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

S.A. No.221(V) of 2019,
S.A. No.116(ET) of 2019 &
S.A. No.16(C) of 2019

(Arising out of the order of the learned Addl.CST(Appeal), South Zone, Berhampur in First Appeal Nos. AA 77 (V) RL-II/2018-19, AA 87 (ET) RL-II /2018-19 & AA 65 (CST) RL-II/ 2018-19 disposed of on 05.09.2019)

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

M/s. Jai Balaji Jyoti Steels Limited,
Village-Tainser, Near Birkera,
Dist- Sundargarh, Odisha. ... Appellant.

- Vrs. –

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

For the Appellant : : Mr. B. B. Panda, ld. Advocate
For the Respondent: : Mr. D. Behura, ld.S.C.(C.T.)
: : Mr. S. K. Pradhan, ld. ASC(C.T)

Date of Hearing : 04.10.2023 * Date of Order : 25.10.2023**

O R D E R

The aforesaid three second appeals filed by the dealer assessee under Section 78 of the OVAT Act, Section 17 of the OET Act and Section 18A of the CST Act arose out of the orders dated 05.09.2019 of the Additional Commissioner of Sales Tax (appeal),

Rourkela (in short, 'ld. FAA') passed in First Appeal Case Nos. AA 77(V) RL-II/2018-19, AA 87(ET) RL-II/2018-19 and AA 65 (CST) RL-II/2018-19 with respect to the assessments passed under Section 43 of the OVAT Act, under Section 10 of the OET Act and under Rule 12(4) of the CST (O) Rules by the Deputy Commissioner of Sales Tax, Rourkela-II Circle, Rourkela for the tax period 01.04.2007 to 31.03.2010. As all these second appeals pertain to the same dealer for the same tax periods, but under different Acts, so they are heard together and disposal made in a composite order for the sake of convenience.

2. The facts that led to emergence of these appeals are summarized hereunder for better appreciation. The dealer-assessee under the name and style of M/s Jai Balaji Jyoti Steel Limited, Tainsar near Birkera, Uditnagar, Rourkela, TIN-21682000007 is engaged in manufacture and trading of Sponge Iron, MS Ingots and MS billets utilizing raw materials like iron ore, coal, dolomite, pig iron, pooled iron, manganese, MS scraps, ferro silicon etc. effecting purchases from both inside and outside the state of Odisha. The learned assessing authority was in receipt of two Tax Evasion Reports being one from the Sales Tax Officer, Investigation Unit, Cuttack and the other from the Sales Tax Officer, Vigilance, Sambalpur alleging purchase and sale suppression together with suppression of production. Assessments under Section 43 of the OVAT Act, under Section 10 of the OET Act and under Rule 12(4) of the CST (O) Rules were completed by the learned assessing authority based on such allegation of suppressions contained in the Tax Evasion Reports emanating tax demand of ₹4,44,18,645.00 under the OVAT Act, ₹1,15,48,848.00 under the OET Act and

₹4,65,543.00 under the CST Act. The first appeals as preferred against the said assessments resulted in reduction in demand to ₹49,72,186.00 under the OVAT Act, ₹18,64,557.00 under the OET Act and ₹2,51,573.00 under the CST Act. The dealer-company has further preferred these second appeals before this forum with the first appeals having not yielded satisfactory reliefs as expected.

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3. Mr. B. B. Panda, learned Advocate who represents the dealer-company has submitted additional grounds of appeal in addition to the grounds of appeal filed at the time of filing second appeals. The additional grounds pertain to sustainability of initiation of the proceedings either under Section 43 of the OVAT Act or under Section 10 of the OET Act without completion of assessments under Section 39, 40, 42 or 44 of the OVAT Act and under Section 9(2) of the OET Act. It is also submitted that the additional grounds raised herein concerning maintainability of the escapement proceedings involving question of law or fact can be raised at any time though not raised earlier in the ratio of the decision of the Hon'ble High Court of Odisha in case of ***State of Orissa and Others Vs. D.K. Construction and others*** reported in Vol,(2017) 100 VST 24 (Orissa). The learned Advocate places reliance on the decision dated 01.12.2021 of the Hon'ble High Court of Odisha in case of ***Keshab Automobiles Vs. State of Odisha*** passed in STREV No.64 of 2016 and in case of ***M/s ECMAS Resins Pvt. Limited and Others Vs. State of Odisha*** passed on 05.08.2022 in W.P.(C) No.7458 of 2015. It is pleaded that in the instant case, 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 31.03.2010 on **30.03.2013** vide order No.3270 dated 02.04.2013 in respect of 43 assessment (OVAT Act) and vide order No.3271 dated 02.04.2013 in respect of 10 assessment (OET Act). Both the reassessment orders were served upon the dealer-company on 01.05.2013. It is clarified that the dealer-company was also assessed under Section 42 of the OVAT Act and under Section 9 C of the OET Act for the tax period from 01.04.2006 to 31.03.2011 on **12.04.2013** vide order No.3824 dated 25.04.2013 and order No.3825 dated 25.04.2013 respectively. The said orders were served upon the dealer company on 01.08.2013. It is therefore argued that since the assessments passed under Section 43 of the OVAT Act and under Section 10 of the OET Act were passed prior to assessments passed under section 42 of the OVAT Act and under Section 9 of the OET Act, it is asserted that there was no compliance of statutory requirements necessitated for initiation of re-assessment proceedings under Section 43 of the OVAT Act and under Section 10 of the OET Act. In view of the above stance, the learned Advocate seeks interference of this forum.

