

**BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL,  
CUTTACK.**

**S.A.No. 279(V)/2017-18**

(Arising out of order of the Id.JCST, Puri Range, Puri, in First  
Appeal Case No. 106111711000037,  
disposed of on dtd.31.08.2017)

**Present: Sri S.K. Rout**  
**2<sup>nd</sup> Judicial Member**

M/s. Shree Balaji Tabacoo Bhandar,  
At/P.O.- Main Road, Pipili,  
Dist. Puri

.... Appellant

**-Versus-**

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

.... Respondent

For the Appellant :Mr. S.C. Nanda & Mr. B. Sendha, Advocates  
For the Respondent :Mr. S.K. Pradhan, A.S.C. (C.T.)

(Assessment Period : 31.03.2006 to 25.05.2011)

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Date of Hearing: 08.04.2022 \*\*\* Date of Order: 21.04.2022

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**ORDER**

Challenge in this appeal is the order dtd.31.08.2017 passed by the learned Joint Commissioner of Sales Tax, Puri Range, Puri/First Appellate Authority (in short, JCST/FAA) in First Appeal Case No.106111711000037 thereby reducing the amount of assessment and allowing the appeal in part against the assessment order passed by the learned Assessing Authority/Sales Tax Officer, Puri Circle, Puri (in short, AA/STO) u/s.43 of the Odisha Value Added Tax Act, 2004 (in short, OVAT

Act) for the tax periods 31.03.2006 to 25.05.2011 raising an extra demand of tax of Rs.13,86,824/- and penalty of Rs.27,73,648/-.

2. The case at hand is that, the dealer-appellant being a proprietorship concern is engaged in trading of unmanufactured tobacco having its place of business at Pipili. The Audit Assessment of the proprietorship concern was completed on dtd.17.01.2012 relating to the tax period from 31.03.2006 to 25.05.2011 by determining the GTO and TTO at Rs.1,22,88,437/- and Rs.1,13,793.77 respectively. Later on the Accountant General, Orissa, Bhubaneswar (in short AG) during course of statutory audit found the assessment order as defective. The AG raised the objection that "Unmanufactured Tobacco" is taxable @4% from 01.07.2005 to 31.05.2007 vide Entry-123 of the Part-II of the Schedule-B of the Orissa Value Added Tax Act. From 01.06.2007 onwards the unmanufactured tobacco has become @12.5% as unspecified item under Part-III of Schedule B to the OVAT Act as the State Government omitted the entry No.123 from the schedule with the intention to levy tax at a higher rate than four percent. On scrutiny of the assessment records and statements furnished by the dealer for the tax period 31.03.2006 to 25.05.2011, AG observed that the dealer had effected total sale of unmanufactured tobacco valued Rs.1,21,70,362/- excluding the Value Added Tax. The details of sales turnover, rate of tax and VAT not levied on the said turnover was finalized and assessed as per the table given below :

Tax periods	Sale value of tax Exempted unmanufactured tobacco	Tax Rate applicable	Tax not levied
01.04.2006 to 31.03.2007	Rs.16,57,041.00	@4%	Rs.66,282.00
01.06.2007 to 31.03.2011	Rs.98,71,834.00	@12.5%	Rs.12,33,979.00
01.04.2011 to 25.05.2011	Rs.6,41,487.00	@13.5%	Rs.86,601.00
<b>Total</b>	<b>Rs.1,21,70,362.00</b>		<b>Rs.13,86,862.00</b>

A.G. observed that non-levy of VAT at the appropriate rate on turnover of sale of unmanufactured tobacco of Rs.1,21,70,362/- resulted in short levy of tax of Rs.13,86,862/-.

Pursuant to such observation of A.G. proceeding u/s.43 of the OVAT Act was initiated against the dealer-assessee for the tax period in question. So, notice in Form VAT-307 was issued to the dealer. Pursuant to such notice, representative of the dealer appeared who sought for the reason of reopening of the proceeding u/s.43 of the Act. So, the reason for reopening of the proceeding u/s.43 of the OVAT Act was furnished by the ld.STO in spite of issuance of statutory notices, when the dealer declined to participate in the proceeding, assessment was completed ex-parte by the ld.STO.

3. Being aggrieved with such assessment order, the dealer filed first appeal before the learned JCST, Puri Range, Puri who reduced the amount of assessment allowing the appeal partly.

4. Being dissatisfied with the order of ld.FAA, the present second appeal has been preferred by the dealer.

5. Cross objection has been filed by the State-respondent in this case.

6. Head the contentions and submissions of both the parties in this regard. Leaned Counsel appearing for the dealer vehemently contended that initiation of proceeding u/s.43 of the OVAT Act and issuance of notice in VAT Form-307 is not at all maintainable and without jurisdiction. Further, learned Counsel for the dealer forcefully argued that the percentage of tax levied and imposition of penalty are not correct. Per contra, learned counsel appearing for the Revenue argued stating that, the order of the learned FAA is quite genuine in the eye of law.

The instant case requires adjudication of three issues :

- (1) Whether initiation of proceeding for reassessment u/s.43 of the OVAT Act is genuine ?
- (2) Whether unmanufactured tobacco is subject to tax @4% ?
- (3) Whether imposition of penalty is proper ?

