

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

**Present: Smt. Suchismita Misra, Chairman,  
Sri Subrata Mohanty, 1<sup>st</sup> Judicial Member  
&  
Sri R.K. Rout, Accounts Member-II**

**S.A.No.128(V) of 2013-14**

(Arising out of the order of the JCST, Bhubaneswar Range,  
Bhubaneswar, in First Appeal Case No. AA106111011000154/  
BHI/10-11, disposed of on dtd.24.04.2013)

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

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

M/s. Auro Agencies,  
Puspa Market,  
Cuttack Road, Bhubaneswar. ... Respondent

**S.A.No.147(V) of 2013-14**

(Arising out of the order of the JCST, Bhubaneswar Range,  
Bhubaneswar, in First Appeal Case No. AA106111011000154/  
BHI/10-11, disposed of on dtd.24.04.2013)

M/s. Auro Agencies,  
Puspa Market,  
Cuttack Road, Bhubaneswar. ... Appellant

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

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

For the Revenue : Mr. M.S. Raman, A.S.C.  
For the Dealer : Mr. N.K. Das, Advocate

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Date of Hearing: 19.06.2019 \*\*\*\* Date of Order: 20.06.2019  
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**ORDER**

Both the appeals above, one at the instance of Revenue and the other at the instance of the assessee-dealer preferred against the order of first appellate authority, whereby and wherein a demand raised in an assessment u/s.43 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) by the assessing authority covering the tax period from 01.04.2009 to 30.10.2009 relating to the assessee-dealer was modified but not to the satisfaction of either parties.

For sake of convenience, both the appeals are decided by this common order.

2. The assessee-dealer M/s. Auro Agencies, a registered dealer under the Act engaged in trading of glass sheets, aluminium sheets and fittings on wholesale and retail basis, both interstate and intrastate transactions. The dealer was originally self-assessed u/s.39 of the OVAT Act on 06.01.2010. However, at a later period basing on a tax evasion report dtd.16.02.2010 submitted by Enforcement Wing, Bhubaneswar with the allegation of stock suppression, purchase suppression and sale suppression, an escaped assessment proceeding was initiated covering tax period from 01.04.2009 to 31.10.2009. Allegations as forthcoming from the tax evasion report can be categorized under five heads. The determination of tax liability by the assessing authority and later by the first appellate authority in the appeal preferred by the dealer mentioned herein below for better appreciation.

			Assessing Authority	First Appellate Authority
(A)	Sales suppression detected on verification of physical cash vis-à-vis issue of tax/retail invoice	-	Rs.6,388/-	Nil
(B)	Suppression of purchase detected on verification of physical stock	-	Rs.4,47,957/- (@ 65/-/sft)	Rs.18,36,289.00 (Shortage) (@26.31/sft)
(C)	Sale suppression on verification of recovered documents	-	Rs.45,36,632/- (@65/-/sft)	Rs.18,36,289.00 (@ 26.31/sft)
(D)	Sale suppression on verification of recovered documents (payments received)	-	Rs.80,16,427/-	Rs.16,48,715.00
(E)	Purchase suppression detected from verification of recovered documents (payments made)	-	Rs.1,06,90,868/-	Allowed in full
	Total suppression established	-	Rs.2,36,98,272/-	Rs.49,27,821.19

The allegations against the dealer are, (i) excess cash, (ii) excess physical stock, (iii) unaccounted for payment received, (iv) unaccounted payment made and (v) sale suppression.

It is evident from the comparative chart of the assessment by two authorities below that, the first appellate authority deleted the unaccounted for excess cash of Rs.6,388.00 and unaccounted for purchase based on slips to the tune of Rs.1,06,90,868.00. However, the first appellate authority enhanced the discrepancy of stock/excess physical stock value from Rs.4,47,957.00 to Rs.15,12,817.00. On the other hand, it has reduced the unaccounted for sale based on recorded written slips from Rs.45,36,632.00 to Rs.18,36,289.00 and unaccounted for sale based on transaction recorded in the written slips towards payment received from Rs.80,16,427.00 to Rs.16,48,715.00. While re-determining the

suppressions, the first appellate authority has valued per sqft of glass sheet at Rs.26.31 instead of Rs.65.00 as held by the assessing authority.