4. The State has filed cross objection supporting the order of the ld.FAA. The State, on the other hand, protests acceptance of additional grounds of appeal contending that the same were not raised earlier either at assessment or at first appellate stage. Raising of such new grounds at second appeal is not justified, since it is completely new justifying the afterthought action of the assesse to avoid payment of tax. In citing the decision rendered in case of ***State of Orissa Vs. Lakhoo Varjang 1960 SCC Online Ori 110:(1961) 12 STC 162***, the State argues that the additional evidence must be limited only to the questions that were then

pending before the Tribunal. It is also contended that the additional grounds taken by the appellant may not be taken into consideration in view of Rule 102 of the OVAT Act which has prescribed for restriction to adduce fresh evidence before the Tribunal and in view of Section 98 of the OVAT Act which provides total protection to the issues relating to non-communication of notice or order if not raised at the first instance cannot be raised subsequent point of time.

The State submits that the returns filed by the dealer-assessee were in order confirming to the provisions of the statute. They were thus self-assessed requiring no communication of acceptance of returns. As the self-assessed returns were vitiated by allegations of suppression brought forth in the Tax Evasion Reports, the learned assessing authority initiated proceedings under Section 43 of the OVAT Act and Section 10 of the OET Act for the tax period 01.04.2007 to 31.03.2010. Nonetheless, the dealer-assessee has been assessed under Section 42 of the OVAT Act and 9C of the OET Act for the tax period 01.04.2006 to 31.03.2011. Accordingly, reassessments have justifiably been taken up under Section 43 of the OVAT Act and Section 10 of the OET Act by the learned assessing authority. Therefore, the State urges before this forum not to consider admission of the additional grounds of appeal.

5. Averments placed by both the rival parties are heard. The dealer-company has endorsed several grounds in defense of the order of the ld.FAA. Additional grounds of appeal have been submitted at this forum during the course of hearing raising a substantial question with respect of sustainability of initiation of proceedings under Section 43 of the OVAT Act and Section 10 of the

OET Act without assessments being completed under Section 39, 40, 42 or 44 of the OVAT Act and Section 9C of the OET Act.

Before we go into other grounds of appeal on merit, we find it essential to look into the additional grounds that speak of the aspect of maintainability of the proceedings. Consequent upon outcome of the decision of the Hon'ble High Court of Odisha in case of ***Keshab Automobiles Vs. State of Odisha*** (supra) on 01.12.2021 and in case of ***M/s ECMAS Resins Pvt. Limited and Others Vs. State of Odisha*** (supra) on 05.08.2022, the modality of acceptance of self-assessed returns has been conceptualized in consequence of amendment to Section 39(2) of the OVAT Act introducing the concept of 'deemed' self-assessment only with effect from 1st October, 2015. With respect to OVAT Act, the Hon'ble High Court in case of ***Keshab Automobiles Vs. State of Odisha*** holds that if the self-assessment under Section 39 of the OVAT Act for the 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 reopened under Section 43(1) of the OVAT Act and further subject to the fulfillment of other requirements of that provisions as it stood prior to 1st October, 2015.

Similarly, as for the OET Act, the Hon'ble Court in case of ***M/s ECMAS Resins Pvt. Limited and Others Vs. State of Odisha*** holds 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. On the whole, the modality of acceptance of self-assessed returns prior to 01.10.2015 was made public on 01.12.2021 after the outcome of the decision of the Hon'ble Court in case of ***Keshab Automobiles Vs. State of Odisha.***

Under the backdrop of the above facts, it is made clear that the additional grounds submitted before this forum became available on account of change of circumstances or law. The Tribunal has discretion to consider the question of law arising in assessment proceedings although not raised earlier. The Hon'ble High Court of Odisha in case of ***State of Orissa and Others Vs. D.K. Construction and others*** reported in (2017) 100 VST 24 (Orissa) holds that it is trite in law that question of law can be raised at any stage. Accordingly, the contention of the State in this regard is not acceptable.

6. In the present case, it is observed that the reassessments framed under the OVAT Act and the OET Act relate to the tax period form 01.04.2007 to 31.03.2010.It is absolutely a tax period prior to 01.10.2015. There is no evidence on record to the effect that the self-assessed returns have been communicated to the dealer-company by the assessing authority or an acknowledgement availed thereof. The prerequisites outlined in the aforesaid decisions of the Hon'ble High Court of Odisha are vitiated. Thus, initiation of proceedings under Section 43 of the OVAT Act and Section 10 of the OET Act is not sustainable in law. This apart, as emerged from going through the records, the audit assessments under Section 42 of the OVAT Act and Section 9C of the OET Act pertaining to the tax period 01.04.2006 to 31.03.2011 were passed on 12.04.2013 whereas the

escaped assessments were passed on 30.03.2013. Thus, audit assessments are found to have taken place subsequent to escaped assessments. To conclude, the assessments passed under Section 43 of the OVAT Act and Section 10 of the OET Act in the impugned cases being devoid of jurisdiction are liable to be quashed. This being the fate of these cases, other issues raised in the grounds of appeals are rendered redundant.

