. AA (ET) 31/2014-15 confirming the assessment order of the Assessing Authority.

4. The facts of the cases, in short, are that –

M/s. Ramya Enterprises is engaged in business of domestic electrical cables on retail-cum-wholesale basis. The assessments relate to the period 01.04.2011 to 31.03.2013. The Assessing Authority raised tax and penalty of ₹62,45,511.00 u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') and ₹7,95,261.00 u/s. 10 of the Odisha Entry Tax Act, 1999 (in short, 'OET Act') on the basis of Tax Evasion Report (TER).

The Dealer preferred first appeals against the orders of the Assessing Authority before the First Appellate Authority. The First Appellate Authority rejected the appeals summarily due to failure to furnish the proof of payment of 20% of the disputed tax as pre-deposit for entertaining the appeal. Against such rejection orders of the First Appellate Authority, the Dealer approached this Tribunal, but subsequently withdrawn the second appeals filed by the Dealer as it had filed writ petition before the Hon'ble Court on the ground of jurisdiction and maintainability of the escaped assessment proceedings on 21.06.2018. While disposing of the writ petition, the Hon'ble Court vide order No. 7 dated 05.01.2023 were pleased to set aside the impugned order by restoring the appeal to file for disposal. Accordingly, the First Appellate Authority took up the appeals for hearing and disposal, which ultimately resulted in dismissal of appeals vide the impugned orders. Being aggrieved with the orders of the First Appellate Authority, the Dealer prefers these appeal. Hence, these appeals.

The State files cross-objections.

5. The learned Counsel for the Dealer submits that the orders passed by the First Appellate Authority and the Assessing Authority are otherwise illegal in law and facts involved. He further submits that without completing an assessment u/s. 39, 40, 42 or 44 of the OVAT Act, initiation of proceeding directly u/s. 43 of the said Act is not sustainable in law.

He also submits that under the OET Act the Assessing Authority directly completed assessment u/s. 10 without completing an assessment u/s. 9(1) and (2) of the said Act. He contends that there is no communication of acceptance of self-assessment return to the Dealer before passing reassessment orders u/s. 43 of the OVAT Act and u/s. 10 of the OET Act. Therefore, he submits that the orders of the First Appellate Authority and the Assessing Authority under the OVAT Act and OET Act are liable to be set aside in the ends of justice.

He relies on the decisions of the Hon'ble Court in cases of ***M/s. Keshab Automobiles v. State of Odisha*** in **STREV No. 64 of 2016** decided on 01.12.2021 and ***M/s. ECMAS Resins Pvt. Ltd. and other v. State of Odisha*** in **WP(C) Nos. 7458 of 2015 & 7296 of 2013** decided on 05.08.2022.

6. On the contrary, learned Addl. Standing Counsel (CT) for the State supports the orders of the fora below and submits that the self-assessments of the Dealer have been accepted u/s. 39(2) of the OVAT Act and u/s. 9(2) of the OET Act. He contends that that the Dealer has not challenged the maintainability of the proceeding at an earliest opportunity, so, he is precluded to raise the same in view of provision of Section 98 of the OVAT Act.

He also urged that the Dealer could have raised the same before the Assessing Authority. He further submits that communication/ acknowledgment of the order of acceptance of self-assessed return is a

matter of fact and the same cannot be objected at belated stage. So, he submits that the orders of the fora below require no interference in appeal.

He relies on the decision of the Hon'ble Court in case of ***The State of Orissa v. Lakhoo Varjang***, reported in **[1961] 12 STC 162 (Orissa)**.

7. Having heard the rival submissions and on careful scrutiny of the record, it is apparent that assessments u/s. 43 of the OVAT Act and u/s. 10 of the OET Act can only be made after the assessments are completed u/s. 39, 40, 42 or 44 of the OVAT Act and u/s. 9(1) & (2) of the OET Act respectively.

