

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) Nos.7458 of 2015 and 7296 of 2013

In W.P.(C) No.7458 of 2015

M/s. ECMAS Resins Pvt. Ltd. Petitioner

-versus-

State of Odisha and others Opposite Parties

In W.P.(C) No.7296 of 2013

M/s. Shyam Metalics & Energy Ltd. Petitioner

-versus-

The Commissioner of Commercial Taxes, Odisha and others Opposite Parties

Advocates appeared in these cases:

For Petitioner

**Mr. Jagabandhu Sahoo,
Senior Advocate
along with Ms. Kajal Sahoo,
Advocate
(In W.P.(C) No.7458 of 2015)**

**Mr. S.P. Mishra,
Senior Advocate
along with Mr. B.P. Mohanty,
Advocate
(In W.P.(C) No.7296 of 2013)**

For Opposite Parties

**Mr. Sunil Mishra,
Additional Standing Counsel**

CORAM:

THE CHIEF JUSTICE

JUSTICE K.R. MOHAPATRA

JUSTICE B.P. ROUTRAY

JUDGMENT

05.08.2022

Dr. S. Muralidhar, CJ.

1. In both these writ petitions, a common question of law arises for consideration under the Orissa Entry Tax Act, 1999 (OET Act). The question is whether a formal communication of the acceptance of the return filed by way of self-assessment under Section 9 (2) of the OET Act is a pre-requisite to the reopening of an assessment under Section 10 (1) of the OET Act?

Background

2. At the outset, it must be noticed that in the context of the Orissa Value Added Tax Act, 2004 (OVAT Act), a similar question was considered by this Court in its decision in *M/s. Keshab Automobiles v. State of Odisha* (decision dated 1st December 2021 in STREV No.64 of 2016) which holds, in the context of Section 43 read with Section 39 (2) of the OVAT Act, prior to their amendment with effect from 1st October 2015, that unless there is a communication of the acceptance of the return filed in the first instance by way of self assessment, there cannot be a reopening of the assessment. The aforementioned decision of this Court in *M/s. Keshab Automobiles (supra)* has been affirmed by the Supreme Court of India in its order dated 13th July 2022 in SLP (Civil) No.9912 of 2022 (*Deputy Commissioner of Sales Tax v. M/s. Rathi Steel and Power Ltd. etc. and batch*) by the following order:

“We have gone through the impugned order (s) passed by the High Court. The High Court has passed the impugned order (s) on the interpretation of relevant provisions, more particularly Section 43 (1) of the Odisha Value Added Tax Act, 2004, which was prevailing prior to the amendment. We are in complete agreement with the view taken by the High Court. No interference of this Court is called for in exercise of powers under Article 136 of the Constitution of India. Hence, the Special Leave Petitions stand dismissed.

Pending application (s) shall stand disposed of.”

3. In fact, W.P.(C) No.7458 of 2015 was at one stage adjourned awaiting the decision of the Supreme Court in the aforementioned SLP.

Referral order

4. As regards the reference to this Full Bench, it was made by the order dated 31st March 2022 of the Division Bench of this Court in W.P.(C) No.7458 of 2015 (***M/s. ECMAS Resins Pvt. Ltd. v. State of Orissa***) by the following order:

“1. One of the issues involved in the present case is whether the impugned order of reassessment for the period 1st April, 2008 to 31st March, 2014 is valid in view of the non-communication of the acceptance of the original return filed by the assessee by way of self-assessment under Section 9 (2) of the Orissa Entry Tax Act, 1999 (OET Act)?

2. Mr. Sahoo, learned Senior counsel for the Petitioner placed reliance on the decision of this Court in ***M/s. Keshab Automobiles v. State of Odisha*** (decision dated 1st December, 2021 in

STREV No. 64 of 2016) which holds in the context of Section 43 read with Section 39 of the Odisha Value Added Tax Act, 2004 (OVAT Act) that unless such acceptance of the return filed by way of self-assessment is actually communicated to the assessee, there cannot be a re-opening of the assessment.

3. Mr. Sunil Mishra, learned Senior Standing counsel for the Department on the other hand refers to the decision dated 7th December, 2016 of the Co-ordinate Division Bench of this Court in W.P. (C) No.22343 of 2015 (*M/s. Nilachal Ispat Nigam Ltd. v. State of Odisha*) which arose under the OET Act and in para 12 of which it has been concluded that for the purposes of Section 10 of the OET Act there need not be a formal communication by the Department to the Assessee of the acceptance of the original return filed by way of self-assessment under Section 9 (1) of the OET Act.