7. **S.A. No. 16(C) of 2019**

As discussed earlier, the dealer-company was assessed under Rule 12(4) of the CST (O) Rules for the tax period 01.04.2007 to 31.03.2010 basing on the Tax Evasion Reports (supra). Extra demand of ₹4,65,543.00 including penalty of ₹3,10,362.00 was raised at assessment due to non-furnishing of Form 'H' worth ₹38,79,520.00. The ld.FAA while confirming the tax demand of ₹1,55,181.00 has deleted penalty of ₹3,10,362.00 and has instead levied interest of ₹ 96,392.00.

8. The dealer-company has preferred second appeal assailing levy of interest as unjust holding that since the first appeal order has been passed on 05.09.2019, levy of interest for ₹96,392.00 is not warranted. On the other hand, Mr. B.B. Panda, learned Advocate appearing on behalf of the dealer-appellant has filed additional grounds/additional evidence during the course of hearing contending that the CST payable for an amount of ₹8,81,659.00 meant for adjustment against the excess ITC in account as shown at column 50 of the return filed on 20.03.2013 in Form VAT 201 for the month ending February, 2013 has not been taken into account by the learned assessing authority at assessment as per Rule 7(3)(C)

of the CST(O) Rules. A copy of the return in question has been filed at this forum.

9. Per contra, the State objects to the above contention stating that the dealer has failed to submit Form 'H' on the turnover of ₹38,79,520.00 under CST Act for the material period. Thus, the demand has been raised by the forums below due to non-submission of declaration Form 'H' by the dealer under Section 5(3) of the CST Act. That, the dealer-appellant has adjusted ITC of ₹8,81,659.00 as per Rule 7(3) (c) of the CST (O) Rules in the CST return filed in the month of February,2013. Hence, non-consideration of an amount of ₹8,81,659.00 against CST payable as claimed by the appellant dealer in the additional grounds of appeal is not maintainable.

10. Heard the rival contentions vis-à-vis the orders of the forums below. The dealer-company rebuts levy of interest. In this connection, it is amply clear that levy of interest on account of delayed payment of admitted tax that arose owing to non-submission of declaration Form 'H' is automatic. Coming to the statutory provisions, Rule 8 of the CST (O) Rules provides for levy of interest if a registered dealer fails without sufficient cause to pay the amount of tax due as per the return furnished by it. In case of ***Indodan Industries Ltd Vs. State of UP*** reported in (2010) 27 VST 1(SC), it is held that the interest is compensatory in nature in the sense that when the assesse pays tax after it becomes due, the presumption is that the Department has lost the revenue during the interregnum period and that the assesse enjoys that amount during the said period and in order to recover the lost revenue, the levy of

interest is contemplated. In view of this, the argument of the dealer-company denying levy of interest is turned down.

11. As to the dispute on non-consideration of the amount of CST payable for ₹8,81,659.00 as agitated in the additional grounds of appeal, it is said earlier in the foregoing para-5 that a new question of law or fact though not raised earlier in the forums below can be raised in the Tribunal. The contention of the learned Advocate purportedly as to overlooking of CST payable of ₹8,81,569.00 destined for adjustment against excess ITC at assessment cannot be taken for granted merely relying on the copy of the relevant return adduced at this forum without detail verification of the relevant books of accounts. This issue cannot be dispensed with without a hearing afforded to the dealer appellant to justify its stance. This would amount to infringement of natural justice. It is therefore advisable that the learned assessing authority is required to verify the genuineness of the claim of the dealer-appellant calling for the relevant books of accounts exclusively on whether the amount of CST payable involving ₹8,81,659.00 relating to the return for the month ending February,2013 filed in Form VAT 201 was taken into account for adjustment against excess ITC available in account at assessment or not.

12. Under the above facts and in the circumstance, it is ordered that the appeals filed by the dealer-company in S.A. No. 221(V) of 2019 and S.A. No.116 (ET) of 2019 are allowed. The orders of the ld.FAA in these two second appeals are set aside and the orders of assessments passed under Section 43 of the OVAT Act and Section 10 of the OET Act are quashed.

The appeal filed by the dealer-company in S.A. No.16(C) of 2020 with respect to assessment under Rule 12(4) of the CST (O) Rules is partly allowed. The order of the ld.FAA is set aside. The learned assessing authority is directed to reassess the dealer-company in the light of the observations imparted at para 11 above within three months from the date of receipt of this order without fail.

The cross objections and additional cross objections are accordingly disposed of.

Dictated and corrected by me.

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

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