

**BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL:
CUTTACK.**

S.A. No. 339 (V) of 2016-17

(Arising out of the order of the learned Addl.CST(Appeal), South Zone,
Berhampur, in First Appeal case No. AA-(VAT)05/2015-16
disposed of on 08.09.2016)

**P r e s e n t: Shri G.C.Behera, Sri. S.K.Rout & Shri M.Harichandan,
Chairman. Judicial Member-II Accounts Member-I.**

M/s.Maa Mangala Flour Mills (P) Ltd.
At-Plot No.329/673, Alkar, Janla, Khurda. ... Appellant.

- V e r s u s -

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

For the Appellant ... Mr.B.N.Joshi, Adv.
For the Respondent ... Mr.M.L.Agarwal, SC

Date of hearing: **30.12.2022** * * * Date of Order:**30.12.2022**

ORDER

Challenge in this appeal is the order dated 08.09.2016 passed by the learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (in short, ACST/FAA) in first appeal case No.AA(VAT)05/2015-16, thereby allowing the appeal in part and remanding the case to the learned assessing officer for re-assessment against the assessment order passed under Section 43 of the OVAT Act by the learned DCST, Jatni Circle, Jatni (in short, DCST/AA) for the tax period 4/12 to 03/14 raising demand of Rs.10,01,896.00 including penalty of Rs.6,67,931.00 imposed under Section 43(2) of the OVAT Act.

2. The case at hand is that the dealer in the instant case is M/s.Maa Mangala Flour Mills (P) Ltd. having TIN No.21921105050 is engaged in manufacturing and sale of Atta, Maida, Suji, Chokoda etc. out

of procurement of wheat both inside as well as outside of the State. The dealer was self-assessed under Section 39 of the OVAT Act by filing of regular returns pertaining to the tax periods from 01.04.2012 to 31.03.2014. But the self assessment is re-opened by the learned assessing officer under Section 43 of the OVAT Act on receipt of allegations of purchase and sales suppression framed by the learned DCST, Vigilance Wing, Cuttack in fraud case report no.1/49 dated 16.01.2014. The fraud case report (in short FCR) entails that the visiting officials recovered some incriminating documents from the business premises of the dealer and the same have been seized for verification. The visiting officials also checked the weighbridge installed in the business premises and took possession of the computerized print out copies of the wieghment report from 07.07.2013 to 16.07.2013 reflecting thereof the actual quantity of goods loaded in different incoming vehicles as mentioned thereof. This apart, the physical stock position of goods kept in the business premises was also noted down with the assistance of the dealer in order to ascertain the genuineness of the maintenance of the books of accounts. During course of verification of seized documents, it was detected that loading slip no.1851 dtd 26.01.2013, No.1941 and 1936 dtd.28.02.2013 issued by the dealer in support of transportation of wheat as mentioned therein from the goods shed at Railway Station, Jatni to the business premises has not been accounted for in the books of accounts towards purchase of said goods. Accordingly, purchase suppression of 46750 kg. of wheat valued at Rs.7,83,062.50 (@Rs.16.75per kg) framed against the dealer. Likewise, the discrepancy as noted in the books of accounts figure and reflected in the weighment report from 07.04.2013 to 16.07.2013 in respect of goods brought in different incoming vehicles was calculated at Rs.4,32,702.75. The discrepancy was also deducted in the physical stock position of different goods after cross verification with the books of accounts in course of investigation. The detailed discrepancy as reported by the investigating officials was calculated at Rs.80,78,545.00 which led to the formation of an opinion that certain turnover of the dealer has escaped from self

assessment and accordingly the proceeding was initiated under Section 43 of the OVAT Act. On confrontation of the latches detected in the fraud case report, the assessing officer established the total suppression of Rs.66,79,308.30 which has been taxed @5% resulting a demand of Rs.10,01,896.00 including penalty of Rs.6,67,931.00 imposed under Section 43 (2) of the OVAT Act.

3. Against such demand, the dealer preferred first appeal before the learned Addl. Commissioner of Sales Tax (Appeal), South zone, Berhampur (FAA) who allowed the appeal in part and remanded the matter to the learned assessing officer for reassessment.