4. It will be noticed here that the decision in *Keshab Automobiles (supra)* arose under the OVAT Act. The effect of the amendment to Sections 39 and 43 of the OVAT Act with effect from 1st October, 2015 by way of the OVAT (Amendment) Act, 2015 was being considered there. It will be noted here that the said issue does not arise as far as the OET Act is concerned since there was no corresponding amendment to the OET Act in 2015. Also, the wording of Section 10 of the OET Act which pertains to reopening of assessment is not in pari materia with its counterpart Section 43 of the OVAT Act. Nevertheless Section 9 (2) of the OET Act which pertains to self-assessment and is a counterpart of Section 39 of the OVAT Act does contemplate 'acceptance' of the return filed by way of self-assessment. Therefore, the question whether without the communication of the acceptance of such self-assessment, there can be a re-opening of the assessment would still arise for consideration.

5. Having considered the legal position on the question of ‘acceptance’ of a return filed by way of self-assessment as discussed in ***Keshab Automobiles (supra)***, although it was in the context of the OVAT Act, this Court is of the view that the correctness of the opinion expressed by the co-ordinate Bench of two learned judges of this Court in para 12 of the decision in ***Nilachal Ispat Nigam Ltd. v. State of Odisha (supra)*** interpreting Section 9 (2) read with Section 10 of the OET Act requires to be re-considered.

6. Accordingly, the present petition is directed to be placed before the larger Bench of three Judges on 28th June, 2022 to consider the following question:

“Is the view taken by the Division Bench of this Court in its decision dated 7th December 2016 in W.P. (C) No.22343 of 2015 (*M/s. Nilachal Ispat Nigam Ltd. v. State of Odisha*) in the context of Section 9 (2) read with Section 10 of the OET Act require reconsideration? In other words, whether a formal communication of the acceptance of the return filed by way of self-assessment under Section 9 (2) of the OET Act is a pre-requisite to the reopening of an assessment under Section 10 (1) of the OET Act?”

7. The interim order shall continue till the next date.”

5. An identical question arises for consideration in the companion W.P.(C) No.7296 of 2013 (***M/s Shyam Metalics & Energy Ltd. v. The Commissioner of Commercial Taxes, Odisha***) in which the following order was passed on 19th July, 2022:

“1. One of the issues raised in the present petition is whether the Assessing Officer could have exercised jurisdiction under Section 10(3) of the OET Act, 1999 when there is no assessment order as such. It is pointed out that in the first instance there was a self assessment by the dealer in terms of Section 9(1) read with 9(2) of the OET Act, 1999 and there was no order as such was passed by the Assessing Officer in respect thereof.

2. It is pointed out that this very issue namely whether there can be reassessment order without there being an assessment order is pending before the Larger Bench of this Court.

3. List this matter along with W.P.(C) No.7458 of 2015 with the said batch of petitions before the Larger Bench.

4. The interim order passed earlier shall continue till the next date.”

Background facts in W.P.(C) No.7296 of 2013

6. The facts in W.P.(C) No.7296 of 2013 are that the Petitioner-M/s Shyam Metalics & Energy Ltd. (SMEL) is registered as a dealer under the OVAT Act and is engaged in manufacturing and sale of sponge iron, steel billets, TMT bars etc. For the purpose of its manufacturing unit, SMEL has a captive power plant (CPP) where it manufactures electricity. Coal is one of the raw materials used in the process of manufacturing of the sponge iron, TMT bar and billets etc. Relying on a judgment of this Court in ***Bhushan Power and Steel Limited v. State of Orissa (2012) 56 VST 50 (Orissa)*** wherein it was held that coal used in the production of the electricity in the CPP cannot be treated as raw material for the

manufacturing of sponge iron. Thus, it was held that the dealer was not entitled to avail concessional levy of entry tax on purchase of coal used to generate electricity in the CPP.

7. On the basis of the above decision in ***Bhushan Power and Steel Limited (supra)***, the Assistant Commissioner of Sales Tax (ACST), Sambalpur II Circle issued a notice to the Petitioner under Section 10 (3) of the OET Act seeking to reopen the assessment for the period 1st April, 2005 to 31st December, 2012. On 23rd February 2013, the Assessing Officer (AO) i.e. the ACST reopened the assessment for the period from 1st April, 2005 to 31st December, 2012 and denied the exemption on payment of entry tax @1% on the coal used for production of electricity. Accordingly, a demand of Rs.1,67,62,329/- was raised.

8. Aggrieved by the above re-assessment order, SMEL filed W.P.(C) No.7296 of 2013 in this Court seeking the quashing of not only the re-assessment order, but also the consequential demand notice. While directing notice to issue in the present petition on 4th January 2016, this Court passed an interim order that no coercive action would be taken against the Petitioner. That stay order has continued since.

Background facts in W.P.(C) No.7458 of 2015

9. As far as W.P.(C) No.7458 of 2015 filed by ECMAS Resins Pvt. Ltd. (ERPL) is concerned, the order under challenge is dated 19th February 2015, passed by the Deputy Commissioner of Sales

Tax (DCST), Puri Circle, Puri re-opening the assessment for the period 1st April 2008 to 31st March, 2014.

