BEFORE THE ODISHA SALES TAX TRIBUNAL: CUTTACK
(Full Bench)

S.A. Nos. 219(ET) & 220(ET) OF 2005-06

(Arising out of order of the learned ACST, Balasore Range,
Balasore in First Appeal Case Nos. AA- 05/BA-2002-03-ET &
AA- 293/BA-2002-03-ET, disposed of on dated 31.05.2005)

Present: Shri R.K. Pattanaik, Chairman,
Shri A.K. Dalbehera, 1st Judicial Member, and
Shri R.K. Pattnaik, Accounts Member-III

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

-Versus-

M/s. Niraj Cement Structural (P) Ltd.,
At/PO- Badabazar, Jaleswar, Dist. Balasore ... Respondent

For the Appellant : Sri M.L. Agarwal, Standing Counsel (CT)
For the Respondent : Sri A.N. Mohanty, Advocate

Date of hearing: 29.05.2020 ***** Date of order: 10.06.2020

O R D E R

A statute is an edict of legislature and the conventional way of interpreting a statute is to seek the intention of its maker. It is the judicature's duty to act upon the intention of the legislature or mens or sententia legis. The Courts have to objectively determine the interpretation with guidance furnished by the accepted principles. If a statutory provision is open to more than one interpretation then the Court has to choose the interpretation which represents the true intention of the legislature. The function of the Courts as such is only to expound and not to

legislate. The above are the general principles with regard to interpretation of statute which are to be borne in mind, while exploring it.

2. In the present context, as it seems, a little bit of interpretation is essential apparently relatable to a dispute vis-a-vis the tax demand as against the earth moving machineries, whether, it fall under one category or the other for the purpose of taxation. Precisely speaking, the instant appeals are up against the impugned order dated 31.05.2005 promulgated in Appeal Nos. AA- 05/BA-2002-03-ET and AA- 293/BA-2002-03-ET correspond to the assessment periods from Dec, 2001 to Feb, 2002 and 2001-02 respectively by the learned Assistant Commissioner of Sales Tax, Balasore Range, Balasore (in short, 'the FAA'), whereby, the demand so raised by the orders of assessment dated 21.03.2002 and 25.10.2002 under Sections 10(3) and 7(4) of the Odisha Entry Tax Act, 199 (in short, 'the Act') respectively was reduced on the grounds inter alia that such reduction of demand with respect to the earth moving machineries, such as, excavators, bulldozers, road rollers, etc. falling under Serial 9 of Part-II instead of Serial 2 of Part-III of the Schedule to be untenable and against the settled principles of law.

3. In fact, the respondent carried business in works contract under National Highway Authority as the sub-contractor of M/s Larsen and Toubro Ltd. for widening of NH-5 was subjected to assessment and in course of verification of the returns, the Assessing Authority, Balasore Circle, Balasore (in short, 'the AA') found it to have purchased or brought the scheduled goods for its utilization in execution of works which included the earth moving machineries and ultimately,

tax demand was raised after its adjustment with the provisional and being aggrieved appeals were carried and finally, Appeal No. AA- 05/BA-2002-03-ET vis-a-vis the provisional assessment stood dismissed and Appeal No. AA- 293/BA-2002-03-ET with respect to regular assessment was allowed in part and consequentially, the assessment was reduced. Against such reduction in assessment, the appellant State preferred the instant appeals primarily raising a point concerning the decision on the earth moving machineries and other vehicles, whether, falling under the category of 'machinery and equipments, etc.' vide Serial 9 of Part-II or 'motor vehicles' as appearing in Serial 2 of Part-III of the Schedule as originally assessed by the AA. The Tribunal is to examine as to if the earth moving machineries and other vehicles of the descriptions do really fall in the category of motor vehicles as has been claimed by the State?

