

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

S.A. No.321(V) of 2016-17

(Arising out of the order of the learned JCCT, Koraput Range,
Jeypore, in First Appeal case No. AAV.(MKG)06/16-17,
disposed of on 28.10.2016)

**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.Shivasankar Modern Rice Mill,
Jayanagr, MV 42, PO/Dist:Makkangiri. ... Appellant.

- V e r s u s -

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

For the Appellant ... Mr.S.Sundaram,Advocate.
For the Respondent ... Mr.M.L.Agarwal, SC(CT)

Date of hearing: **30.01.2023** * * * Date of Order:**02.02.2023**

ORDER

Dealer prefers this appeal challenging the order dated 28.10.2016 passed by the learned Deputy Commissioner of Sales Tax (Appeal), Koraput Range, Jeypore (in short, DCST/FAA) in first appeal case No.AAV(MKG)06/16-17 thereby confirming the order of assessment passed by the learned Asst. Commissioner of Sales Tax, Malkangiri Circle, Malkangiri (in short, STO/AO) under Section 43 of the OVAT Act, 2004 for the period from 01.04.2012 to 20.10.2014 raising a demand of Rs.28,84,851.00 including penalty of Rs.19,23,234.00 under Section 43(2) of the Act.

2. The case at hand is that the dealer appellant being a rice miller purchases paddy from different mandies on behalf of the Odisha State Civil Supplies Corporation. After milling, delivers rice to the said corporation and sales broken rice, bran in the open market. After a joint verification of the commodities in the mill premises of the firm by the vigilance wing, Nabarangpur, shortage of Q.11817.13 paddy was detected. Then the STO, Vigilance of Nabarangpur division issued notice to the dealer and on examination of the books of accounts found many discrepancies. Thereafter, a tax evasion report was submitted against the dealer on the basis of which assessment was done under Section 43 of the OVAT Act and tax was levied amounting to Rs.9,61,617.00 and penalty of Rs.19,23,234.00 was also imposed under Section 43(2) of the Act. So, the total demand of Rs.28,84,851.00 was raised.

3. Against such demand, the dealer preferred first appeal before the learned DCST (Appeal), Koraput Range, Jeypore who confirmed the demand.

4. Further being dis-satisfied with the order of the learned DCST (Appeal), Koraput Range, Jeypore (FAA) , the dealer has preferred the present second appeal as per the grounds stated in the grounds of appeal.

5. Cross objection is filed in this case by the State respondent.

6. During course of argument, learned counsel for the dealer appellant vehemently contended that without assessing the

appellant under Section 39,40, 42 or 44 of the OVAT Act, the assessing officer assessed the appellant under Section 43 of the OVAT Act which is against the statute and liable to be quashed.

7. Per contra, learned Standing Counsel for the revenue supported the order of the learned first appellate authority with the submission that the same is in accordance with 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, Malkangiri Circle, Malkangiri for the period 01.04.2012 to 20.10.2014 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 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,

Sd/-

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

I agree,

I agree,

Sd/-

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

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

Sd/-
(Shri M.Harichandan)
Accounts Member-I