THE FULL BENCH, ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No.16(ET) of 2020

S.A. No.17(ET) of 2020

S.A. No.18(ET) of 2020

(Arising out of the orders of the learned Addl.CST(Appeal) Bhubaneswar in First Appeal Nos. AA-204/OET/DCST(Asst)/BH/2013-14 & AA-108101510000249/2015-16 disposed of on 25.09.2019 & AA-108101610000035/BH-III/2015-2016 disposed of on 30.10.2019.)

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

M/s. GMR Kamalanga Energy Ltd.,
Plot No-HIG-28, BDA Colony,
Jaydev Vihar, Bhubaneswar. ..... Appellant.

-Vrs. –

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

For the Appellant : : Mr. J. Sahoo, Sr. Advocate.
: : Mr. N.K. Das, Advocate
For the Respondent: : Mr. D. Behura, S.C.(C.T.)
: : Mr. S.K. Pradhan, Addl. S.C.(C.T.)

Date of Hearing : 26.02.2024 * Date of Order :22.03.2024**

O R D E R

These three second appeals preferred by the dealer are against the first appeal orders of the Additional Commissioner of Sales Tax (Appeal), Bhubaneswar (in short, 'ld. FAA') passed in First Appeal Cases mentioned above confirming the orders of assessments

passed under Section 10 of the OET Act by the Deputy Commissioner of Sales Tax, Bhubaneswar-III Circle, Bhubaneswar (in short ld. Assessing Authority). These appeals though relate to different tax periods involve common question of facts and law. For convenience, they are clubbed together for hearing and disposal made in a common order.

2. The facts leading to these second appeals are summarized in brief for better appreciation. M/s. GMR Kamalanga Energy Limited., Plot No-HIG-28, BDA Colony, Jaydev Vihar, Bhubaneswar is a limited Company registered under the Companies Act, 1956. In the process of setting up a thermal power plant at Kamalanga village, Dhenkanal for generation of electricity, the limited company had procured plants and machineries both from inside and outside the State of Odisha and had also imported plants and machineries from the outside the territory of India. Basing on the Tax Evasion Report alleging non-payment of entry tax on goods imported from abroad, the ld. Assessing Authority assessed the dealer-company under Section 10 of the OET Act for the tax period from 01.08.2012 to 30.06.2013, 01.08.2013 to 31.08.2014 and 01.09.2014 to 31.08.2015 raising demands of tax and penalty of ₹13,76,46,468.00, ₹2,68,90,863.00 and ₹5,09,40,198.00 respectively. The demands so raised were

affirmed the first appeal. Aggrieved, the dealer-company approached this forum for relief. Hence, these appeals.

3. Apart from endorsing grounds of appeal at the time of filing appeals, Mr. J. Sahoo, the ld. Senior Advocate seeks to table additional grounds before this forum on jurisdictional issue forming the question of law striking the root of the case. Mr. Sahoo contends that in absence of any written communication or acknowledgement as to completion of assessment under Section 9(2) of the OET Act read with Rule 15 of the OET Rules, reassessment under Section 10 of the OET Act made by the authority is not sustainable in law as the said provision is made applicable *mutatis and mutandis* to the provision of reassessment as contemplated under Section 43 of the OVAT Act, as stood prior to 1st October, 2015 i.e. before the OVAT (Amendment) Act, 2015. As the said issue was neither agitated at first appeal nor at this forum while filing memorandum of appeal, the ld. Sr. Advocate solicits interference of this Tribunal to take cognizance of the additional grounds in the substantial interest of justice, as the position under the OET Act stands covered by the judgment of the Full Bench of the Hon'ble High Court of Orissa dated 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 under Section 9(1)

read with Section 9(2) of the OET Act is "accepted" by the Department by a formal communication, it cannot trigger a notice of reassessment under Section 10(1) of the OET Act read with Rule 15B of the OET Rules. Under the above principle of law, additional ground inserting Clause **15-A** after ground No.15 of the grant of appeal has been filed holding that the assessments made in the aforesaid three cases determining the tax liability of the dealer-assessee and subsequent confirmation/reduction of the same by the ld.FAA for the tax periods under appeal are erroneous and not maintainable and liable to be deleted in absence of any written communication or acknowledgement as to completion of assessment under Section 9(2) of the OET Act.

