

**BEFORE THE DIVISION BENCH, ODISHA SALES TAX TRIBUNAL,  
CUTTACK.**

**S.A.No.21(V) of 2019.**

Arising out of the order of Ld. Addl.CST,(Appeal) Central Zone,  
Odisha, Cuttack, in First Appeal Case No.AA-106101810000038/  
disposed of on dated 17-01-2019)

**P r e s e n t:-** **Shri S.K.Rout,** & **Shri S.R.Mishra,**  
2<sup>nd</sup> Judicial Member Accounts Member-II

M/s. Jindal India Thermal Power Ltd,  
Deranga, Kaniha, Talcher . . . Appellant,

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

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

For the Appellant . . . Mr. R.P.Kar, Sr. Adv. &  
Mr.A.K.Das, Adv.

For the Respondent . . . Mr. D.Behura,  
Standing Counsel,  
(Commercial Taxes).

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Date of Hearing: 7-10-2023

Date of Order:04-11-2023  
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**ORDER**

The dealer-appellant on filing this second appeal U/s.78 of the Odisha Value Added Tax Act, (in short, OVAT Act) seeks the intervention of this forum against the order dated 17.01.2019 passed by the Learned Additional Commissioner of Sales Tax,(Appeal)(hereinafter referred to as Ld. Fist Appellate Authority/Ld. FAA) passed in First Appeal Case No.AA-106101810000038, confirming the order of assessment passed U/s.43 of the OVAT Act by the Learned Assessing Authority, Angul Range, Angul, (in short Ld. AA) in case of Jindal India Thermal Power Ltd., for the tax period from 1.4.2011 to 31.3.2013.

2. The brief fact of the case is that the dealer appellant which was in process of setting up of a Thermal Power Plant was subjected to audit assessment U/s.42 of the OVAT Act and was assessed to Nil vide the order passed by the Ld. AA on 30.9.2013.

3. As per the impugned order of assessment passed U/s.42 of the OVAT Act, although the dealer was yet to start any production during

the period, yet has supplied goods to contractors on cost recovery basis for which the audit has suggested for levy of tax of Rs.1,28,33,046.00 and penalty of Rs.2,56,66,093.20 U/s.42(5) of the OVAT Act. On the above findings made in the Audit Visit Report, the dealer has discharged the tax of Rs.1,28,33,046.00 on 31.7.2013 i.e. prior to completion of assessment undertaken U/s.42 of the OVAT Act. Since the dealer has discharged the tax liability prior to assessment, the Ld. AA has accepted the same and assessed the dealer to 'Nil' without imposition of any penalty.

4. Thereafter, the Ld. AA has reopened the assessment U/s.43 of the OVAT Act, which resulted with the impugned order apparently on the ground that there was less payment of admitted tax of Rs.47,023.00 and non-levy of penalty U/s.42(5) of the OVAT Act as the dealer has deposited the tax on admitting the same only after being pointed out by the Audit Team. Accordingly, the assessment completed U/s.43 of the OVAT Act, resulted with extra demand of Rs.2,64,08,653.00 which includes penalty of Rs.2,63,61,630.00 U/s.43(2) of the OVAT Act.

5. The dealer on being aggrieved with the aforesaid order passed U/s.43 of the OVAT Act has preferred an appeal before the Ld. FAA who vide his order dated 17.1.2019 has confirmed the impugned order of assessment.

6. On being further aggrieved the dealer has preferred the present appeal primarily with the following grounds:-

(i) That the impugned order passed by the Ld. FAA is arbitrary and hence liable to be quashed.

(ii) That the impugned assessment proceeding initiated at the behest of audit objection without any formation of opinion of own by the Ld. AA is bad in law as well as the result of change of opinion for which is not sustainable before the eyes of law.

(iii) That the application of Sec.33(5) of the OVAT Act for initiation of proceeding U/s.43 of the OVAT Act is improper.

