BEFORE THE DIVISION BENCH-I, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 132 (VAT) of 2016-17
&
S.A. Nos. 62 (ET) & 63 (ET) of 2016-17

(Arising out of orders of the learned JCST (Appeal), Sundargarh Range, Rourkela in Appeal Nos. AA V 6/2009-10, AA V 3 ET/2009-10 & AA V 2 ET/2009-10, disposed of on 24.02.2016 & orders of the Hon'ble Court passed in STREV No. 76 of 2017 & STREV Nos. 3 & 4 of 2018))

Present: **Shri G.C. Behera, Chairman**
&
Mr. J. Khan, Accounts Member-III

M/s. Konark Electronics,
2nd NAC Guest House, M.S. Marg,
Rourkela, Sundargarh ... Appellant

-Versus-

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

For the Appellant : Sri T.K. Satpathy, Advocate
For the Respondent : Sri N.K. Rout, Addl. S.C. (CT)

Date of hearing : 24.12.2024 *** Date of order : 24.12.2024

O R D E R

Pursuant to the remand orders of the Hon'ble Court in **STREV No. 76 of 2017** dated 18.04.2024 & **STREV Nos. 3 & 4 of 2018** dated 24.01.2024, these second appeals are taken up for disposal afresh in this composite order for the sake of convenience.

The Hon'ble Court have been pleased to set aside the order dated 27.06.2017 passed by the Tribunal in **S.A. No. 132 (VAT) of 2016-17**, order

dated 16.11.2017 in **S.A. Nos. 62 (ET) & 63 (ET) of 2016-17** and remitted the same with a direction to consider the point agitated by the petitioner (before the Hon'ble Court) on fact *vis-a-vis* applicability of the ratio of judgments in ***Jindal Stainless Ltd. v. State of Orissa and others***, **[2012] 54 VST 1 (Orissa);** order dated 20.12.2022 in the case of ***M/s. Bateman Engineering (India) Private Limited v. Commissioner of Sales Tax, Orissa and others*** (**W P (C) No. 18698 of 2015**) & order dated 31.03.2022 in the case of ***Pal Construction v. Assessing Authority*** (**W P (C) No. 16957 of 2009)**.

S.A. No. 132 (VAT) of 2016-17 :

2. Dealer had assailed the order dated 24.02.2016 of the Joint Commissioner of Sales Tax (Appeal), Sundargarh Range, Rourkela (hereinafter called as 'First Appellate Authority') in F A No. AA V 6/2009-10 confirming the assessment order of the Assessing Authority, Rourkela I Circle, Uditnagar (in short, 'Assessing Authority').

S.A. Nos. 62 (ET) & 63 (ET) of 2016-17 :

3. Dealer had also assailed the orders dated 24.02.2016 of the First Appellate Authority in F.A. Nos. AA V 3 ET/2009-10 & AA V 2 ET/2009-10 confirming the assessment orders of the Assessing Authority.

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

M/s. Konark Electronics carries on trading business of industrial electrical equipments and spares on wholesale-cum-retail basis by effecting purchases and sales both inside and outside the State of Odisha. The assessments relate to the periods 01.04.2005 to 31.03.2006 and 01.04.2006 to 31.03.2007. The Assessing Authority raised tax demand of ₹4,14,560.00 u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act' for the period 01.04.2005 to 31.03.2006 on the basis of Audit Visit Report (AVR). Similarly, the Assessing Authority raised tax demands of ₹6,22,642.00 u/s. 9C of the Odisha Entry Tax Act, 1999 (in short, 'OET

Act') for the period 01.04.2005 to 31.03.2006 and ₹4,73,699.00 for the period 01.04.2006 to 31.03.2007 basing on the AVRs.

The Dealer preferred first appeals against the orders of the Assessing Authority before the First Appellate Authority. The First Appellate Authority confirmed the assessments and dismissed the appeals in *ex parte*. Being aggrieved with the orders of the First Appellate Authority, the Dealer prefers **S.A. Nos. 132 (VAT) of 2016-17, S.A. Nos. 62 (ET) & 63 (ET) of 2016-1**7. The State filed cross-objections. This Tribunal vide orders dated 27.06.2017 & 16.11.2017 dismissed the appeals confirming the orders of the First Appellate Authority.

