

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

S.A. Nos. 136 & 137 of 2008-09

&

S.A. Nos. 261 & 262 of 2008-09

(Arising out of orders of the learned ACST (Appeal), Puri Range,
Bhubaneswar in Appeal Nos. AA- 10/PUII-K/06-07 &
AA- 11/PUII-K/06-07, disposed of on 07.01.2008)

Present: **Shri G.C. Behera, Chairman**
Shri S.K. Rout, 2nd Judicial Member &
Shri S.R. Mishra, Accounts Member-II

S.A. Nos. 136 & 137 of 2008-09

M/s. Kukumina Construction (P) Ltd.,
Chhatrama, Dist. Khurda ... Appellant

-Versus-

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

S.A. Nos. 261 & 262 of 2008-09

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

-Versus-

M/s. Kukumina Construction (P) Ltd.,
Chhatrama, Dist. Khurda ... Respondent

For the Dealer : Sri B.P. Mohanty, Advocate
For the State : Sri D. Behura, S.C. (CT)

Date of hearing : 15.09.2023 *** Date of order : 12.10.2023

O R D E R

Both the Dealer and State have preferred the aforesaid second appeals for the same assessment periods involving common question of facts and law. So, they are taken up together for disposal in this composite order for the sake of convenience.

S.A. Nos. 136 & 137 of 2008-09 :

2. Dealer assails the orders dated 07.01.2008 of the Asst. Commissioner of Sales Tax (Appeal), Puri Range, Bhubaneswar (hereinafter called as 'First Appellate Authority') in F A No. AA- 10/PUII-K/06-07 & AA- 11/PUII-K/06-07 reducing the demands raised in assessment orders of the Sales Tax Officer, Assessment Unit, Khurda (in short, 'Assessing Authority').

S.A. Nos. 261 & 262 of 2008-09 :

3. State is also in appeals against the said orders dated 07.01.2008 of the First Appellate Authority reducing the demands raised in assessment orders of the Assessing Authority.

4. The facts of the cases, in brief, are that –

M/s. Kukumina Construction (P) Ltd. is engaged in business of processing of stone products like bazuri, stone chips, metal etc. Dealer supplies hard stone ballast to the Railway Department, Khurda as per agreement. The assessments relate to the years 2002-03 and 2003-04. The Assessing Authority in *ex parte* assessment raised demand of ₹37,81,358.00 u/s. 12(4) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act') for the year 2002-03. Similarly, the Assessing Authority raised demand of ₹7,35,029.00 u/s. 12(4) of the OST Act for the year 2003-04.

Dealer preferred first appeals against the orders of the Assessing Authority before the First Appellate Authority. The First Appellate Authority reduced the tax demands to ₹3,63,454.70 for the year 2003-03 and

₹6,63,137.00 for the year 2003-04 with a direction to adjust TDS amount subject to verification. Being aggrieved with the orders of the First Appellate Authority, the Dealer as well as State prefer these appeals. Hence, these appeals.

The State files cross-objection and additional cross-objection.

5. The learned Counsel for the Dealer submits that in a similar matter, this Tribunal has already held that supply of hard stone ballast comes under minor minerals as per Entry No. 117 of the Taxable List and thus, exigible to tax @ 4% after exclusion of loading, unloading, transportation charges etc. He further submits that the First Appellate Authority ought to have allowed 55% deduction towards labour and service charges. So, he submits that the orders of the First Appellate Authority and Assessing Authority are otherwise bad in law and the same need interference in appeal.

He relies on the decision of the Hon'ble Court in case of *State of Orissa & others v. M/s. D.K. Construction & others*, reported in [2017] 100 VST 24 (Orissa); and order of this Tribunal dated 14.12.2010 passed in S.A. No. 2051 of 2005-06 (*M/s. D.K. Construction v. State of Orissa*).

6. Per contra, the learned Standing Counsel (CT) for the State submits that the nature of contract is supply contract and the First Appellate Authority went wrong in allowing deduction towards labour and service charges to the Dealer. He further submits that contract entered into by the Dealer is delivery of hard stone ballast and thus, it was a contract for transfer of chattels qua chattels. So, he submits that impugned orders of the First Appellate Authority need interference to that extent.

He relies on the decision of the hon'ble Court in case of *P.K. Satapathy v. State of Orissa*, [1999] 116 STC 494 (Orissa);

7. Heard rival submissions of the parties, gone through the orders of the First Appellate Authority and Assessing Authority vis-a-vis the materials on record. It transpires that the assessments were completed on the strength

of Fraud Case Report (FCR). The Dealer has not filed any return for the periods under assessment. So, the Assessing Authority completed the assessments by adopting best judgment principles in absence of books of account. The Assessing Authority determined the tax liability considering the cost of stone ballast @ ₹300.00 per cft.