4. The State has filed cross objection as well as the additional cross objection in defence of the contention taken by the dealer-assessee in the grounds of appeal/ additional grounds. It is submitted that the Hon'ble Supreme Court vide order dated 09.10.2017 in **Civil Appeal No(s) 3381-3400 of 1998** (State of Kerala and Others Vrs. Fr. William Fernandez Etc) and Batch of Civil Appeals has upheld the legislative competence of the State Legislature to impose entry tax on the goods imported from outside the country into a local area of the State for consumption, use or sale. The controversy regarding the validity of levy of entry tax on

imported goods has been set at rest. Thus, the dealer-company is liable to pay entry tax on such imported goods. The dealer-company has disclosed the turnover of imported goods in the return. Thus, entry tax is liable on the admitted imported goods including incidental expenses by way of self-assessment under Section 9(1) of the OET Act.

Notwithstanding the above, it is submitted that the Hon'ble High Court of Orissa in **W.P.(C) No.13736 of 2017** & batch in case of M/s. Shree Bharat Motors ltd. and Another Vrs The Sales Tax Officer, Bhubaneswar-I Circle, Bhubaneswar and others has held in page 128 of para 17.1 that:-

"*Considering the peculiar nature of the lis, such balance entry tax (2/3rd of tax due which remained unpaid during 2010-17) can be determined by the petitioner(s) as per definition of the term "SELF-ASSESSMENT" in section 2(47) of the OVAT Act read with Section 2(g) of the OET taking into account the figures disclosed in the returns and deposited by the petitioner(s) within a period of sixty days from today, if not already deposited. In the event of difficulty in payment of such balance amount, the Commissioner of Sales Tax may grant appropriate installment(s) on being approached by the petitioner(s*)."

"*To strike a balance between deprivation of the State of Odisha to utilize 2/3rd of the amount of tax since September, 2009 till March, 2017 at the relevant point of time and non-payment of full amount of tax liability disclosed in the return(s) during this period by the petitioner, the aforesaid unpaid entry tax, for the period during which interim order dated 30.10.2009 as modified vide order dated*

03.02.2010 passed by the Supreme Court of India in I.A.Nos.327-651 filed by the State of Odisha in its appeals being SLP(C) Nos.14454-14778/2008 was operational, is directed to be deposited along with simple interest @9% per annum based on the principles enunciated in Tata Refractories Ltd. Vrs. Sales Tax Officer, (2003) 129 STC 506(SC) = (2003) 1 SCC 65; Commissioner, Commercial and Sales Taxes and others Vrs Orient paper Mills and Another, (2004) 9 SCC 181 = (2004) 133 STC 19 (SC): Odisha Forest Development Corporation Ltd. Vrs. Anupam Traders and others, 2019 SCC online SC 1524; Union of India Vrs. Wilowood India Pvt. Ltd., (2022) 9 SCC 341; IDL Industries Ltd. Vrs. State of Odisha, (2004) 134 STC 62 (Ori).

Under the above backdrop of the cases, the State pleads that the dealer-company is liable to pay entry tax with interest in case of admitted turnover in the return under the OET Act.

5. Gone through the rival contentions. The orders of the forums below are gone through with reference to the grounds of appeals/additional grounds appeal and the cross/additional objections filed in defence. It is a fact that the dealer-assessee at the time of filing of this second appeal has not taken the ground of maintainability in the grounds of appeal. The dealer-assessee took the plea of maintainability in the additional grounds of appeal. It is pertinent to mention here that this Tribunal has discretion to consider the question of law arising in assessment proceeding although not raised earlier. For, the new/additional grounds became available on account of change of circumstances or law. In view of

this, the additional grounds filed by the ld. Advocate at the time of hearing of the case are adjudged as accepted.