10. The occasion for the issuance of the notice for reopening of the assessment is that ERPL is engaged in sale of products like polyester, resins, glass articles and other polypher and epoxide resins in primary forms. ERPL is stated to have its own manufacturing unit at Hyderabad and its depot at Puri. It is stated that ERPL's depot at Puri obtains stock of products from its manufacturing unit at Hyderabad for sale in Odisha.

11. On the basis of a tax evasion report of the DCST, Vigilance Division, notice in Form E-32 was issued stating that goods purchased/received by the ERPL were chemicals of different variety falling under Entry 73 of Part-I of the Entry Tax Rate Schedule which reads "chemicals used for any purpose" and therefore, was exigible to entry tax @1% on all the products except glass fiber. The assessment order dated 19th February 2015 was passed raising a demand of Rs.60,19,134/-.

12. Although on merits, it is the contention of ERPL that unsaturated polyester resin in liquid form is not schedule goods under the OET Act and cannot be covered under 'chemicals', the assessment order is also challenged on the ground that there is no initial assessment order to begin with under Section 9 (2) of the OET Act.

13. W.P.(C) No.7458 of 2015 was filed challenging the said assessment order, in which, on 13th October 2015, this Court directed that the impugned assessment order shall remain stayed. That interim order has continued since.

14. This Court has heard the submissions of Mr. S.P. Mishra, learned Senior Advocate appearing for the SMEL and Mr. Jagabandhu Sahoo, learned Senior Advocate appearing for the ERPL. The Department was represented by Mr. Sunil Mishra, learned Additional Standing Counsel in both the matters.

Relevant provisions of the OET Act and Rules

15. To address the question referred to the Larger Bench for its opinion, reference is first required to be made to the relevant provisions of the OET Act and the Orissa Entry Tax Rules, 1999 (OET Rules) and thereafter, undertake a comparative assessment of the provisions of the OET Act and OVAT Act.

16. Under Section 2(q) of the OET Act, words and expressions used in the OET Act and not defined therein and yet defined in the OVAT Act would have same meaning assigned to them under the OVAT Act.

17. Section 9 of the OET Act talks of “self assessment” and reads as under:

“9. Self assessment-

(1) Subject to provisions of sub-section (2), the amount of tax due from a registered dealer or a dealer liable to be registered under this Act shall be assessed in the manner hereinafter provided, for each tax period or periods during which the dealer is so liable.

(2) If a registered dealer furnishes the return in respect of any tax period within the prescribed time and the return so furnished is found to be in order, it shall be accepted as self-assessed subject to adjustment of any arithmetical error apparent on the face of the said return.”

18. The critical words as far as Section 9 (2) is concerned is the requirement that the return furnished “shall be accepted as self-assessed” subject to adjustment of any arithmetical error apparent on the face of the return. What constitutes ‘acceptance’ is the critical question. To understand this, one needs to refer to Rule 15 of the OET Rules which reads as under:

“15. Self-assessment:-

(1) Where a dealer files return for a tax period within the period specified in sub-rule (1) of Rule 10 and the return is found to be correctly and completely filled in, and there is no arithmetical mistake apparent on the face of such return, the said return shall be accepted as self-assessed.

(2) Where there is any arithmetical mistake apparent on the face of such return, and such mistake can be reconciled without any reference to the dealer to whom the return relates, such return may accordingly be rectified and the rectification so made may be intimated to the dealer in Form E28 for information.

(3) If the rectification as intimated to the dealer under sub-rule (2) is not accepted by the dealer, he may, within seven days from the date of receipt of such intimation, file an application stating therein the correct position along with reasons for occurrence of such mistake to the assessing authority, and if such authority is satisfied, the return referred to in sub-rule (2) shall be accepted as self-assessed.

(4) Where the arithmetical mistake apparent on the face of the return furnished for a tax period remains un-reconciled, such mistake shall be intimated to the dealer to whom the return relates in Form E28 for necessary rectifications within fourteen days from the date of receipt of the intimation and if the assessing authority is satisfied that the mistake is *bona fide* and not deliberate, such authority shall accept the return as self-assessed.

(5) Where the dealer fails to rectify the mistake as intimated under sub-rule (4) within the time specified therein or the mistakes are found to be deliberate with an intention to evade tax or an attempt to evade tax, the return, wherein the mistakes are found, shall be referred to audit under Section 9B of the Act.”

