

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

**S.A. No. 40 (VAT) of 2018**

(Arising out of order of the learned JCST (Appeal), Sambalpur Range,  
Sambalpur, in Appeal No. AA-266/SAI/VAT/2014-15,  
disposed of on 21.12.2017)

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

M/s. Krishna Marbles and Tiles,  
At- Kainsir Road, Ainthapali,  
PO- Budharaja, Sambalpur-768004 ... Appellant

-Versus-

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

For the Appellant : Sri D.K. Das, Advocate  
For the Respondent : Sri N.K. Rout, Addl. SC (CT)

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Date of hearing : 08.11.2023 \*\*\* Date of order : 23.11.2023  
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**ORDER**

Dealer is in appeal against the order dated 21.12.2017 of the Joint Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur (hereinafter called as 'First Appellate Authority') in F.A. No. AA-266/SAI/VAT/2014-15 confirming the assessment order of the Deputy Commissioner of Sales Tax, Sambalpur I Circle, Sambalpur (in short, 'Assessing Authority').

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

M/s. Krishna Marbles and Tiles carries on business in marbles and tiles of all varieties. The assessment relates to the period 01.04.2012 to 31.03.2013. As per corrigendum order, the Assessing Authority rectified tax

and penalty to ₹6,39,168.00 u/s. 43 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') on the basis of Tax Evasion Report (TER).

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 supporting the order of the First Appellate Authority to be just and proper.

3. Learned Counsel for the Dealer submits that the order of assessment passed by the Assessing Authority u/s. 43 of the OVAT Act is not maintainable in absence of any assessment u/s. 39, 40, 42 or 44 of the OVAT Act. He further submits that the acceptance of self-assessment was not communicated to the Dealer and as such, reopening the proceeding u/s. 43 of the OVAT Act on receipt of TER is not sustainable in law. He further contends that the preliminary issue should be addressed first before going to the merit of the case. He also argues that the calculation of sales suppression of Sambalpur Head Office is presumption and assumption only.

He relies on the decision of the Hon'ble Court in case of *M/s. Keshab Automobiles v. State of Odisha* (STREV No. 64 of 2016, decided on 01.12.2021). So, he submits that the orders of the Assessing Authority and the First Appellate Authority are liable to be set aside in the ends of justice.

4. On the contrary, the learned Standing Counsel (CT) for the State submits that self-assessed return filed u/s. 39 of the OVAT Act was verified by the Assessing Authority. He did not raise the issue in the earliest opportunity, i.e. Assessing Authority, but only took such ground of maintainability before the First Appellate Authority. He submits that the First Appellate Authority has already dealt in the said ground. He further

submits that communication/acknowledgement of the order of acceptance of self-assessed return is a matter of fact and the same cannot be objected at this belated stage before this forum.

5. Heard the rival submissions and gone through the orders of the Assessing Authority and First Appellate Authority vis-a-vis the materials on record. The Dealer raised the preliminary issue of maintainability of proceeding u/s. 43 of the OVAT Act in absence of any assessment u/s. 39, 40, 42 or 44 of the said Act.

The State claims that the First Appellate Authority has already considered the preliminary issue of maintainability and the Dealer has not raised the same at the earliest opportunity before the Assessing Authority. Admittedly, the Dealer has not raised the point of maintainability before the Assessing Authority, but raised the same only before the First Appellate Authority.

It is settled law that a proceeding u/s. 43 of the OVAT Act is not maintainable unless any proceeding u/s. 39, 40, 42 or 44 of the said Act has been completed, self-assessment return has been accepted and communicated to the Dealer. The Dealer has taken the same before the First Appellate Authority. It is also settled that the point of law can be taken at any stage even before this forum. Maintainability of 43 proceeding in absence of acceptance of self-assessed return is a point of law and same can be challenged in any forum. Moreover, the law is well settled when the same has been decided by the Hon'ble High Court of Orissa and affirmed by the Hon'ble Apex Court. After such settled law, the Dealer can take the same issue before this forum even for the first time without raising earlier. So, the submission of the learned Addl. Standing Counsel (CT) cannot be accepted.

Hon'ble Court in the case of *M/s. Keshab Automobiles* cited supra have been pleased to observe in para-22 as follows :-

“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 1<sup>st</sup> October, 2015 are not ‘accepted’ either by a formal communication or an acknowledgement 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 fulfilment of other requirements of that provision as it stood prior to 1<sup>st</sup> October, 2015.”

In view of the ratio laid down by the Hon’ble Court, the Department is required to communicate a formal communication or acknowledgment regarding the acceptance of the self-assessment u/s. 39 of the OVAT Act. In this case, the State has not filed any materials to show that the acceptance of the self-assessment has been communicated to the Dealer. Thus, the First Appellate Authority went wrong in rejecting the contention of the Dealer with regard to maintainability. As the proceeding u/s. 43 of the OVAT Act is not maintainable on the point of jurisdiction and the same has been decided as preliminary issue, so, it is not required to deal with other issues of the Dealer on merit.

6. In view of the decision of the Hon’ble Court in case of *M/s. Keshab Automobiles* cited supra, the assessment proceeding u/s. 43 of the OVAT Act is without jurisdiction in absence of any assessment u/s. 39, 40, 42 or 44 of the said Act. So, the orders of the Assessing Authority and the First Appellate Authority under the OVAT Act are not sustainable in the eyes of law as the same are without jurisdiction. Hence, it is ordered.

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

**Dictated & Corrected by me**

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

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(G.C. Behera)  
Chairman**