7. No cross objection was filed by the State-Respondent.

8. Heard the case, gone through the impugned orders of the forums below vis-a-vis the materials available on record.

9. From amongst the issues put-forth on the grounds of appeal, substantial dispute stressed upon by the Ld. Counsel of the dealer is that of jurisdiction of the Ld. AA in initiating the proceeding U/s.43 of the OVAT Act without fulfilment of the prerequisites. He emphatically stated that the applicability of the said section merely for imposition of penalty, left out at the time of assessment U/s.42 of the OVAT Act, is without jurisdiction of the Ld. AA.

10. Per contra, Mr. D.Behura, learned counsel representing the State supports the order of the forum below and averred that since the disputed payment of tax of Rs.1,31,33,792.00 was not admitted in the returns but was paid after the Audit Findings, the same violates the proviso of section 34(5) of the OVAT Act warranting initiation of the present proceeding U/s.43 of the OVAT Act and as such no irregularity was committed by the Ld. AA.

11. On hearing of the above rival contentions and going through the records produced, it transpires that although the AVR has suggested for levy of penalty on the short payment of tax detected in course of Audit, the Ld. AA has consciously not levied the same while finalising the assessment U/s.42 of the OVAT Act.

12. Now the question arises whether for less payment of admitted tax and for levy of penalty, which could not be imposed at the time of original assessment, constitute valid reasons for reopening of the proceeding U/s.43 of the OVAT Act ?

In this context it becomes imperative to refer to Section 43 of the OVAT Act which reads as follows:-

Where, after a dealer is assessed 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 –

(a) escaped assessment, or

- (b) been under-assessed, or
- (c) been assessed at a rate lower than the rate at which it is assessable;

or that the dealer has been allowed –

- (i) wrongly any deduction from his turnover, or
- (ii) input tax credit, to which he is not eligible,

the assessing authority may serve a notice on the dealer in such form and manner as may be prescribed and after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he deems necessary, proceed to the best of his judgement the amount of tax due from the dealer.]

13. In the case in hand, it is observed none of the above conditions has ever existed warranting initiation of proceeding U/s.43 of the OVAT Act by the Ld. AA. If there was less payment of admitted tax of Rs.42,023.00 and non-levy of penalty, the same could have been mitigated by the revenue through other appropriate proceeding but not by invoking Section 43 of the OVAT Act.

14. With regard to the levy of penalty, the learned counsel of the dealer in course of the present proceeding has cited the decision of Hon'ble High Court of Orissa, in W.P.(C). No.22773 of 2010 in case of **Mahanadi Coal Fields Ltd, Vrs. Commissioner of Sales Tax and others**, in which Hon'ble Court have been pleased to observe that :-

*“...After hearing learned counsel for the parties and going through the materials available on record, this Court finds that the assessing officer has got every power in terms of Section 9C(3), (4) and (5) of the Orissa Entry Tax Act to impose penalty or interest in appropriate cases but the same should be done only at the time of passing the assessment order and he cannot reopen a matter by issuing notice for the purpose of imposing penalty on the amount of tax assessed. Accordingly, this Court has no hesitation to quash the*

*assessment order dated 10.11.2010 passed by the Deputy Commissioner of Sales Tax (LTU), Sambalpur Range, Sambalpur under annexure-1 and directs accordingly..”*

14. The above judicial pronouncement made by the Hon’ble High Court of Orissa, was directed against the re-opening of assessment U/s.10 of the OET Act, which is in parimateria with Section 43 of the OVAT Act. Keeping reliance on the aforesaid decision of the Hon’ble High Court, we thus come to conclusion that the initiation of proceeding U/s.43 of the OVAT Act without fulfilling the pre-conditions and for levy of penalty is unjust and without jurisdiction.

15. Resultantly, the appeal preferred by the dealer-appellant is allowed in full and the impugned order of the Ld. FAA is hereby set-aside. As a necessary corollary thereof, the order of the Ld. AA U/s. 43 of the OVAT Act is quashed.

Dictated and corrected by me

**Sd/-**  
**(S.R.Mishra)**  
Accounts Member-II.

I agree,

**Sd/-**  
**(S.R.Mishra)**  
Accounts Member-II.

**Sd/-**  
**(S.K.Rout)**  
2<sup>nd</sup>Judicial Member.