19. Further, as far as reassessment is concerned, the relevant provision is Section 10 of the OET Act read with Rule 15 B of the OET Rules both of which read as under:

Section 10 of the OET Act:

“10. Reassessment in certain cases.-

(1)Where for any reason all or any of the scheduled goods brought by a dealer has escaped assessment of tax, or where value of all or any of the scheduled

goods has been under-assessed, or any deduction has been allowed wrongly, the assessing authority, on the basis of information in his possession, may, within a period of seven years from the end of the year to which the tax period relates, serve a notice on the dealer in such form and in such manner as may be prescribed and after making such enquiry as he considers necessary and after giving the dealer a reasonable opportunity of being heard, proceed to assess the dealer accordingly.

(2) If the assessing authority is satisfied that the escapement or under assessment of tax on account of any reason (s) mentioned in sub-section (1) above is without any reasonable cause, he may direct the dealer to pay in addition to the tax assessed under sub-section (1), by way of penalty, a sum equal to twice the amount of tax additionally assessed under this section.

(3) Where any order passed by the assessing authority in respect of a dealer for any period is found to be erroneous or prejudicial to the interest of revenue consequent to, or in the light of, any judgment or order of any Court or Tribunal, which has become final and binding, then, notwithstanding anything contained in this Act, the assessing authority may proceed to reassess the tax payable by the dealer in accordance with such judgment or order, at any time within a period of three years from the date of the judgment or order.”

Rule 15B of the OET Rules:

15B. Audit assessment.-

(1) If the tax audit conducted under Section 9B of the Act results in findings, which the assessing authority considers to be affecting the tax liability of a dealer for a tax period or tax periods, such authority shall serve a notice in Form E30 along

with a copy of the Audit Visit Report, upon such dealer, directing him to appear in person or through his authorized representative on such date, time and place, as specified in the said notice for compliance of the requirements of sub-rules (2) and (3).

(2) The assessing authority may, in the notice referred to in sub-rule (1), require the dealer-

(i) to produce the books of accounts maintained under the provisions of the Act and these Rules;

(ii) to furnish records and documents required to be maintained under the Act and these Rules claiming deductions or concessions, as may be applicable;

(iii) to furnish any other information relating to assessment of tax, levy of interest, imposition of penalty; and

(iv) to explain the books of account, other accounts, records, documents or information referred to in sub-clauses (i), (ii) and (iii),

on the date and at the time specified in the notice.

(3) In addition to the accounts and documents referred to in sub-rule (2), a dealer if so desires, may produce such other evidence and documents in support of his claim preferred in his returns, or rebut the charges made in the Audit Visit Report, or any objection which he wishes to raise.

(4) The assessing authority, while hearing the dealer on the date specified in the notice referred to in sub-rule (1) or on any date to which the hearing is adjourned for making an assessment of tax payable by him, shall-

(a) examine the accounts, documents, records or any other evidence furnished under sub-rule (2);

(b) call for such information or evidence from the dealer or any person as deemed necessary;

(c) consider the objection, if any, preferred by such dealer and examine the evidence in support thereof; and

(d) make such enquiry, as deemed necessary, for the purpose of such assessment:

Provided that not more than three adjournments shall be granted to a dealer for hearing his case.

(5) The assessing authority shall, after hearing the dealer in the manner specified in sub-rules (2), (3) and (4), assess the tax due from that dealer accordingly, in respect of a tax period or tax periods, for which the assessment proceeding has been initiated, and impose penalty under sub-section (5) of Section 9C of the Act.

(6) In the event of default by a dealer to comply with the requirement of the notice referred to in sub-rule (1), the assessing authority may make to the best of judgment, an ex parte assessment of the tax payable by such dealer in respect of such tax period or tax periods and pass an order of assessment, in writing, recording the reasons therein and shall impose penalty under sub-section (5) of Section 9C”

Provisions of the OVAT Act and Rules

20. At this stage, it is necessary to refer to the corresponding provisions of the OVAT Act. Section 39 (2) of the OVAT Act is in *pari materia* with Section 9 (2) of the OET Act. Likewise, Rule 48 of the Orissa Value Added Tax Rules 2005 (OVAT Rules) talks of self assessment and is in *pari materia* with Rule 15 of the OET Rules. Section 39 (2) of the OVAT Act and Rule 48 of the OVAT Rules read as under:

Section 39 (2) of the OVAT Act:

“39. Self assessment.—

XXX

XXX

XXX

(2) If a registered dealer furnishes the return in respect of any tax period within the prescribed time and the return so furnished is found to be in order, it shall be accepted as self assessed subject to adjustment of any arithmetical error apparent on the face of the said return.”

Rule 48 of the OVAT Rules:

“48. Self-assessment:-

(1) Where a dealer files return for a tax period within the period specified in Rule 34 and the return is found to be correctly and completely filled in, and there is no arithmetical mistake apparent on the face of such return, the said return shall be accepted as self-assessed.

(2) Where there is any arithmetical mistake apparent on the face of such return and such mistake can be reconciled without any reference to the dealer to whom the return relates, such return may accordingly be rectified and the rectification so made may be intimated to that dealer in Form VAT-305 for information.

