

2. The appellant is a Government of India Organisation allegedly executed works contract under the scheme of improvement/ strengthening of existing road from Balinga-Hemgir-Kanika-Belpahar running through the districts of Sundargarh and Jharsuguda in the State of Odisha. Since the appellant's turnover had reached the taxable limit but it was found not registered under the OST Act and Rules, the STO, Sambalapur I Circle initiated assessment proceeding under Section 12(5) of the OST Act for the tax periods 1999-2000 and 2000-01. The appellant had effected job work in pursuance to memorandum of understanding (MOU) entered into between General Manager (Construction), M.C.L. Burla and the Chief Engineer (Project) representing D.G.B.R. (appellant). In the assessment the appellant took a plea that it is not involved in any kind of business involving sale or purchase requiring registration under the Act or filing tax return. Since the appellant remained absent in the final hearing, the assessment orders were passed ex-parte. The learned assessing officer has observed that the appellant had received a sum of Rs.2,50,00,000.00 against the job works under the works contract for the period 1999-2000 and for Rs.5,00,00,000.00 for the period 2000-01. The job works undertaken by the appellant comprised of transfer of property in goods exigible to tax under OST Act. Therefore, the appellant was treated as a dealer as per Section 2(c)(vi) of the OST Act and the assessment was completed on application of best judgment principle, since the appellant neither appeared nor produced the books of accounts. The assessing authority allowed deduction of 45% towards labour and service charges and thereafter, levied tax on the rest amount treating the same as TTO at Rs.1,36,95,000.00 for the tax period 1999-2000 and for Rs.2,75,00,000.00 for the tax period 2000-01.

3. Being aggrieved, the appellant knocked the door of the first appellate authority challenging the maintainability of the assessment, competency of the assessing authority and with further

grounds like, the appellant cannot be treated as a dealer under the Act, the percentage of deduction towards labour and service is arbitrary. Further, while pleading that the appellant being a Government of India undertaking engaged in sovereign functions so is not exigible to be taxed as a dealer under the Act.

The first appellate authority vide impugned orders reiterated the views of assessing authority and confirmed the order of the assessing authority for two periods of assessment, as a result the demand as raised remained undisturbed.

4. On the above backdrop of both the appeals above, the appellant has preferred these two appeals with the contentions like proper opportunity of being heard was not afforded to the appellant, the assessing authority is not competent under the Act, the appellant is not a dealer covered under OST Act, the appellant is immune from levy of sales tax being a Central Government Undertaking and the deduction towards labour and service charges is lower in side whereas the penalty as imposed is illegal.

5. The appeals are heard without cross objection advanced by the revenue whereas the appeals are heard setting the dealer appellant ex-parte as it remained absent in the final hearing in spite of notice duly sent and served.

Question No.1:-

6. The appellant has contended that sufficient opportunity was not provided by the assessing authority or by the first appellate authority.

The learned Addl. Standing Counsel, Mr. Raman argued that this is a matter of the years 1999-2000 and 2000-01, the dealer was duly served with notice of hearing before the assessing authority. It is the dealer, who had preferred the first appeal, was also found remained absent in the final hearing before the first appellate authority. Similar is the case before this Tribunal. When it

is found that the appellant remained absent in spite of due service of notice addressed to the dealer in the address mentioned in the cause title of the appeal, this being a matter of twenty years it only can be said that the appellant being a government of India undertaking remained casual all along right before the assessing authority to this Tribunal. The allegation of non-extension of proper opportunity before assessing authority became redundant when the dealer is found remained absent before the first appellate authority. Similarly, the allegation like proper opportunity was not provided by the first appellate authority is necessarily answered by the very conduct of the appellant. Needless to mention here that the appellant remained absent also before this Tribunal. In that view of the matter no presumption can be drawn from the act and conduct of the appellant that there was any kind of violation of principle of natural justice in the case in hand.

The jurisdiction of the assessing authority though disputed with a feeble plea but it has no legs to stand since the information regarding works contract and payments were detected from the records from Mahanadi Coal-fields Ltd., Sambalpur situated with the jurisdiction of the learned assessing authority. Hence, this plea is also found not sustainable.

