

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

**S.A. No. 283(VAT) of 2015-16**

(Arising out of the order of the learned JCST, Cuttack I Range,  
Cuttack, in First Appeal case No. AA-(OVAT) 30/CUIE/2013-14  
disposed of on 30.09.2015)

**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.Tara Tarini Enterprisers,  
OMP Market Complex, Cuttack. ... Appellant.

**- V e r s u s -**

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

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

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Date of hearing: **29.12.2022** \* \* \* Date of Order: **30.12.2022**  
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**ORDER**

The dealer prefers this appeal challenging the order dated 30.09.2015 passed by the learned Joint Commissioner of Sales tax, Cuttack I Range, Cuttack ( in short, JCST/FAA), thereby confirming the order of assessment passed by the learned ACST, Cuttack East Circle, Cuttack under Section 43 of the OVAT Act raising demand of Rs.13,25,913.00 which includes penalty of Rs.8,83,941.76 for the tax period from 01.04.2005 to 31.12.2009.

2. The dealer in the instant case is a proprietorship concern carrying on business in plaster of paris, lime powder, cem powder, red earth, yellow earth, white earth, gypsum powder, stone powder, thinner, white cement, glue, wall putty and brush in the State of Odisha in the name and style of M/s.Tara Tarini Enterprisers, having Tin No.21521202713. Pursuant to the notice issued in Form-VAT 307 for the

tax period under challenge, the dealer produced the purchase and sale register and submitted the purchase and sale statement. On verification, the dealer was found to have applied the tax rate of 4% to the items of plaster of paris, lime powder, cem powder, red earth, yellow earth, white earth, gypsum powder and stone powder and tax rate of 12.5% to paints, thinner, white cement, glue, wall putty and brush. On verification, the learned assessing officer came to the conclusion that the dealer was resorting application of wrong tax rate of 4%. The said goods being residual ones were required to be subject to VAT @12.5% as per entries in Part-III of the tax rate schedule under the OVAT Act, 2004. The gross turnover and the taxable turnover of the dealer for the tax period under challenge was accordingly determined at Rs.95,42,396.06. Tax @12.5% on the said turnover computes to Rs.11,92,799.51. After allowing set off of ITC to the tune of Rs.3,59,157.63 being supported by tax invoices relating to the purchase effected in this regard and adjusting the payment of tax made to the tune of Rs.3,91,671.00, the balance tax payable was computed to Rs.4,41,970.88. A penalty of Rs.8,83,941.76 was imposed under Section 43(2) of the OVAT Act. Thus, tax and penalty in toto was arrived at Rs.13,25,912.64 or Rs.13,25,913.00 which the dealer was required to pay as per the terms and conditions of the demand notice.

3. Against such demand, the dealer preferred first appeal before the learned JCST, Cuttack I Range, Cuttack/First Appellate Authority, who confirmed the demand.

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 this case by the State respondent.

6. During course of argument, learned Counsel for the dealer vehemently, contended that the assessing officer is not justified to pass the assessment order under Section 43 of the OVAT Act, 2004 without passing

an order under Section 42 of the said Act for which the assessment order passed is without jurisdiction and liable to be quashed.

7. Per contra, learned Standing counsel for the Revenue, Mr. M.L.Agarwal supported the orders of the fora below stating that the learned first appellate authority has rightly passed the order which is sustainable in the eye of law.

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, Bhubaneswar I Circle, Bhubaneswar for the period 01.04.2005 to 31.12.2009 on the ground that the notice issued in Form VAT-307 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 assessed 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 1<sup>st</sup>. 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 1<sup>st</sup>. Oct, 2015 before the Department could form an opinion regarding escaped assessment or under assessment.....”

So, the position prior to 1<sup>st</sup>. 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 assessment in Form VAT 307 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**

**I agree,**

**I agree,**

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

**(Shri G.C.Behera)**  
**Chairman**

**(Shri M.Harichandan)**  
**Accounts Member-I**