3. At first instance, the visiting officials on verification of the physical cash with sale proceeds of the day excess differential amount of Rs.6,388.00. Then, on verification of the stock book with physical stock, the visiting officials noticed shortage of 1,40,802.26 sqft. of glass, later on reconciliation of this taking into consideration of the stock receipt on stock receipt on the day of visit and delivered on the strength of delivery challan, stock sold against tax invoice and retail invoice and breakage and damage, the shortage was recalculated at 72.173.03 sqft. Further, at the assessment stage, the assessing authority after reconciliation held on excess stock only to the quantity of 6891.64 sqft. That excess stock was valued by Rs.65.00 per sqft. totaling to Rs.4,47,957.00.

The next allegation as per vigilance officials is, they recovered 72 nos. of written slips and printed documents depicting some business transactions. The said documents were investigated into and out of that the enforcement officials found discrepancy in 22 nos. of slips. The said 22 nos. of slips further verified and found it contained out of account sale transaction of 69,794.34 sqft. of glass valued at Rs.45,36,632.10 i.e. @ Rs.65.00 per sqft. Some transactions recorded in those slips were representing receipt of payment of Rs.80,16,427.00 as received by the dealer on account of sale, so it was treated as sale suppression. Further, from those slips, it was found that, an amount of Rs.1,06,90,868.00 was shown as payment made by the dealer on account of purchase, that amount was treated as purchase suppression. To sum up, the assessing authority determined the suppression as per the table below.

(A)	Sales suppression detected on verification of physical cash vis-à-vis issue of tax/retail invoice	-	Rs.6,388/-
(B)	Suppression of purchase detected on verification of physical stock	-	Rs.4,47,957/- (@ 65/-/sft)
(C)	Sale suppression on verification of recovered documents	-	Rs.45,36,632/- (@65/-/sft)
(D)	Sale suppression on verification of recovered documents (payments received)	-	Rs.80,16,427/-
(E)	Purchase suppression detected from verification of recovered documents (payments made)	-	Rs.1,06,90,868/-
	Total suppression established	-	Rs.2,36,98,272/-

The total suppression as per table above was taxed @12.5%. The tax due from the dealer was calculated at Rs.99,62,285.40, addition to that tax due penalty u/s.43(2) of the OVAT Act for Rs.59,24,570.00 was imposed thereby, the total raised against the dealer was at Rs.88,86,855.00.

Being aggrieved with such assessment, the dealer preferred appeal before first appellate authority who in turn, vide its impugned order re-determined the suppressions. The first appellate authority made a thorough scrutiny of each slips containing the unaccounted for money received against sale and money paid against unaccounted for purchase. He took consideration of the dealer's plea of outstanding loan amount from one M/s. Subhalav Trade Link Pvt. Ltd., Kolkata. The wrong crept in the calculation of the slips and ultimately it is found that, the dealer could properly explained the goods worth of Rs.1,06,90,868.00. Accordingly, he deleted the determination of the assessing authority regarding the unaccounted for payment made against the allegation of purchase suppression. However, with regard to unaccounted for payment received against sale suppression, the first appellate authority found the allegations under some of incriminating recovered slips are baseless and against few are correct, but in ultimate analysis, he found the determination of unaccounted for sale suppression recalculated at Rs.63,67,711.81.

Similarly, the recovery of excess cash of Rs.6,388.00 when duly explained it was accepted by the first appellate authority, so the said finding is beyond question. In determining the stock discrepancy, the first appellate authority enhanced the quantity of excess stock by Rs.37,37,481.15.

4. **Contention of the dealer**

- (i) fixation of price at Rs.65.00 per sqft of glass sheet is whimsical and not sustainable as exorbitant.
- (ii) determination of suppression is also not based on record and incorrect as the average loss to the goods in transit or in stock by handling has not been properly appreciated both in fact and figure particularly keeping view the fact that, the good dealt by the dealer are glass made goods.
- (iii) the enhancement on the suppression to the physical stock by the first appellate authority without giving statutory notice and without giving proper opportunity of being heard as required under law is illegal and not sustainable.
- (iv) It is further contended that the determination of suppression in sale is whimsical not based documents.

