BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 51 (VAT) of 2023
&
S.A. No. 19 (ET) of 2023

(Arising out of orders of the learned JCST (Appeal), Ganjam Range, Berhampur in Appeal Nos. AA (VAT) 02/2019-20 & AAE 02/2019-20, disposed of on 31.03.2023)

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

M/s. Epari Brothers,
Marthapeta, 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 D. Behura, S.C. (CT) &
Sri N.K. Rout, Addl. SC (CT)

Date of hearing : 01.02.2024 *** Date of order : 07.02.2024

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. 51 (VAT) of 2023 :

2 Dealer assails the order dated 31.03.2023 of the Joint Commissioner of Sales Tax (Appeal), Ganjam Range, Berhampur (hereinafter called as ‘First Appellate Authority’) in F A No. AA (VAT)

02/2019-20 confirming the remand assessment order of the Sales Tax Officer, Ganjam I Circle, Berhampur (in short, 'Assessing Authority').

S.A. No. 19 (ET) of 2023 :

3. Dealer is also in appeal against the order dated 31.03.2023 of the First Appellate Authority in F A No. AAE 02/2019-20 confirming the remand assessment order of the Assessing Authority.

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

M/s. Epari Brothers trades in edible oil, sugar, biscuits etc. on wholesale-cum-retail basis. The reassessments relate to the period 01.04.2013 to 31.03.2014. Dealer was earlier assessed u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') and u/s. 10 of the Odisha Entry Tax Act, 1999 (in short, 'OET Act') on the basis of Tax Evasion Report (TER) No. 37 dt. 26.12.2013 wherein the Assessing Authority raised tax demands of ₹4,19,145.00 under the OVAT Act and ₹5,700.00 under the OET Act.

Assessment orders under the OVAT Act and OET Act were challenged in first appeals vide F A Nos. AAV 36/14-15 & AAE – 08/14-15 respectively. The First Appellate Authority vide order dated 30.06.2017 set aside the matters for reassessment as per the provisions of law. Accordingly, Assessing Authority completed the reassessments in *ex parte* and revised the demands to ₹3,31,488.00 under the OVAT Act and ₹68,670.00 under the OET Act.

Further, Dealer preferred first appeals against the orders of the Assessing Authority before the First Appellate Authority. The First Appellate Authority confirmed the tax demands and dismissed the appeals. Being aggrieved with the orders of the First Appellate Authority, the Dealer prefers these appeals. Hence, these appeals.

The State files cross-objections supporting the impugned orders of the First Appellate Authority confirming the orders of reassessment to be just and proper in the facts and circumstances of the case.

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 further submits 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 Standing Counsel (CT) for the State supports the orders of the fora below and submits that the self-assessment of the Dealer has 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 raised that the Dealer could have raised the same before the Assessing Authority and First Appellate authority. He further submits that

the Dealer only raised the point of maintainability before the First Appellate Authority, i.e. in the impugned order. 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 reassessment u/s. 43 of the OVAT Act can only be made after the assessment is completed u/s. 39, 40, 42 or 44 of the said Act.

Learned Standing Counsel (CT) for the State 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. 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) No return, assessment, appeal, rectification, notice, summons or other proceedings accepted, made, issued or taken, or purported to have been accepted, made, issued or taken in pursuance of any of the provisions of this Act shall be invalid or deemed to be invalid merely by reason of any mistake, defect or omission in such return, assessment, appeal, rectification, notice, summons or other proceedings, if such return, assessment, appeal, rectification, notice or other proceedings are, in subsistence and effect, in conformity with or according to the intents, purposes and requirements of this Act.*
>
> *(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.

(3) No order, including an order of assessment, revision or rectification passed by any authority under any provision of this Act shall be invalid merely on the grounds that the action could also have been taken by any other authority under any other provision of this Act."

Learned 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...."

The impugned order reveals that the Dealer has taken this ground before the First Appellate Authority, so the decision in case of ***Lakhoo Varjang*** cited supra no way helps the State. Moreover, this is not a not case of taking additional ground in second appeal as the same has already been raised before the First Appellate Authority. Bare reading of Section 98(2) of the OVAT Act reveals that the Dealer is precluded to raise the summon or question before this forum, if he has not raised the same before the First Appellate Authority. The Dealer has already taken the ground before the First Appellate Authority. So, I do not find any merit in the submission of the State on this score.

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. Keshaba 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 reassessment orders of the Assessing Authority are hereby quashed. Cross-objections are disposed of accordingly.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

Sd/-
(G.C. Behera)
Chairman