BEFORE THE JUDICIAL MEMBER-II:
ODISHA SALES TAX TRIBUNAL: CUTTACK.

P r e s e n t: **Shri S.K. Rout,**
2nd Judicial Member

S.A. No. 198(V) of 2019
(Arising out of the order of the learned Joint Commissioner CT & GST (Appeal), Sundargarh Territorial Range, Rourkela, in First Appeal Case No. AA V 101 of 2017-18, disposed of on dtd.19.06.2019)

S.A. No. 6(ET) of 2022
(Arising out of the order of the learned Joint Commissioner CT & GST (Appeal), Sundargarh Territorial Range, Rourkela, in First Appeal Case No. AA V 86 ET of 2017-18, disposed of on dtd.26.02.2021)

M/s. Rajesh Store &
Maa Maheswary Marble,
Jhirpani, Rourkela,
Dist.- Sundargarh. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. S.K. Agarwal, Advocate
For the Respondent ... Mr. D. Behura, S.C. &
Mr. D. Das, A.S.C.

Date of hearing: 09.06.2023 *** Date of order: 13.06.2023

O R D E R

Both these appeals are disposed of by this composite order as the same involve common question of law

and fact in between the same parties and challenge is the orders passed by the same authority.

S.A. No. 198(V) of 2019

The dealer prefers this appeal challenging the order dtd.19.06.2019 passed by the learned Joint Commissioner CT & GST (Appeal), Sundargarh Territorial Range, Rourkela (hereinafter referred to as, JCST/first appellate authority) in First Appeal Case No. AA V 101 of 2017-18, thereby confirming the order of assessment passed by the learned Sales Tax Officer, Rourkela II Circle, Panposh (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 ₹3,77,232.00 including penalty of ₹2,51,488.00 for the tax period 01.07.2015 to 30.11.2015.

S.A. No. 6(ET) of 2022

The dealer prefers this appeal challenging the order dtd.26.02.2021 passed by the learned Joint Commissioner CT & GST (Appeal), Sundargarh Territorial Range, Rourkela (hereinafter referred to as, JCST/first appellate authority) in First Appeal Case No. AA V 86 ET of 2017-18, thereby confirming the order of assessment passed by the the learned Sales Tax Officer, Rourkela II Circle, Panposh (hereinafter referred to as, STO/assessing authority) u/s.10 of the Orissa Entry Tax Act, 1999 (in short, the OET Act) raising demand of

₹67,908.00 which includes tax of ₹22,636.00 and penalty of ₹45,272.00 for the tax period 01.07.2015 to 30.11.2015.

2. The case at hand is that, the dealer-appellant in the instant case is a company incorporated under the Companies Act, 1956 is engaged in trading of iron and steel goods, hardware goods, electrical goods, plastic goods, marble, tiles, pipe and pipe fitting, ceramic tiles etc. Pursuant to fraud case report No.08/2017-18 dtd.22.08.2017, the learned assessing officer completed the assessment u/s.43 of the OVAT Act and u/s.10 of the OET Act and raised the demands against the dealer as mentioned above.

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

4. 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.

5. Cross objections in these cases are filed by the State-respondents.

6. 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.

7. Per contra, the learned 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 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.

8. 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.

9. 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).

10. 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, I am of the view that the claim of the appellant deserves a merited acceptance.

11. In the result, both the appeals preferred by the dealer are partly allowed. The orders of assessment for the tax period 01.07.2015 to 30.09.2015 are hereby quashed and the assessment for the period from 01.10.2015 to 30.11.2015 are hereby set aside. The case is remanded back to the learned assessing officer for re-computation of tax for the period from 01.10.2015 to 30.11.2015 with the observations made above

within a period of three months of receipt of this order. Cross objections are disposed of accordingly.

Dictated & corrected by me,

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