Learned Addl. Standing Counsel (CT) for the State has argued that the Dealer is precluded to raise the point of maintainability unless the same is not challenged at an earliest opportunity in view of provision of Section 98 of the OVAT Act. The relevant provision of Section of 98 of the OVAT Act is reproduced herein below for better appreciation :-

> *"**98. Assessment proceedings, etc. not to be invalid on certain grounds –***
> *(1) xx xx xx*
> *(2) The service of any notice, order or communication shall not be called in question if the notice, order or communication, as the case may be, has already been acted upon by the dealer or person to whom it is issued or where such service has not been called in question at or in the earliest proceedings commenced, continued or finalised pursuant to such notice, order or communication."*

Learned Addl. Standing Counsel (CT) for the State also relied on the decision in case of ***Lakhoo Varjang*** cited supra. In the said case, the Hon'ble Court have been pleased to observe as under :-

> "4. ... No subsequent change in case law can affect an order of assessment which has become final under the provisions of the Sales Tax Act...."

In the case of ***National Thermal Power Company Limited v. Commissioner of Income-Tax,*** reported in **1996 (12) TMI 7 – Supreme Court**, the Hon'ble Apex Court have been pleased to observe that :-

> " ...Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.
>
> The refrained question, therefore, is answered in the affirmative, i.e. the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee..."

In view of the decision in case of ***Lakhoo Varjang*** cited supra, Hon'ble Court nowhere restricts the Tribunal to allow additional ground, but the same must be limited only to the questions that were then pending before the Tribunal. Similarly, in case of ***National Thermal Power Company Limited*** cited supra, the Hon'ble Apex Court categorically observed that the Tribunal has the discretion to allow new ground where the Tribunal is only required to consider a question of law arising from the facts which are on the record in the assessment proceeding.

In the instant case, it is required to be answered whether a proceeding u/s. 43 of the OVAT Act can be initiated in absence of any proceeding u/s. 39, 40, 42 or 44 of the said Act or in absence of any communication of acceptance of self-assessment. The fact does not disclose that any communication of acceptance of self-assessment has been made to the Dealer. As the point of maintainability of assessments completed u/s. 43 of the OVAT Act and u/s. 10 of the OET Act can only be maintainable after completion of assessments u/s. 39, 40, 42 or 44 of the OVAT Act and u/s.

9(1) and (2) of the OET Act respectively, which touches the root of the case. So, the Dealer can raise the point of maintainability even at this stage.

Even on perusal of record, it reveals that the Dealer had not taken the ground of maintainability in the earlier occasion, but the Dealer has taken the same ground before the First Appellate Authority when the appeal was restored by virtue of the order of the Hon'ble Court. So, the objection of the State does not merit for consideration as the Dealer has already taken the point of maintainability before the First Appellate Authority.

8. Hon'ble Court in the case of ***M/s. Keshab Automobiles*** cited supra have been pleased to observe in para-22 as follows :-

> "22. 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 fulfilment of other requirements of that provision as it stood prior to 1st October, 2015."

In view of the ratio laid down by the Hon'ble Court, the Department is required to communicate a formal communication or acknowledgment regarding the acceptance of the self-assessment u/s. 39 of the OVAT Act. In this case, the State has not filed any materials to show that the acceptance of the self-assessment has been communicated to the Dealer.

9. In view of the decision of the Hon'ble Court in case of ***M/s. Keshab Automobiles*** cited supra, the assessment proceeding u/s. 43 of the OVAT Act is without jurisdiction in absence of any assessment u/s. 39, 40, 42 or 44 of the said Act. So, the orders of the Assessing Authority and the First Appellate Authority under the OVAT Act are not sustainable in the eyes of law as the same are without jurisdiction.

10. In the case of ***M/s. ECMAS Resins Pvt. Ltd.*** and other cited supra, Hon'ble Court have been pleased to observe that unless the self assessment is accepted by the Department by a formal communication to the dealer, it cannot trigger a notice for reassessment u/s. 10(1) of the OET Act r/w. Rule 15B of the OET Rules. The relevant portion of the order of the Hon'ble Court is reproduced herein below for better appreciation :-

> "43. 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 15 B of the OET Rules. This answers the question posed to the Court."

11. In view of the ratio laid down above by the Hon'ble Court, I am of the considered view that the assessment for the impugned period is not sustainable in the eyes of law in absence of acceptance of return of self assessment u/s. 9(1) r/w Section 9(2) of the OET Act. Hence, it is ordered.

12. Resultantly, both the second appeals filed under the OVAT Act and OET Act are allowed and the impugned orders of the First Appellate Authority confirming the assessment orders of the Assessing Authority are hereby quashed. Cross-objections are disposed of accordingly.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

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(G.C. Behera)
Chairman