4. The learned Standing Counsel (CT) strenuously urged that the FAA fell into serious error and committed gross illegality in describing the earth moving machineries and other vehicles taxable as 'machinery and equipments' used in execution of works contract falling under Serial 9 of Part-II instead of Serial 2 of Part-III of the Schedule as had originally been assessed by the AA and such a decision resulting in less demand is incomprehensible. The contention is to the effect that the excavators, bulldozers, road rollers fall within the category of motor vehicles as defined in Section 2(28) of the Motor Vehicle Act, 1988 (in short, 'M.V. Act'), according to which, such vehicle means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted

thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty-five cubic centimetres, but unfortunately, the FAA ascribed it as machinery and equipments which resulted in levy of less tax rate instead of 12%. While claiming so, the learned Standing Counsel (CT) cited rulings, such as, Natwar Parikh & Co. Vs. State of Karnataka:(2005) 7 SCC 364; Bose Abraham Vs. State of Kerala:(2001) 121 STC 614 (SC); Government of A.P. Vs. Road Rollers Owners Welfare Association:(2004) 6 SCC 210; and M/s. Vijay Traders Vs. CTO:(2011) 45 VST 113 (AP) which summed up the general principles called out from the M.V. Act and Rules referring to the decided cases reported in AIR 1975 SC 17 and AIR 1992 SC 1371 besides Bose Abraham's case (supra), while interpreting the taxation on motor vehicles under the Act. According to the State, by no stretch of imagination, the earth moving machineries, etc. of the respondent to be treated as machinery and equipments when there is a specific entry at Serial 2 of Part III of the Schedule, a conclusion which is clearly deductible from the enunciated law, as deciphered above.

5. As a counter, the respondent contended that the decision of the FAA on the subject matter applying a lesser rate of tax in respect of earth moving machineries, bulldozers, etc. having categorized it as machinery and equipments falling under Serial 9 Part-II of the Schedule instead of motor vehicle under Serial 2

of Part-III thereof as originally assessed by the AA, is absolutely justified and not to be interfered with. The contention of the learned counsel for the respondent is that such lesser rate of tax exigible on the earth moving machineries, excavators, bulldozers, etc. as machinery and equipments is absolutely just and proper in view of the fact that the machineries so used for the works contract are fitted with chain mounted wheels which are not adaptable for use upon roads, the fact which was completely lost sight of by the AA, while branding it as motor vehicles within the definition of Section 2(28) of the M.V. Act. So, as per the respondent, rightly the earth moving machineries and other vehicles have been treated as machinery and equipments exigible to tax at the rate of 2%.

6. As earlier stated, a certain amount of interpretation is needed to be explored to classify the earth moving machineries, bulldozers, etc. as to whether belonging to Part-II or Part-III of the Schedule under the relevant entries. The Tribunal is reminded of the principles as to interpretation, objective and purpose of interpretation keeping in mind the legislative intent. What was intended by the legislature while incorporating the words 'vehicles adapted for use upon roads', an expression as contained in Section 2(28) of the M.V. Act is to be unearthed. The earliest of the rulings on the subject was rendered in Bolani Ores Limited Vs. State of Orissa reported in AIR 1975 SC 17 (supra) by the Hon'ble Apex Court, wherein, it was held that dumpers and rockers though registrable under the M.V. Act are not taxable under the Taxation Act as long as they are working solely within the premises of respective owners and proceeded to define the words 'adapted for

use' appearing in Section 2(18) of the M.V. Act, 1939 and observed that the said words have the same connotation as 'is suitable' or 'is fit' for use on the roads and concluded that the meaning of the word 'adapted' in Section 2(18) of the said Act (old) is itself indicated in Entry 57 of the List II of Seventh Schedule to the Constitution which confers powers on the State to tax vehicles whether propelled mechanically or not and the words 'adapted for use' must, therefore, be constructed as 'suitable for use' and such words cannot be larger in their import by including vehicles which are not 'suitable for use' on roads. The above is the judgment legal classicus on the point which was followed by M/s. Central Coal Fields Ltd. Vs. State of Orissa reported in AIR 1992 SC 1371 (supra) and then Bose Abraham's case (ibid). In Central Coal Fields Ltd. case (supra), the Hon'ble Apex Court found the type of vehicles adapted or suitable for use on roads and being motor vehicles per se, while referring to Bolani Ores' case and thus, observed that it were liable to taxation on the footing of their use or kept for use on public roads, the network of which, the State spreads, maintains it and keeps available for use of motor vehicles and hence, entitled to a regulatory and compensatory tax. From the above decisions, it is made to understand that if a particular vehicle is meant for a specific purpose and specially designed therefor, either mechanically propelled or otherwise but adapted for use upon roads is certainly a motor vehicle as defined in Section 2(28) of the M.V. Act and in absence of such adaptation, it cannot be so, rather to be held as machinery and equipments normally used in manufacture, mining generation, etc. or for execution of works contract, or for other general

