

**BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL:  
CUTTACK**

**S.A. No. 138 (VAT) of 2020**

(Arising out of order of the learned Joint Commissioner of CT & GST  
(Appeal), Sundargarh Territorial Range, Rourkela  
in Appeal No. AAV 03 of 2016-17, disposed of on 31.08.2019)

Present: **Shri G.C. Behera, Chairman**

M/s. Mahak Commercial Pvt. Ltd.,  
Qr. No. EM/32, Basanti Colony,  
Rourkela, Sundargarh ... Appellant

-Versus-

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

For the Appellant : Sri R. K. Mishra, Advocate  
For the Respondent : Sri D. Behura, S.C. (CT) &  
Sri S.K. Pradhan, Addl. SC (CT)

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Date of hearing : 02.04.2024 \*\*\* Date of order : 08.04.2024  
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**ORDER**

Dealer is in appeal against the order dated 31.08.2019 of the Joint Commissioner of CT & GST (Appeal), Sundargarh Territorial Range, Rourkela (hereinafter called as 'First Appellate Authority') in F A No. AAV 03 of 2016-17 confirming the assessment order of the Sales Tax Officer, Rourkela-I Circle, Uditnagar (in short, 'Assessing Authority').

2. The facts of the case, in short, are that –

M/s. Mahak Commercial Pvt. Ltd. is engaged in processing of coal to coke and sale of coal, coke & iron ore fines. The assessment relates to the period 01.04.2007 to 31.03.2012. The Assessing Authority raised tax,

interest and penalty of ₹1,50,098.00 u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') basing on AG Audit objection.

The Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority confirmed the assessment and dismissed the appeal. Being aggrieved with the order of the First Appellate Authority, the Dealer prefers this appeal. Hence, this appeal.

The State files cross-objection and additional cross-objection.

3. The learned Counsel for the Dealer submits that the Assessing Authority reopened the proceeding u/s. 43 of the OVAT Act without forming any opinion even after completion of 42 proceeding. So, he submits that the orders of the First Appellate Authority and the Assessing Authority are not sustainable in the eyes of law.

He relies on the decision of the Hon'ble Apex Court in case of *M/s. Larsen & Toubro Ltd. v. State of Jharkhand and others* (Civil Appeal No. 5390 of 2007, decided on 21.03.2017).

4. Per contra, learned Standing Counsel (CT) for the State submits that the information on the strength of A.G. Audit report is a valid piece of information in possession of the Assessing Authority within the meaning of Section 43 of the OVAT Act. So, he submits that the order of the First Appellate Authority confirming the assessment order suffers from no infirmity.

5. Having heard rival submissions and on careful scrutiny of the record, it appears that the A.G. Audit has pointed out some audit objection with regard to non-reversal of ITC due to branch transfer of goods for ₹3,49,536.00.

In course of hearing, the Dealer challenges the maintainability of the proceeding on the ground that the A.G. Audit objection is merely change of opinion and as such, the assessment already completed u/s. 42 of the OVAT Act cannot be disturbed. It is not in dispute that the proceeding u/s.

42 of the OVAT has already been completed basing on the AVR. So, it is clear that prior to 43 proceeding, a proceeding u/s. 42 of the OVAT Act was completed. It further reveals that ITC of ₹38,04,560.00 was credited for the years to 2007-08 to 2011-12, against which 'nil' ITC was reversed, ITC of ₹34,93,356.00 was to be adjusted against VAT sales and ₹3,11,204.00 was to be adjusted against CST sales. The A.G. Audit raised objection for non-reversal of ITC against branch transfer sale.

Section 43(1)(c)(ii) of the OVAT Act prescribes that the Assessing Authority may serve a notice on the Dealer as per law on the basis of any information in his possession, which indicates that the whole any part of the turnover of the Dealer in respect of any tax period(s) has escaped assessment or has been under assessed; and proceed to assess to the best of his judgment the amount of tax due from the Dealer if the Dealer has been allowed ITC to which he is not eligible.

The A.G. Audit found that the Dealer had effected branch transfer of goods worth of ₹33,04,500.00 and ₹2,93,51,336.00 during the years 2010-11 and 2011-12 respectively. But, the Assessing Authority had not computed the proportionate non-reversal ITC due to branch transfer of goods. So, this A.G. Audit information comes within the meaning of information in possession of the Assessing Authority as required for initiation of proceeding u/s. 43 of the OVAT Act.

6. Further, order dated 19.06.15 of the record transpires that the Assessing Authority has not recorded any reason for initiation of the proceeding u/s. 43 of the OVAT Act while issuing notice in Form VAT-307. The assessment order is also silent about reason of initiation of proceeding u/s. 43 of the OVAT Act. The relevant portion of the order is reproduced below for better appreciation :-

“xxx Receiving AG audit objection regarding non reversal of ITC due to branch transfer of goods, the reassessment proceeding was initiated against the dealer and statutory notice in Form VAT 307 was issued to the dealer fixing the date to 14.07.2015. xxx”

As the order sheet and assessment order itself is silent regarding forming of opinion for initiation of proceeding u/s. 43 of the OVAT Act and the Assessing Authority initiated the assessment u/s. 43 of the OVAT Act merely on the basis of A.G. Audit objection, so the prosecution fails due to non-recording of reasons before initiation of proceeding as per settled position of law. Hence, it is ordered.

7. Resultantly, the appeal stands allowed and the impugned order of the First Appellate Authority is hereby set aside. The assessment order is quashed. Cross-objection and additional cross-objection are disposed of accordingly.

**Dictated & Corrected by me**

**Sd/-  
(G.C. Behera)  
Chairman**

**Sd/-  
(G.C. Behera)  
Chairman**