4. Further being dis-satisfied with the order of the learned first appellate authority, the dealer has preferred the present second appeal as per the grounds stated in the grounds of appeal.

5. Cross objection has been filed in the instant case by the State respondent.

6. During course of argument, learned counsel for the dealer stated that additional ground is taken challenging that the orders passed by the learned forum below are illegal and arbitrary. No assessment under section 39,42 or 44 was made before initiation of proceeding under Section 43 of the OVAT Act and also no communication or written acknowledgement is given by the department. Since, the concept of deemed assessment of return has been introduced for the first time since 1st. October, 2015, the impugned order of reassessment is liable to be quashed for the periods under challenge.

7. Per contra, 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.

8. Heard the contentions and submissions of both the parties in this regard. The sole contention of the dealer appellant is that the assessment order of sales tax officer, Jatni Circle, Jatni for

the period 01.04.2012 to 31.03.2014 on the ground that the demand notice is not maintainable. It was vehemently urged by the learned Counsel for the dealer assessee that the initiation of proceeding under Section 43 of the OVAT Act was illegal and bad in law in the absence of formation of any independent opinion by the assessing authority as required under Section 43(1) of the Act. The escaped turnover assessment could not have been initiated under Section 43 of the OVAT Act when the dealer assessee was not self assessed under Section 39 of the Act. Further contention of the dealer assessee is that the initiation of such proceeding by the assessing authority under Section 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 Vrs. 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 under Section 39 of the OVAT Act after filing the return and it was communicated in writing about such self assessment. So when the very initiation of proceeding under Section 43 of the OVAT Act is bad in law, the entire proceeding becomes a nullity and is liable to be dropped.

After a careful scrutiny of the provisions contained under Section 43 of the OVAT Act, one thing becomes clear that only after assessment of dealer 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 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 under Section 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 an initial assessment which should have been formally accepted for the periods in question i.e. before 1st. Oct, 2015 before the Department could form an opinion regarding escaped assessment or under assessment.....”

So, the position prior to 1st. Oct. 2015 is clear. Unless there was an assessment of the dealer under Section 39,40,42 or 44 for any tax period, the question of reopening the assessment under Section 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 under Section 39 of the OVAT Act for the tax periods prior to 01.10.2015 are not accepted either by a formal communication or an acknowledgement by the Department, then such assessment cannot be sought to be reopened under Section 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 acknowledgment 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 Vrs. State of Odisha, S.A.No.209(V) of 2013-14 Order of Hon’ble Full Bench, OSTT dated 06.06.202, State of Odisha Vrs. M/s.Jaiswal Plastic Tubes Ltd. S.A.No.90(V) of 2010-11, Order of Hon’ble Full Bench, OSTT, dated 06.06.2022, M/s.Jalaram Tobacco Industry Vrs. State of Odisha S.A. NO.35(V) of 2015-16, Order of Hon’ble Full Bench, OSTT dated 16.08.2022, M/s.Eastern Foods Pvt. Ltd. Vrs. State of Odisha S.A.No.396 (VAT) of 2015-16, Order of Hon’ble Full Bench dtd.23.08.2022 and M/s.Shree Jagannath

Lamination and Farmes Vrs. State of Odisha, S.A.No.25 (VAT) of 2015-16, Order of Hon'ble Full Bench , OSTT dated 15.10.2022.

So in view of the above analysis, the impugned notice of reassessment issued to the dealer is to be treated as without any authority. In view of the above discussion, we arrive at a conclusion that the order of assessing authority and the first appellate authority are not sustainable in the eyes of law and the same warrant interference in this appeal. Hence order.

9. The appeal filed by the dealer assessee is allowed and the impugned orders of the forums below are hereby quashed. The cross objection is disposed of accordingly.

Dictated and Corrected by me,

(Shri S.K.Rout)
Judicial Member-II

(Shri S.K.Rout)
Judicial Member-II

I agree,

(Shri G.C.Behera)
Chairman

I agree,

(Shri M.Harichandan)
Accounts Member-I