5. In cross objection Revenue has supported the impugned order to be legal and binding. On the other hand, the dealer has not raised cross objection in the appeal of the Revenue.

6. **Contention of the revenue in it s appeal**

The determination of price of glass by the FAA is incorrect as it is determined on the basis of average mean price without considering the market price.

No cross objection is filed to the revenue appeal by the dealer.

7. The rival contentions raised following substantive questions of law and fact for decision.

- (i) Whether the first appellate authority is wrong in estimating the price of the glass sheet when reducing the price from the price determined by the assessing authority?
- (ii) Whether the enhancement of suppression in stock by the first appellate authority is not sustainable as the dealer was not given a particular of being heard by proper notice for proposed enhancement?
- (iii) Whether the determination of suppression as well as stock discrepancy by the first appellate authority and by the assessing authority, both are whimsical and arbitrary, hence not tenable?
- (iv) What order?

8. **Point No.1**

The suppression when detected, the assessing authority valued per sqft of the glass sheet under suppression at Rs.65.00. On the other hand, the first appellate authority fixed the price at Rs.26.31 per sqft. Claim of the dealer is, the price must be in between Rs.15.00 to Rs.20.00 sqft. On the other hand, claim of the Revenue is the price should not have been reduced by the first appellate authority and to that effect, the price fixed by the assessing authority should be restored.

At the outset, it is pertinent to mention here that, the plea of the Revenue in the cross objection in dealer's appeal contradict the plea of the Revenue in its own appeal. In cross objection to the dealer's appeal, Revenue has supported the findings of the first appellate authority which includes the finding on fixation of price at Rs.20.31. However, the only ground basing which the Revenue has preferred appeal is, fixation of price by first appellate authority is erroneous. It is noticed that, the first appellate authority, at one place of the impugned order has mentioned about the claim of the dealer, in argument before him claiming relating to price at Rs.15.00 to Rs.20.00 but, he has overlooked the grounds of appeal, wherein the dealer himself has claimed that, the average price per sqft is Rs.21.00.

Here, the plea of the dealer in argument contradict the plea taken in argument, so it is unsafe to accept the price either Rs.15.00 to Rs.20.00 or Rs.21.00 per sqft. The first appellate authority has compared the price of the goods from some sale bills of the dealer. In consideration of the shape and size and the price on the sale bill by an indepth analysis of the factual aspect, it has decided the average mean price at Rs.26.31 per sqft. It is not the case that, the first appellate authority has fixed the price mechanically or whimsically. When the findings is based on scrutiny of the documents relating to the sale price, then hardly there is any scope before this Tribunal to unsettled the findings of the first appellate authority on this question. It is not out of place to mention here that, no evidence led from either side in support of their respective claim of genuine price or how the price fixed by the first appellate authority is whimsical. So, it is believed that, the claim of the Revenue is bad both in law and fact, whereas the claim of the dealer on this point is not supported by any cogent reason with evidence, hence untenable.

9. **Point No.2**

The question of enhancement of the suppressed turnover by the first appellate authority is challenged by the dealer on the plea that, the first appellate authority has erred in law by not following the provision u/s.77(7)(b) of the OVAT Act read with Rule 89(3) of the OVAT Rules. The sub-rule (3) of the Rule 89 reads as follows:-

“(3) The appellate authority shall not enhance an assessment or a penalty without giving the appellant a reasonable opportunity of being heard against such enhancement”

10. Nothing can be brought to the surprise of the party by in court or tribunal at its own motion if it is a question of fact. When a new fact is taken into consideration, party should be made aware of the fact so as to enable him to give his explanation on the question of fact alleged. The provision above mandates for notice to the dealer when any new fact brought in by the authority. So, it can safely be said that, notice to the

dealer for enhancement is condition precedent. Any order not in accordance to the procedure laid down cannot withstand in the eye of law. Here, in this case, it is almost remain undisputed that, the enhancement to the stock suppression by the first appellate authority is surprising to the dealer in the final order, hence there is violation of principle of natural justice, resulting thereby the enhancement is illegal and not tenable in law.