In first appeal, the First Appellate Authority accepted the returns filed by the Dealer after examination of books of account. The First Appellate Authority allowed 30% deduction towards labour and service charges holding the Dealer to have executed works contract under the contractee, i.e. South Eastern Railway, Khurda Road, which resulted in reduction of tax demands for both the years under appeal.

On such finding of the First Appellate Authority, both the Dealer as well as State prefer second appeals. The Dealer has taken the following grounds and additional grounds in appeal :-

Grounds : (i) The allowance of labour and service charges by the First Appellate Authority @ 30% is inadequate, which ought to be 55% considering loading, unloading, handling, transportation charges etc.

Additional Grounds :

(ii) The supply of hard stone ballast is liable to be taxed @ 4% after exclusion of loading, unloading, transportation charges etc. in view of the decision of the Hon'ble Court in case of *M/s. D.K. Construction* cited supra.

On the contrary, the State has taken the following grounds :-

(i) The supply of hard stone ballast by the Dealer to the S.E. Railway at specified rate was by way of sale. The Dealer has already received payment towards loading, unloading, labour handling, transportation, royalty, sales tax, octroi and cess

charges. So, the consideration received by the Dealer towards supply of ballast is exigible to OST.

8. On the above facts and circumstances of the case, the issues in appeals are as follows :—

- (i) Whether the supply of hard stone ballast is liable to be taxed @ 4% & whether the loading, unloading, transportation charges etc. thereof shall be included or excluded ?
- (ii) Whether the transaction of supply of hard stone ballast by the Dealer to the Railways at specified rate is by way of sale or works contract ?

Both the issues are inter-linked, so the same are taken up together for adjudication. It is not in dispute that there was an inter se agreement between the Dealer and the contractee, South Eastern Railway, Khurda. It is also not in dispute that the Dealer has received gross payment towards the supply of hard stone ballast to the Railways Department as per the measurement in cubic mtr. The agreement stipulates supply and stacking of hard stone ballast (machine crushed) of approved quality confirming to the Railway specification including all cost of materials, loading, unloading, handling, transportation and royalty, octroi, sales tax and all other incidental charges. The rate has been fixed as per measurement of cubic mtr. for machine crushed stone ballast at ₹377.97. The contractor is to make its own loading arrangement and the rate fixed for loading is ₹17.97 per cubic mtr. So, it is evident that the rate fixed, i.e. ₹377.97 per cubic mtr. is including all incidental charges including loading, unloading, handling etc. till stacking of the hard stone ballast at Railway yard. It further reveals that that the Dealer is entitled to get ₹17.97 per cubic mtr. towards the cost of loading.

In a similar matter, i.e. **S.A. No. 2051 of 2005-06 (M/s. D.K. Construction v. State of Odisha)**, this Tribunal has already held that the ballast supplied by the contractor to the S.E. Railway were minor minerals,

which is also a mineral. On such finding, this Tribunal has already held in that case that the hard stone ballast is exigible to tax @ 4% after deducting the amount received by the contractor towards loading charges from the payment received by him. The said finding has already been affirmed by the Hon'ble Court in case of *M/s. D.K. Construction* cited supra.

In view of such settled position of law, the finding of the First Appellate Authority treating the supply of hard stone ballast as works contract and thereby allowing deduction @ 30% towards labour and service charges and levying tax @ 8% on the TTO, is contrary to the decision of the Hon'ble Court cited supra and thus, liable to be set aside. Further, we are unable to accede to the contention of the Dealer to the effect that the loading, unloading, transportation charges etc. are to be excluded from the TTO since the contract being indivisible and the amount received by the Dealer after delivery in stacks was the consideration for the transaction.

In view of such matter, we observe here that the amount received by the Dealer towards supply of hard stone ballast including loading, unloading, handling, transportation, royalty, octroi, sales tax and all other incidental charges, @ ₹377.97 per cubic mtr., is exigible to tax @ 4%. As such, the Assessing Authority is required to compute the tax liability afresh as per law. But, so far as the charges for loading arrangement @ ₹17.97 per cubic mtr. if received by the Dealer are to be excluded from levy of tax. Hence, it is ordered.

9. Resultantly, the appeals filed by the Dealer are allowed in part whereas the appeals preferred by the State are allowed. The impugned orders of the First Appellate Authority stand set aside. The Assessing Authority is directed to recompute the tax liability of the Dealer as per law for both the years under dispute keeping in view the observations made above within a period of three months from the date of receipt of this order.

Cross-objection and additional cross-objection are disposed of accordingly.

Dictated & Corrected by me

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

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

I agree,

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

I agree,

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