With regard to issue no.1, the contention of the learned Advocate for the dealer is that initiation of reopening of assessment u/s.43 of the OVAT Act by the learned AO on the basis of AG Audit objection without formation of his subjective opinion/satisfaction is not maintainable and without jurisdiction. Prior to adjudication, let me have a glance to the language as entailed in Sec.43(1) of the OVAT Act which is as follows : “Where after a dealer is assessed u/s.39, 40, 42 or 44 of the OVAT Act for any tax period, the assessing authority on the basis of any information in his possession is of opinion that the whole or part

of the turnover of the dealer in respect of such tax period on tax periods has ;

*(a) escaped assessment, or  
 (b) been under assessed, or  
 (c) been assessed at a lower rate than the rate at which it is assessable, or that the dealer has been allowed-  
 (d) wrongly any deductions from the turn over, or  
 (II) input tax credit to which he is not eligible,  
 the assessing authority may serve a notice on the dealer in such form & manner as may be prescribed & after giving a reasonable opportunity of being heard & after making any other enquiry as he deems necessary, proceed to assess the dealer to best of his judgment”.*

After have a glance to this section, it becomes clear that prior to initiation of a proceeding u/s.43(1) of the OVAT Act, two conditions must be fulfilled :

- (1) The Assessing Authority must be in possession of an information and (2) basing upon such information, the assessing authority must form an independent objective opinion that the turnover of the dealer has escaped assessment or under assessed etc. So, it becomes clear that the formation of required opinion and belief by the Assessing Officer is a condition, precedent before reopening of assessment. Whether such aspects are complied with in the instant case ? To support it, learned Counsel for the Revenue argued that although unmanufactured tobacco is exigible to be taxed under OVAT Act, but the assessing authority while finalizing the assessment proceeding treated unmanufactured tobacco as a tax free commodity which led loss to Government Revenue. So, on the basis of information, the STO/AA, Puri Circle,

Puri formed an opinion that there is prima facie evidence that the dealer has been under assessed in respect of tax period he was earlier assessed u/s.42 of the OVAT Act. In the instant case, the learned AA on receipt of AG objection, formed his opinion which is clear for his order dtd.21.03.2013. Learned Counsel for the Revenue has also relied upon the decisions of our own Hon'ble Court decided in the case of **Bindlish Chemical and Pharmaceutical Works Vrs. Commissioner of Sales Tax, Orissa and Another** reported in Vol.89 STC Page 102 and in **D. Ch. Guruvalu Son & Co. Vrs. Sales Tax Officer, Koraput-II Circle** reported in 2008 VST 509 (ORI).

Apart from this, learned Counsel for the Revenue to support his claim has also relied upon the earlier order of this Tribunal decided by Full Bench in S.A.No.230(V)/2016-17 decided on dt.20.12.2017. So, adhering the principle of parity, it is to be held that initiation of proceeding for reassessment u/s.43 of the OVAT Act in the instant case is genuine. On the other hand, the dealer has relied upon the decision of this Tribunal decided by Division Bench in S.A.No.135(ET) of 2017-18 and a decision of our Hon'ble Court decided in the case of **The Indure Limited Vrs. Commissioner of Sales Tax and Others** on dtd.04<sup>th</sup> July, 2006, but the same are not befitting in this instant case in view of it's peculiar fact and circumstances.

Then comes the next issue whether unmanufactured tobacco is subject to tax @4%. On this score, learned Counsel for the Revenue urged that, this particular issue has already been

settled by this Tribunal in S.A.No.230(V) of 2016-17 (Division Bench)) and S.A.No.129(V) of 2012-13 (Full Bench). It is clear that unmanufactured tobacco fell under the provisions of OVAT Act and the rate of tax thereon was 4% as per Entry Sl.No.123 of the Part-II of the Schedule-B attached to the OVAT Act upto 31<sup>st</sup> May, 2007. The entry "Unmanufactured Tobacco" was brought within schedule A of the OVAT Act w.e.f. 01.06.2007 vide Entry Sl.No.35A. So, both the Notifications No.24984-CTA-2007 (SRO 343/07) and Notification No.24981-CTA-14/2007 (SRO-342/07) must be read conjointly as in one notification the entry is omitted from Schedule B and the said entry is inserted in Schedule A on the same day and as such, it is quite certain that VAT @4% is leviable from 01.04.2006 to 31.05.2007. From 01.06.2007 the unmanufactured tobacco was allowed to continue in Entry Serial 35 A of the Schedule A of the OVAT Act till 07.12.2011. From 08.12.2011 vide F.D. Notification No.52002-CTA-7/2011 (SRO 1026/2011) such item was omitted from the Schedule A. So, in view of such notifications, the observations made by A.G. is not genuine relating to the period from 01.06.2007 to 25.05.2011. So, in view the above analysis, the dealer-appellant is liable to pay VAT @4% on turnover of sale of unmanufactured tobacco for the period from 01.04.2006 to 31.05.2007.

So, when the dealer-appellant is required to pay VAT of Rs.66,282/- on sale turnover of Rs.16,57,041/-, ultimately, he is liable to pay penalty equal to twice the amount of VAT assessed u/s.43 of the OVAT Act as the turnover was escaped from

assessment. The scenario of the instant case clearly entails that all the aspects have properly been adjudicated upon by the learned FAA in consonance with the position of law and as such, the same needs no interference.

7. In the result, the appeal preferred by the dealer is dismissed and the order of the ld.FAA is hereby confirmed. The cross objection filed by the State-respondent is disposed of accordingly.

Dictated and Corrected by me,

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

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