(3) If the rectification as intimated to the dealer under sub-rule (2) is not accepted by the dealer, he may, within seven days from the date of receipt of such intimation, file an application stating therein the correct position along with reasons for occurrence of such mistake, to the assessing authority, and if such authority is satisfied, the return referred to in sub-rule (2) shall be accepted as self-assessed.

(4) Where the arithmetical mistake apparent on the face of the return furnished for a tax period remains

un-reconciled, such mistakes shall be intimated to the dealer to whom the return relates in Form VAT-305 for necessary rectifications within fourteen days from the date of receipt of the intimation and if the assessing authority is satisfied that the mistake is *bona fide* and not deliberate, such authority shall accept the return as self-assessed.

(5) Where the dealer fails to rectify the mistake as intimated under sub-rule (4) within the time specified in that sub-rule or the mistakes are found to be deliberate with an intention to evade tax or attempt to evade tax, the return, wherein the mistakes are found, shall be referred to audit under Section 41.”

21. As far as re-assessment is concerned, the corresponding provisions of the OVAT Act are Section 43 (as it stood prior to 1st October 2015) and Rule 50 of the OVAT Rules which read as under:

Section 43 of the OVAT Act (as it stood prior to 1st October 2015):

“43. Turnover escaping assessment.-

(1) Where, after a dealer is assessed under Section 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—

- (a) escaped assessment, or
- (b) been under-assessed, or
- (c) been assessed at a rate lower than the rate at which it is assessable;

or that the dealer has been allowed—

(i) wrongly any deduction from his turnover, or

(ii) input tax credit, to which he is not eligible,

the assessing authority may serve a notice on the dealer in such form and manner as may be prescribed and after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he deems necessary, proceed to assess to the best of his judgment the amount of tax due from the dealer.

(2) If the assessing authority is satisfied that the escapement or under assessment of tax on account of any reason(s) mentioned in sub-section (1) above is without any reasonable cause, he may direct the dealer to pay, by way of penalty, a sum equal to twice the amount of tax additionally assessed under this section.

(3) No order of assessment shall be made under sub-section (1) after the expiry of seven years from the end of the tax period or tax periods in respect of which the tax is assessable.”

Rule 50 of the OVAT Rules:

“50. Assessment of escaped turnover. –

(1) Where a dealer has already been assessed under section 39, 40, 42 or 44 and it is required to reopen the assessment under subsection (1) of section 43 for occurrence of any or more of the events specified in that subsection, the assessing authority shall serve a notice in Form VAT -307 upon the dealer.

(2) The hearing of the dealer shall be concluded in accordance with the provisions of sub-rules (2), (3), (4) and (5) of rule 49.

(3) The assessing authority shall, after hearing the dealer in the manner specified in sub-rule (2), assess to the best of judgment, the amount of tax payable

by the dealer in respect of a tax period or tax periods, for which assessment proceeding has been initiated, and impose penalty under sub-section (2) of section 43.

(4) In the event of default by a dealer to comply with the requirements of the notice referred to in sub-rule (1), the assessing authority may make, to the best of judgment, an ex parte assessment of the tax payable by such dealer in respect of such tax period or tax periods and pass an order of assessment in writing, after recording the reasons therein.”

22. It must also be noticed here that scrutiny of every return by a dealer by the assessing officer (AO) is mandatory in terms of Section 7 (10) and 7 (11) of the OET Act. The corresponding provision in the OVAT Act is Section 38.

The decision in M/s. Keshab Automobiles

23. In the context of Section 39 (2) of the OVAT Act read with Section 43 thereof, this Court examined the issue in ***M/s. Keshab Automobiles (supra)***. The question that arose in that case was however also about the effect of the amendment brought to Section 39 (2) after 1st October 2015, whereas that issue does not arise in the context of the OET Act. It would suffice to note that the corresponding provisions of the OVAT Act namely Section 39 (2) of the OVAT Act as it stood prior to 1st October 2015 is in *pari materia* with Section 9 (2) of the OET Act.

24. As was held in ***M/s. Keshab Automobiles (supra)***, there had to be a formal communication of an acceptance of return or even an

acknowledgment by the Department in terms of Section 39 (2) of the OVAT Act as it stood prior to 1st October, 2015. The position underwent a change after 1st October 2015. This was noticed in *M/s. Keshab Automobiles (supra)* where after comparing Section 39 (2) as it stood prior to 1st October 2015 (which corresponds to Section 9 (2) of the OET Act) and the provision as it stood after its amendment in 1st October 2015, this Court observed as under:

“11. ... The concept of ‘deemed’ self assessment was introduced only with effect from 1st October, 2015. Prior thereto, if such return filed by the dealer under Section 39 of the OVAT Act and was “found to be in order” and within the prescribed time, then it was to be accepted as self assessed subject to adjustment of arithmetical errors.”