7. Placing reliance on decisions like (1999) 114 STC 520 (SC) *State of Tamilnadu Vrs. Board of Trustees of the Port of Madras* and (2002) 126 STC 288 (SC) *CST Vrs. Sai Publication Fund* the assessee claims that since it does not carry out “business” within the meaning of Section 2(b)(i) or 2(b)(ii), it could not be treated as “dealer” within the meaning of Section 2(c)(vi) of the OST Act.

Applying the ratio of *State of Tamilnadu Vrs. Board of Trustees of the Port of Madras, (1999) 114 STC 520 (SC) = (1999) 4 SCC 630*, the Hon’ble Apex Court decided in *Commissioner of Sales Tax Vrs. Sai Publication Fund, (2002) 126 STC 288 (SC)* that the definition of “dealer” in Section 2(11) [of the Bombay Sales Tax Act, 1959] clearly

indicates that in order to hold a person to be a “dealer”, he must “carry on business” and then only he may also be deemed to be carrying on business in respect of transactions incidental or ancillary thereto.

In this context it is pertinent to reproduce the definition of dealer as per section 2(c)(v) OST act

“a person who transfers property in goods (whether as goods or in some other form) involved in the execution of a works contract;”.

Section 2(b) define “**business**” as follows:-

“**business**” includes-

(i) any trade, commerce or manufacture or any adventure of concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern; and

(ii) any transaction in connection with, or incidental or ancillary to such trade, commerce, manufacture, adventure or concern.

Section 2(bb) defines “**casual dealer**” as follows:

“ **Casual dealer**” means a person, who has, whether as principal, agent or in any other capacity, occasional transactions of a business nature involving purchasing, selling, supplying or distributing goods in the State whether for commission, remuneration or otherwise.

Further **Section 2(jj) "Works Contract"** reads as follows:-

"Works Contract" includes any agreement for carrying out, for cash or deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any moveable or immovable property.

Adverting to the case in hand on perusal of the memorandum of understanding between the MCL and the appellant whereby and wherein the job work was entrusted with certain terms and condition to be performed within stipulated period not only can it be held that there was a work contract existed in pursuance to which the appellant has executed the job.

The first case relied by the dealer in State of Tamilnadu Vrs. Board of Trustees of the Port of Madras, (1999) 114 STC 520 (SC) rendered by division bench of the Hon'ble Supreme Court has been distinguished by the Hon'ble Supreme Court [3-Judge Bench] in Cochin Port Trust Vrs. State of Kerala, [2015] 80 VST 341 (SC). The second case relied by the dealer is in Commissioner of Sales Tax Vrs. Sai Publication Fund, (2002) 126 STC 288 (SC) rendered following the ratio in State of Tamilnadu Vrs. Board of Trustees of the Port of Madras (supra),

Here it is noteworthy to mention that the jurisdictional court, in the case of *State of Odisha Vrs. Steel Authority of India Ltd.*, (2011) 44 VST 50 (Ori) has culled out as follows:

"The honourable apex court in State of Orissa Vrs. Orissa Road Transport Co. Ltd., (1999) 107 STC 204 (SC) held

(i) that the respondent, as a prudent organizafron, in the course of the carrying on of its business sold some obsolete

parts, spare parts, etc., which were used or intended for use in its business, when they were not required by it. Such sales were occasional sales of a business nature which would make the respondent a "casual dealer" within the meaning of the definition in section 2(bb) of the Act. The respondent was a "dealer" carrying on the business of selling spare parts, etc., and thereby became liable to pay sales tax on the sale of such items; and

(ii) that, though the attention of the High Court was not drawn to section 2(bb), on the facts as found by the Tribunal, it was evident that the provisions of section 2(bb) were attracted. The fact that the High Court had ignored a relevant statutory provision could not be a ground for the respondent to contend that the Supreme Court should not also refer to that provision of the Act."

Here we may profitably take cue from another decision by the apex court in the matter of *Karyapalak Engineer, CPWD Vrs. Rajasthan Taxation Board*, (2004) 7 SCC 195 = (2004) 136 STC 641 (SC) wherein the Court has been pleased to opine that:

"21. In the instant case also by the use or consumption of material supplied in the work of construction, there was passing of property and by virtue of receipt of value of such transferred property by way of adjustment in bills the consideration has also passed which in our opinion satisfies the definition of "sale" in the local Sales Tax Act.