11. As regards, excess physical stock and discrepancy of stock as determined by both the fora below, the claim of the dealer is, in glass business, in course of handling wastage/damage is a regular phenomenon. Further, in the sale of glass sheet cut into different sizes and shape as per the demand of individual customer. As a result, damage/wastage of the glass usually takes place. Further, in the process of polishing and handling also there is possibility of damage. So, the discrepancy found in the physical stock position of the glass articles on reconciling the physical stock with book stock is nothing but result of wastage. It is also argued that, the vigilance officials and authorities below have not appreciated the goods in the vehicle in unloading condition inside the business premises on the date of visit.

12. It is argued that, the first appellate authority while calculating the stock discrepancy has not allowed wastage @ 10%. It is vehemently argued that, calculation of damage should have been based on entire stock available as well as sold during the tax period under assessment so as to ascertain the exact quantity of suppression, if any. This argument of the learned Counsel for the dealer has got force in it. Wastage margin should be calculated on entire quantity of sale-purchase.

13. Learned Counsel for the dealer Mr. N.K. Das placed reliance in the matter of Commissioner of Sales Tax, Maharashtra State, Bombay v. East Asiatic Commercial Co (1985) 59 STC 10 (Bombay), State of Tamil Nadu v. Tata Oil Mills Co. Ltd. (1994) 94 STC 218 (Mad.), State of Punjab v. Seth Ganpat Ram Cotton Ginning and Pressing Factory (1989) 74 STC 1 (S.C.). Placing reliance in all the above authorities, it is argued that, the marginal wastage occurred in the context of business of glass sheet that too

in the process of sizing, cutting, polishing, transportation and handling and designing as per customer wish, the dealer should allowed wastage @ 10% of the physical stock.

14. So far as recovery of slips disclosing unaccounted for transactions, the claim of the dealer is, the slips are rough and random notes. However, the first appellate authority as well as the assessing authority with a pre set-up mind enhanced turnover mechanically. Learned Counsel for the dealer placed reliance in the matter of M/s. K.J. Ispat Ltd. v. Commissioner of Commercial Tax, Orissa (2012) 55 VST 228 (Ori.), whereby it has been held that-

“Law is well settled that no demand can be raised in an assessment on suspicion and conjecture. Therefore, before utilizing the said slip against the petitioner, the Assessing Officer has to prove that through the said noting in the slip, the petitioner has sold material worth of Rs.12,15,922/- which was not disclosed in the books of account”. Further at para 36, it was held that, “since the slip was recovered from the petitioner-assessee’s premises, the initial burden is on the assessee to explain the slip and prove that the said slip does not relate to any purchase or sale transaction of the dealer petitioner. However, where the dealer disowns the slip, unless it is established by the revenue that noting made in the slip relates to unaccounted business transaction of dealer no adverse inference can be drawn”.

15. Gone through the impugned order, argument of the Ld. Counsel for the dealer is if the slips are verified minutely, those are evident of rough estimation. The purchasers are registered dealers. The authority can notice them and ascertain from their returns about the actual suppression by the dealer if any. It is further argued that the rough slips are prepared in the regular course of business transaction. Ld. Counsel further argued that, there is an arithmetical error in calculation of the suppression even in accordance to the findings of FAA which needs to be rectified. It is also submitted that, the rough slips seized can be cross verified with the sale register.

16. On conspectus of the facts and circumstances discussed above, it is found that, (i) the first appellate authority has committed wrong in not

allowing damage to the goods like glass while calculating stock discrepancy, (ii) the enhancement notice being illegal not sustainable, (iii) the determination of suppression is to be made afresh and (iv) price as determined by first appellate authority in due consideration of relevant documents and average mean price calls for no interference.

In the result, it is ordered.

17. The appeal of the dealer is allowed in part on contest. The impugned order is set aside. The matter is remitted back to the first appellate authority for determination of tax liability afresh in the light of observation hereinabove. The first appellate authority is requested to make all endeavors to complete the remand assessment within a period of four months hence. The appeal of the Revenue is dismissed accordingly on contest.

Dictated & corrected by me,

Sd/-  
(Subrata Mohanty)  
1<sup>st</sup> Judicial Member

Sd/-  
(Subrata Mohanty)  
1<sup>st</sup> Judicial Member

I agree,

Sd/-  
(Suchismita Misra)  
Chairman

I agree,

Sd/-  
(R.K. Rout)  
Accounts Member-II