Challenging the legality of the aforesaid orders of this Tribunal, the Dealer approached the Hon'ble Court in **STREV No. 76 of 2017 & STREV Nos. 3 & 4 of 2018,** wherein the Hon'ble Court have been pleased to direct this Tribunal to dispose of the remand appeals only on the limited purpose for considering the point agitated by the petitioner on fact *vis-a-vis* the applicability of the ratio of judgments in ***JSL Stainless Ltd. and Bateman Engineering (India) Private Limited*** cited supra under the OVAT Act; and ***JSL Ltd. & Pal Construction*** cited supra under the OET Act.

5. Learned Counsel for the Dealer submits that the Hon'ble Court have been pleased to direct this Tribunal to consider the fact on the limited ground agitated by the Dealer on the fact *vis-a-vis* applicability of the ratio of judgments, i.e. ***JSL Stainless Ltd.; Bateman Engineering (India) Private Limited & Pal Construction*** cited supra. He further submits that the point of law can be agitated at any time even in absence of any specific ground. He contends that the Assessing Authority infracted the mandatory provisions of Section 41(4) of the OVAT Act & Section 9B(2) of the OET Act and thus, the impugned orders as well as assessment orders are not sustainable in the eye of law.

6. On the other hand, the learned Addl. Standing Counsel (CT) for the State submits that the Dealer has not taken any ground on the point of maintainability as per Section 41(4) of the OVAT Act and Section 9B(2) of the OET Act and further submits that the said point cannot be decided in absence of any ground on it.

7. Heard rival submissions of the parties, gone through the orders of the Assessing Authority and First Appellate Authority *vis-a-vis* the materials on record.

The Hon'ble Court have been pleased to direct this Tribunal to dispose of the remand appeals only on the limited purpose for considering the point agitated by the petitioner on fact *vis-a-vis* the applicability of the ratio of judgments in ***JSL Stainless Ltd. and Bateman Engineering (India) Private Limited*** cited supra under the OVAT Act and ***JSL Ltd. and Pal Construction*** cited supra in the appeal under the OET Act.

In the case of ***Jindal Stainless Ltd.*** cited supra, the Hon'ble Court have been pleased to observe that -

> "It is unfortunate that while under OVAT Act Section 41(4) provides for submission of audit visit report within seven days from the date of audit and audit assessment is to be completed within six months from the date of receipt of AVR by the assessing authority, the action of the authorized officer in submitting the AVR to the assessing authority after six months from the date of audit visit not only violates the statutory provisions contained in section 41(4) but also is against the scheme and spirit of audit visit and audit assessment provided under the OVAT Act."

The relevant portion of the order of the Hon'ble Court in the case of ***Bateman Engineering (India) Private Limited*** cited supra is extracted hereunder for better appreciation of the case :-

> "5. The mandatory nature of the time limits set out in Section 41(4) of the OVAT Act that the report must be submitted within seven days of the conclusion of the audit visit has been emphasized by this Court in its order, in the context of an

> identical provision i.e. Section 9-B (2) of the Orissa Entry Tax Act, 1999 (OET Act), in an order dated 28th June, 2022 in W. P. (C) No. 9856 of 2010 (***M/s. Grihasthi Udyog v. Commissioner of Sales Tax***).
>
> 6. With the said time limit not having been adhered to as far as the present case is concerned, the Court has no hesitation in concluding that all proceedings consequent to the said AVR including the impugned assessment order are unsustainable in law. The impugned assessment order and all proceedings and orders consequent thereto are accordingly set aside."