From the facts as emerging from records, it is unraveled that the ld. Assessing Authority has proceeded to assess the dealer-company under Section 10 of the OET Act basing on the Tax Evasion Report wherein it is alleged that entry tax has not been paid on the turnover of scheduled goods imported from outside the territory of India. This is not in keeping with the provisions of the statute. There is precondition to adhere before initiation of proceedings under Section 10(1) of the OET Act. Re-assessment under Section 10 of the OET Act cannot be taken up unless the self-assessed returns of the dealer as contemplated under Section 9 of the OET Act read with Rule 15 of the OET Rules have been accepted by the Assessing Authority and to that effect, a formal communication ought to have been conveyed to the dealer-assessee. In this context, para 43 of the judgment of the Hon'ble High Court of Orissa in case of M/s ECMAS Resins Pvt. Ltd.(supra) is relevant and quoted as under:-

> "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 15B of the OET Rules. This answers the question posed to the Court."

Under the above settled provision of law, we are inclined to infer that the tenability of initiation of proceedings under Section 10(1) of the OET Act read with Rule 15B of the OET Rules in the present cases is vitiated in absence of the self assessments of returns by the dealer-company under Section 9(1) read with 9(2) of the OET Act having been accepted by the ld. Assessing Authority and a formal communication to that effect having been conveyed to the dealer-company. Accordingly, the initiation of proceedings with respect to the aforesaid three second appeals under Section 10(1) of the OET Act is not sustainable being devoid of jurisdiction. The orders of the forums below are therefore liable to be quashed.

6. It is felt worthy to provide a brief account of the circumstances that led the learned assessing authority to raise demands of tax and penalty on imported scheduled goods disclosed in returns without payment of tax. Notwithstanding the above observation of this forum with respect to non-sustainability of initiation of proceedings under section 10 of the OET Act, the facts evolve that, as it appears, the ld. Assessing Authority as pointed out in the Tax Evasion Report could find that there was no entry tax paid on goods imported from outside the territory of India. The learned assessing authority instead of initiating proceeding under Section 10

of the OET Act ought to have proceeded under sub-section (11) of section 7 of the OET Act. Such initiation of proceedings became infracted owing to non-adherence of the pre-conditions necessitated for assessment under section 10 of the OET Act. However, the matter as regards levy of entry tax on scheduled goods brought in from outside the territory of India has been set to rest consequent upon outcome of the verdict of the Hon'ble Apex Court vide order dated 28.03.2017 passed in case of the ***State of Orissa Vs. Reliance Industries Ltd. and Others*** in SLP (C) No.14454-14778 of 2008 pursuant to the decision dated 11.11.2016 rendered in Nine-Judge Bench in case of ***Jindal Stainless Ltd. Vs. State of Haryana,*** 2016 AIR SCW 5617 allowing the SLP filed by the State and thus, a tax on entry of goods into local area for use, sale or consumption therein is permissible although similar goods are not produced within the taxing State. The Division Bench of the Hon'ble Apex Court in case of the ***State of Kerala and Others Vs. Fr. William Fernadez and Others*** reported in (2018) 57 GSTR 6 (SC) relying on the judgment passed in the Nine-Judge Bench (supra) have observed that Odisha Entry Tax Act, 1999, Kerala Tax Act, 1994 and Bihar Tax Act on Entry of Goods in Local Area for Consumption, Use, or Sale, 1993 (before its amendment by Bihar Act, 2003 and 2006) do not exclude levy of entry tax on the goods imported from any place outside

territories of India into a local area for consumption, use or sale. It is also pertinent to mention here that the Hon'ble High Court of Odisha in case of ***S.S. Steeloy Pvt. Ltd. Vs. Commissioner of Commercial Taxes, Odisha and Others*** reported in W.P.(C) No.21007 of 2007 has directed to deposit the balance tax along with interest accrued on or after 28.03.2017.

7. Resultantly, the appeals filed by the dealer-company are allowed. The orders of the ld.FAA are set aside. The orders of assessment are quashed. Cross objections are hereby disposed of accordingly.

However, we would like to observe that the finding of this Tribunal no way affects the payment of admitted tax. The payment of admitted tax, if any, shall be guided by the decision of the Hon'ble High Court of Odisha passed in case of ***M/s. Shree Bharat Motors Ltd*** *cited supra at para 4 above.*

Dictated and corrected by me.

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

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