* * *

23. Consequently, even the argument that in terms of the language of the definition of 'dealer' under Section 2(14) of the Rajasthan Act the appellants cannot be a dealer, will also have to be rejected."

8. Reverting to the case in hand it is held that, having received the consideration for the works executed from Mahanadi Coalfields Ltd., which fact is apparent from the terms of Memorandum of Understanding as well as documents of Mahanadi Coalfields showing that it had made payments to the appellant, it would be erroneous to say that it does not fall within the ambit of the definitions “business” and “dealer” contained in Sections 2(b) and 2(c) of the OST Act. In the aforesaid decision in *Karya Palak Engineer (supra)* the Hon’ble Court held Karya Palak Engineer having erected barbed wire fencing along the border of the country in Rajasthan a “dealer” inasmuch as it received the consideration money and transferred the property in goods.

9. The next contention of the dealer is, in view of inhibition under Article 285 of the Constitution of India, the liability saddled on it is incorrect and illegal. It is submitted by the Addl. SC, that the said decisions may not hold the field in view of decision rendered by the Hon’ble Court in the case of *Collector of Customs Vrs. State of West Bengal, (1999) 1 SCC 192*. In the case of *Collector of Customs Vrs. State of West Bengal, (1992) 85 STC 121 (WBTT)* it was held that the Government does not enjoy immunity from levy of indirect taxes which decision got affirmed in *Collector of Customs Vrs. State of West Bengal, (1999) 1 SCC 192 = (1999) 113 STC 167 (SC)*.

Similar issue was under scrutiny before the honourable supreme court so as to whether the Indian Railways is amenable to be levied with entry tax on the goods brought into local area under the OET Act was carried to Hon’ble Supreme Court in Civil Appeal No. 4935 of 2008 (arising out of SLP (C) No. 2878 of 2008) against the Judgment of the Hon’ble Orissa High Court rendered in *Union of India Vrs. State of Odisha, 103 (2007) CLT 710 = 2007 (Supp.-I) OLR 743*. In the said case the Hon’ble Supreme Court

while affirming the decision of Orissa High Court, it was observed that:

“Suffice it to state that there is a difference between direct tax on property and on income as against indirect tax on manufacture of goods or entry of goods into the local area or sales tax. This dichotomy needs to be kept in mind of constitutional scheme and Article 285 and 289 of the Constitution.”

Here it is also relevant to mention that the ratio decidendi in *Karyapalak Engineer, CPWD Vrs. Rajasthan Taxation Board, (2004) 7 SCC 195 = (2004) 136 STC 641 (SC)* is referred and followed by our own high court in its order dated 22.02.2019 passed in *Union of India Vrs. State of Odisha, STREV 45 of 2003* In view of authoritative pronouncement as cited above it can safely be said that, that the appellant had executed works within the State of Odisha in order to satisfy the terms of the Memorandum of Understanding entered into with Mahanadi Coalfields Ltd. and received payments from Mahanadi Coalfields Ltd., thereby the goods involved in such works got transferred which clearly encompassed within the definition of “sale” and “sale price” envisaged under Section 2(g) and 2(h) of the OST Act.

10. The other contents like books of accounts was not verified and penalty is not warranted are of no avail to the dealer as the dealer did not prefer to contest the appeal by adducing rebuttal evidence hence elaborate discussion on this question is redundant.

11. In the discussion here in above, it is found that the appellant has acted as a contractor under the impugned works contract, it has supplied materials and spent on labour and service to execute the works contract. So the appellant acted as a dealer turned within the mandate of the OST Act. Be that as it may, it is said that the impugned orders suffers from no illegality hence calls for no interference.

It is ordered.

The appeals are dismissed as of no merit.

Dictated and Corrected by me,

(Sri Subrat Mohanty)
Judicial Member.

(Sri Subrat Mohanty)
Judicial Member.

I agree,

(Suchismita Mishra)
Chairman.

I agree,

(Sri R.K.Pattnaik)
Accounts Member-III.