In the case of M/s***. Grihasthi Udyog v. Commissioner of Sales Tax & Another*** (**W P (C) No. 9856 of 2010**, decided on 28.06.2022), the Hon'ble Court have been pleased to observe as under :-

> "3. Although, learned counsel for the Department sought to urge that the AVR was submitted on the same date that it was prepared i.e. 11th December, 2008 there is nothing stated in the counter affidavit about the aforementioned date stamp of the Office of the Assessing Officer as appearing on the AVR, which clearly indicates that it was received in that office on 19th December, 2008 i.e. more than seven days after the conclusion of the audit visit on 6th December, 2008. In other words, from the copy of the AVR placed on record, the authenticity of which has not been disputed by the Opposite Parties, it can safely be concluded that the AVR was submitted to the Assessing Officer only on 19th December, 2008 which has clearly beyond the period of seven days as stipulated under Section 9-B(2) of the OET Act read with Section 41(4) of the OVAT Act. This being a mandatory requirement, all proceedings consequent upon such AVR submitted to the Assessing Officer would stand vitiated in law."

8. On scrutiny of the record, it is found that the Dealer has not taken the specific ground of maintainability in the appeal memos as per the provision of Section 41(4) of the OVAT Act and Section 9B(2) of the OET Act. It is settled law that the point of law can be raised at any stage even in absence of any ground, which strikes the root of the case. Moreover, the same is not an issue here as the Hon'ble Court have been pleased to direct

this Tribunal to consider the factual aspect basing on the materials available on record keeping in view the ratio of decisions of the Hon'ble Court cited supra. Therefore, this Tribunal shall proceed to examine the issue basing on the materials on record.

It is apt to quote below the relevant provisions of the OVAT Act and OET Act, as it stood then, for better appreciation of the case :-

Section 41(4) of the OVAT Act –

> *"After completion of tax audit of any dealer under sub-section (3), the officer authorized to conduct such audit shall,* ***within seven days from the date of completion of the audit****, submit the audit report, to be called* ***"AUDIT VISIT REPORT"****, to the assessing authority in the prescribed form along with the statements recorded and documents obtained evidencing suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit and evasion of tax, if any, relevant for the purpose of investigation, assessment or such other purposes."*

Section 9B(2) of the OET Act –

> *"After identification of individual dealers or class of dealers for tax audit under sub-section (1), the Commissioner shall direct that tax audit in respect of such individual dealers or class of dealers be conducted and for the purpose of conduct of such tax audit under this section, the provisions contained in Section 41 of VAT Act shall mutatis mutandis apply."*

9. The impugned order, assessment order and the copy of the AVR filed by the Dealer transpire that the AVR was prepared on 20.10.2008 and the same was submitted to the Assessing Authority without putting any signature with date on the AVR. The Dealer has produced the xerox copy of the certified copy of order sheet, which reveals that the Assessing Authority has received the AVR on 05.08.2009 and completed the assessment on 25.08.2009 raising demand of ₹4,41,560.00 under the OVAT Act and ₹6,22,642.00 under the OET Act relating to the period 2005-06. Similarly, the copy of the order sheet of the year 2006-07 reveals that the AVR was received on 05.08.2009 and the Assessing Authority completed the assessments on 25.08.2009 raising demand of ₹4,73,699.00 under the OET Act.

Assessment order for the period 2005-06 reveals that the Dealer appeared on 25.08.2009 before the Assessing Authority pursuant to the notice in Form VAT-306 and the assessment was completed by the Assessing Authority on the same day, i.e. on 25.08.2009.

VAT and ET assessment record reveals that on 21.08.2008 the Audit Team visited the business premises of the Dealer and conducted audit. The AVR was submitted by the STO before the ACST on 21.10.2008, which in turn placed before the JCST on the same day. The JCST approved the same on 26.03.2009 and transmitted the AVR record. In turn, the Assessing Authority received the AVR on 05.08.2009, i.e. beyond the statutory period of seven days. Therefore, it is clear cut infraction of statutory provision of Section 41(4) of the OVAT Act read with Section 9B(2) of the OET Act.

Having regard to the decisions of the Hon'ble Court, referred to above, all the proceedings under the OVAT Act and OET Act consequent upon such AVR submitted to the Assessing Officer would stand vitiated in law and are liable to be set aside. Hence, it is ordered.

10. Resultantly, all the appeals under the OVAT Act and OET Act are allowed and the impugned orders of the First Appellate Authority confirming the orders of assessment are hereby quashed.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(J. Khan)
Accounts Member-III