25. Likewise, in *M/s. Keshab Automobiles (supra)* a comparison was undertaken of Section 43 (1) of the OVAT Act (as it stood prior to 1st October 2015 and which corresponds to Section 10 of the OET Act) and Section 43 (1) of the OVAT Act as it stood after 1st October, 2015. Analyzing both the amended and un-amended Section 43 (1) of the OVAT Act, this Court in *M/s. Keshab Automobiles (supra)* observed as under:

“13. It is significant that prior to its amendment with effect from 1st October, 2015 the trigger for invoking Section 43 (1) of the OVAT Act required a dealer 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 or the accused taking the benefit of a lower rate or being wrongly allowed deduction from his turnover or input tax credit to which he is not eligible.

14. However, under Section 43(1) of the OVAT Act, after its amendment with effect from 1st October, 2015 the Assessing Authority can form an opinion about the whole or part of the turnover of the dealer escaping assessment or being under assessed “on the basis of any information in his possession”. In other words, it is not necessary after 1st October, 2015 for the Assessee’s initial return having to be ‘accepted’ before Section 43(1) could be invoked.

15. Therefore, the position prior to 1st October, 2015 is clear. Unless there was an assessment of the dealer under Sections 39, 40, 42 and 44 for any tax period, the question of reopening the assessment under Section 43 (1) of the OVAT Act did not arise.”

26. As far as the OET Act is concerned, the relevant provisions i.e., Section 9 (2) and Section 10 correspond exactly to Section 39 (2) and Section 43 respectively of the OVAT Act as those provisions stood prior to the amendment in 1st October, 2015. The same legal position as above would, therefore, hold good for the provisions of the OET Act as well.

The decision in Nilachal Ispat Nigam Limited overruled

27. However, as noted in the referral order, a different view appears to have been taken by a Division Bench of this Court in ***M/s. Nilachal Ispat Nigam Limited v. State of Odisha*** (decision dated 7th December 2016 in W.P.(C) No.22343 of 2015). It must

be noted that the judgment is dated 7th December 2016, and since it was under the OET Act and Rules thereunder, there was no occasion for the Court to refer to the corresponding provisions of the OVAT Act and the position obtaining thereunder.

28. In para 12 of the judgment in *Nilachal Ispat Nigam Limited* (*supra*) it was observed as under:

“12. So far as the ground taken by the petitioner that the company was assessed as per the provisions of section 9(1) of the Act and as such, it is not known to them as to whether assessment has been finalized or not or in other words, whether the authorities have accepted the self assessment made by the petitioner-company under Section 9(1) has been accepted or not is concerned, we are of the considered view that Section 9 contains a provision for self assessment, which requires the dealer to be assessed in the manner provided for each tax period or periods during which the dealer is so liable and if the registered dealer furnishes the return in respect of any tax period within the prescribed time and the return so furnished is found to be in order, it shall be accepted as self assessed subject to adjustment of any arithmetical error apparent on the face of the said return. Section 10 of the Act provides for reassessment in certain cases when the authority is of the reason to believe that the dealer has escaped assessment of tax and as such communication regarding acceptance of the assessment made under the provisions of Section 9 of the Act is not required to be communicated to the petitioner and the communication can only go in a situation when on scrutiny it will be found that the same is not in order or there is arithmetical error. Under the Taxation Rule the assessee is required to furnish self assessment and the authority is required to assess the

same and there is no provision provided under the Act to communicate in case of acceptance of the assessment. Although under the provision of Orissa Value Added Tax Act under Section 38 read with Section 7(10) each and every return in relation to any tax period furnished by a registered dealer shall be subject to scrutiny by the assessing authority to verify the correctness of the calculation, application of correct rate of tax and interest etc and in case of any mistake, detected in course of scrutiny, the assessing authority shall serve a notice in the prescribed form as we find even from the provision of section 7 or sub-section (11) and as such, if the authorities have not issued any notice under Section 7(11), then the assessment made by the registered dealer under the provisions of Section 9 will be said to be accepted.”

29. Reference at this juncture may be made to Section 7 (10) and (11) of the OET Act which read as under:

7. Return and return defaults:-

xxx

सम्पूर्ण xxx

xxx

(10) Each and every return in relation to any tax period furnished by a dealer under this section, shall be subject to scrutiny by the assessing authority to verify the correctness of calculation, application of correct rate of tax and interest, claim of deductions, if any, under this Act and full payment of tax and interest payable by the dealer for such period.

(11) If any mistake is detected as a result of scrutiny made under sub-section (10), the assessing authority shall serve a notice in the prescribed form on the dealer to make payment of the extra amount of tax along with the interest as per the provisions of this Act, by the date specified in the said notice.

