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. 184(V) of 2018
(Arising out of the order of the learned CT & GST
Territorial Range, Ganjam, Berhampur, in First Appeal Case No.
AAV. 57/2013-14, disposed of on dtd.27.04.2018)
&
S.A. No. 111 (ET) of 2018
(Arising out of the order of the learned CT & GST
Territorial Range, Ganajm, Berhampur, in First Appeal Case No.
AAE. 18/2013-14, disposed of on dtd.27.04.2018)

M/s. Sobha Steel Industries,
Nimakhandi Road, Luchapada,
Dist: Ganjam. … Appellant

- V e r s u s -

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

For the Appellant … Mr. D.C.Patnaik, Advocate
For the Respondent … Mr. D.Behura, S.C.

Date of hearing: **13.01.2023** *** Date of order:**27.01.2023**

O R D E R

Both these appeals are disposed of by this composite order as similar question of facts and law are involved.

2. Challenge in these appeals are the orders dated 27.04.2018 passed by the learned Joint Commissioner of Sales Tax (Appeal), Ganjam Range, Berhampur (in short, JCST/FAA) in first appeal case No.AA.V.57/2013-14 and AAE.18/2013-14 against the order of

assessment passed on dated 06.07.2013 by the learned Sales Tax Officer, Ganjam II Circle, Berhampur (in short, STO/AO) under Section 43 of the OVAT Act, 2004 and under Section 10 of the OET Act, 1999 raising tax demand of Rs.2,42,043.00 and Rs.9,839.00 for the tax period from 01.04.2011 to 31.12.2012.

3. The case at hand is that the dealer appellant M/s.Sobha Steel Industries runs a manufacturing unit for manufacturing of the iron and steel furniture's like office tables, chairs, steel racks, steel alanas and steel almirahs by purchasing the raw materials like M.S. Sheets and frames, locks and handles, paints from inside the State of Odisha and sales the manufacture items inside the State of Odisha only. The purchase registers, sale registers, purchase invoice file and sale memo books are maintained by the appellant for running the day to day business. Pursuant to tax evasion report No.36 of 06.12.2012 the books of accounts were rejected and proceeding under Section 43 of the OVAT Act, 2004 and under Section 10 of the OET Act, 1999 were initiated against the appellant on the escaped turnover. On completion of assessment, learned assessing officer raised a demand of Rs.2,42,043.03 including a penalty of Rs.1,61,362.02 under Section 43(2) of the OVAT Act, 2004. Likewise, in the assessment under Section 10 of the OET Act, 1999, a demand of Rs.9,839.00 including a penalty of Rs.6,559.28 under Section 10(2) of the OET Act, 1999 was also raised.

4. Being aggrieved with such tax demands, the dealer preferred first appeals before the learned JCST (Appeal), Ganjam Range, Berhampur who confirmed the tax demands.

5. Further being dis-satisfied with the orders of the learned JCST (Appea), Ganjam Range, Berhampur (FAA), the dealer has preferred the present second appeals as per the grounds stated in the grounds of appeal.

6. Cross objections are filed in both these cases by the State respondent.

7. The learned counsel appearing for the dealer-assessee contended that the order passed by the learned forum below is 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 order of reassessment is liable to be quashed for the period under challenge.

8. Per contra, the learned Standing Counsel appearing for the Revenue argued that the learned first appellate authority has completed the appeal based on the provision of law and factual position.

9. Heard the contentions and submissions of both the parties in this regard. The sole contention of the dealer-appellant is that the assessment order is 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.

10. 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 a 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).

11. 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 verdict of the Hon'ble Courts, the claim of the appellant deserves a merited acceptance.

12. In the result, for the reasons assigned above, the appeals filed by the dealer-assessee are allowed and the impugned orders of the forums below are hereby quashed. Accordingly, the cross objections are disposed of.

Dictated & corrected by me,

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