30. This has to be compared with the corresponding provision in the OVAT Act viz., Section 38 of the OVAT Act which reads as under:

“38. Scrutiny of return.—

(1) Each and every return in relation to any tax period furnished by a registered dealer under Section 33, shall be subject to scrutiny by the assessing authority to verify the correctness of calculation, application of correct rate of tax and interest, claim of input tax credit made therein and full payment of tax and interest, payable by the dealer for such period.

(2) If any mistake is detected as a result of scrutiny made under sub-section (1), the assessing authority shall serve a notice in the prescribed form on the dealer to make payment of the extra amount of tax along with the interest as per the provisions of this Act, by the date specified in the said notice.”

31. Both sets of provisions of the OVAT Act and the OET Act respectively, therefore, make it mandatory for scrutiny of every return by a dealer. The corresponding Rule under the OET Rules is Rule 15 as amended with effect from 19th October 2005 which has already been extracted hereinabove.

32. Therefore, even Rule 15 of the OET Rules as amended requires the return to be ‘accepted’. If this is read with Rule 10 (3) to (6) of the OET Rules, it is plain that self-assessment is not automatic. It requires compliance with Section 7 (10) and 7 (11) of the OET Act. The same result would be reached from a collective reading of Section 39 of the OVAT Act with Rule 48 of

the OVAT Rules as they stood prior to 1st October, 2015. The long and short of this discussion is that under the OET Act there is no concept of a ‘deemed’ acceptance of a return filed by way of self assessment if nothing is heard from the Department after it is filed. There has to be an overt act of communication of such acceptance by the Department to the dealer.

33. Even in the context of the OVAT Act to which reference was made by the Bench in *M/s. Nilachal Ispat Nigam Limited (supra)*, the position after 1st October 2015 where the concept of ‘deemed’ acceptance was introduced for the first time, made it plain that prior to such amendment there was no such concept of ‘deemed’ acceptance. This was noticed by this Court in *M/s. Keshab Automobiles (supra)* where it was concluded in para 21 to 23 as under:

“21. A comparison of the language used in the amended Section 43 (1) of the OVAT Act with its version prior to 1st October, 2015 makes it clear that a new system has been put in place as far as reopening of returns filed as “self-assessment” is concerned. Now such reopening is permitted even if there was no formal acceptance of the return originally filed. The concept of a “deemed” acceptance of the return has been introduced for the first time since 1st October, 2015. This is not a mere procedural change. Further, the amending statute itself makes it clear that the amendments are with effect from 1st October, 2015 and not with retrospective effect from an earlier date. Therefore, the Court is precluded from presuming that the amendment to Sections 39 (2) and 43 (1) of the OVAT Act and correspondingly to Rule 50 of the

OVAT Rules are either merely clarificatory or retrospective.

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 acknowledgment 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 fulfillment of other requirements of that provision as it stood prior to 1st October, 2015.

23. For all of the aforementioned reasons, the reopening of the assessment sought to be made in the present case under Section 43 (1) of the OVAT Act is held to be bad in law. The question framed is accordingly answered in the negative i.e. in favour of the Assessee and against the Department. It is accordingly, held that in the absence of the completion of the assessment under Sections 39, 40, 42 and 44, reassessment under Section 43 (1) of the OVAT Act is unsustainable in law."

34. This Court had in *M/s. Keshab Automobiles (supra)* distinguished *M/s. Nilachal Ispat Nigam Limited (supra)* when it observed in para 17 [It must be mentioned here that original para 17 of the judgment of this Court in *M/s. Keshab Automobiles (supra)* was corrected by a subsequent order dated 8th April 2022] which reads as under:

"17. A perusal of the decision of this Court in *Nilachal Ispat Nigam Ltd. (supra)* reveals that it was in the context of the Orissa Entry Tax Act (OET Act). Secondly, this Court had no occasion in the

said decision to discuss the effect of more or less similar amendments effected to the provisions of the OVAT Act which were brought into effect from 1st October, 2015. This is despite the fact that the decision is dated 7th December, 2016. The amendments did bring about a significant change to the OVAT Act and therefore had a direct bearing on the issues discussed in the said decision. Consequently, this Court finds that the decision in ***Nilachal Ispat Nigam Ltd.*** is per incuriam inasmuch as it fails to discuss the amended provisions of the OVAT Act which have a direct bearing on the issues adjudicated by this Court.”

35. The decision of this Court in ***M/s. Keshab Automobiles*** (*supra*) has, as already noted, been affirmed by the Supreme Court of India in its order in ***Deputy Commissioner of Sales Tax v. M/s. Rathi Steel and Power Ltd. etc. and batch*** (*supra*). This Court, therefore, is unable to agree with the conclusion reached by the Division Bench of this Court in ***M/s. Nilachal Ispat Nigam Limited*** (*supra*) since it is not consistent with the legal position that emerges on the reading of Section 9 (2) of the OET Act with its corresponding provision of the OVAT Act viz., Section 39 (2) of the OVAT Act as it stood prior to 1st October 2015 and which has been interpreted in the above manner by this Court in ***M/s. Keshab Automobiles*** (*supra*).

36. Further, the decision in ***M/s. Keshab Automobiles*** (*supra*) also noticed earlier decisions of the Supreme Court in ***Ghanshyam Das v. Regional Assistant Commissioner of Sales Tax, Nagpur*** ***AIR 1964 SC 766*** where it was held as under:

“10. ...if a return was duly made, the assessment could be made at any time unless the statute prescribed a time limit. This can only be for the reason that the proceedings duly initiated in time will be pending and can, therefore, be completed without time limit. A proceeding is said to be pending as soon as it is commenced and until it is concluded. On the said analogy, the assessment proceedings under the Sales-tax Act must be held to be pending from the time the said proceedings were initiated until they were terminated by a final order of assessment. Before the final order of assessment, it could not be said that the entire turnover or a part thereof of a dealer had escaped assessment, for the assessment was not completed and if, completed, it might be that the entire turnover would be caught in the net.”

37. This was also seen in the context of an order passed by this Court on 29th February 2008 in W.P.(C) No.2777 of 2008 (*M/s. Jayshree Chemicals Ltd. v. State*) where it was observed as under:

“Apart from that, the concept of escaped assessment under Section 43 of the Orissa Value Added Tax Act comes into play only when the assessment has been made and completed.

In the instant case, without assessment being complete, the notice of escaped assessment is misconceived and as such the said notice under Annexure-1 is quashed.”

38. In the context of the Orissa Sales Tax Act, a Full Bench of this Court in *M/s. Jaynarayan Kedarnath v. Sales Tax Officer, Cuttack-I West Circle (1988) 68 STC 25* followed the judgment

of the Supreme Court in ***Ghanshyam Das (supra)*** and concluded that no escapement of income from assessment can be predicted before an assessment is complete.

39. This Court is of the considered view, therefore, that the decision of the Division Bench of this Court in ***M/s. Nilachal Ispat Nigam Limited (supra)*** which holds that if the authorities have not issued any notice under Section 7 (11) of the OET Act, then the self assessment of the dealer under Section 9 (2) of the OET Act should be taken to have been ‘accepted’ does not set down the correct legal position and to that extent, the said decision is hereby overruled.

Court not to supply the gaps in the statute

40. Mr. Mishra, learned Standing counsel for the Department then submitted that the above interpretation which exposes a gap in the provisions of the OET might result in several similar cases of re-opening of assessments being challenged by the Assesseees or might prevent the Department from issuing notices for re-opening assessments.

41. It is not the task of this Court, while interpreting a taxing statute, to fill the lacunae. In ***Ransom (Inspector of Taxes) v Higgs [1974] 3 All ER 949***, it was explained by Lord Simon that:

“It may seem hard that a cunningly advised taxpayer should be able to avoid what appears to be his equitable share of the general fiscal burden and cast

it on the shoulders of his fellow citizens. But for the courts to try to stretch the law to meet hard cases (whether the hardship appears to bear on the individual tax-payer or on the general body of tax-payers as represented by the Inland Revenue) is not merely to make bad law but to run the risk of subverting the rule of law itself.”

42. Referring to the above decision, Justice G.P. Singh in his *Interpretation of Statutes* (13th Edn., 2012) p. 829 states:

“The same rule applies even if the object of the enactment is to frustrate legitimate tax avoidance devices for moral precepts are not applicable to the interpretation of revenue statutes. It may thus be taken as maxim of tax law, which although not to be overstressed ought not to be forgotten that, “the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him.” The proper course in construing revenue Acts is to give a fair and reasonable construction to their language without leaning to one side or the other but keeping in mind that no tax can be imposed without words clearly showing an intention to lay the burden and that equitable construction of the words is not permissible. Considerations of hardship, injustice or anomalies do not play any useful role in construing taxing statutes unless there be some real ambiguity. It has also been said that if taxing provision is “so wanting in clarity that no meaning is reasonably clear, the courts will be unable to regard it as of any effect. (*IRC v. Ross and Coulter* (1948) 1 All ER 616)”

Conclusion

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.

44. As far as the individual writ petition is concerned, it is ordered as under:

(i) In W.P.(C) No.7458 of 2015 filed by ERPL, the impugned re-assessment order dated 19th February 2015 and the consequential demand, if any, raised are hereby quashed.

(ii) In W.P.(C) No.7296 of 2013 filed by SMEL, the impugned re-assessment order dated 23rd February 2013 and the consequential demand notice (Annexure-3) are hereby quashed.

45. The writ petitions are disposed of in the above terms.

(S. Muralidhar)
Chief Justice

(K.R. Mohapatra)
Judge

(B.P. Routray)
Judge