purposes. The most interesting ruling of the Hon'ble Apex Court can be traced to the case of Chief General Manager, Jagannath Area and others Vs. State of Orissa and another reported in (1996) 10 SCC 676, where, a distinction was suggested to be made on the vehicles run on tyres in contrast to chain plates like caterpillars or military tanks and further elaborated the aspect of adaption of vehicles for being used on roads for the purpose of taxation law. In Union of India and others Vs. Chowgule & Co. Pvt. Ltd. and others reported in 1992 AIR SC 1376, it was held that dumpers were used solely on the premises of the owner for that they were in closed premises, or permission of the authorities was needed to move them from one place to another, or that they are not intended to be used or are in capable of being used for general purposes, or that they have an unladen and laden capacity depending on their weight and size is of no consequence for dumpers are vehicles used for transport of goods and thus, liable to pay a compensatory tax for the availability of road for them to run upon commission. So, the sum and substance of the above citations unerringly suggest that if a particular vehicle is suitable or capable of being used on roads though designed for a specific purpose and utility notwithstanding the fact that they were to be used in closed premises but still can be brought on road is a motor vehicle as defined in Section 2(28) of the M.V. Act. The citations so sponsored by the State in Natwar Parikh & Co. case and Bose Abraham's case (ibid) of the Hon'ble Apex Court point to a conclusion that the words 'motor vehicles' have been defined in a comprehensive sense by the legislature and thus, to be read in the broadest possible sense keeping in mind that

the M.V. Act has been enacted in order to keep control over the motor vehicles, transport vehicles, etc. and such definition includes any mechanically propelled vehicle apt for use upon roads irrespective of the source of power and the fact that merely because a vehicle is put to a specific use such as being confined to an enclosed premises is not likely to render it to be a different kind of vehicle. In Bose Abraham's case the excavator and road roller were held as motor vehicles for the purpose of M.V. Act. In M/s. Vijay Trader's case (ibid), the general tests to be applied were summarized in the following words, such as, the vehicle should be adapted for use upon roads to become a motor vehicle; if it is a registered vehicle and required approval and fitness certificate under the M.V. Act, it would lead to an inference as a motor vehicle; when a vehicle is adapted for use upon roads though it is not driven on the public roads or in a public place and it cannot be driven without obtaining licence, it is certainly a motor vehicle; and the word 'adapted' in Section 2(28) of the M.V. Act has to be read as 'suitable for use on the roads', whether or not, it moves on the roads, if it is suitable to move on the roads, it is termed as a motor vehicle.

7. Understanding the above law in proper perspective, the Tribunal is of the considered view the rate of tax leviable on the alleged vehicles depends on its classification. What is the nature of vehicles and its utility defines the distinction. The conspicuous expression as appearing in Section 2(28) of the M.V. Act, such as, 'adapted for use upon roads' assumes a lot of significance, considering the nature of the lis. What is important to consider is, whether, the vehicles in question really

adapted for use upon roads and as such, exigible to higher rate of tax under the Act. So far as Section 2(28) of the M.V. Act is concerned, it has an inclusive as well as exclusive part, the former relatable to mechanically propelled vehicle adapted for use upon roads and the later being vehicles running upon fixed rails or vehicles of a special type for use only in a factory, or other enclosed premises. In Bolani Ores Ltd. case (supra), the term 'adapted for use' has been construed by the Hon'ble Apex Court, when the question was whether the vehicles such as dumpers, rockers, etc. were motor vehicles from the point of view of registration and taxation and while expanding the meaning of it as occurring in Section 2(28) of the M.V. Act, it was observed that the word 'adapted' when used disjunctively with 'constructed' must be in a physical alteration and in other cases, where it is used alone, it must be given the adjectival sense as 'fit' and 'apt' and thus, having interpreted the words 'adapted for use' as 'suitable for use' and 'fit for use on roads', the conclusion was that the vehicles which moved on pneumatic tyres are registrable as motor vehicles. A vehicle which merely moves from one place to another need not necessarily be a motor vehicle within the definition of Section 2(28) of the M.V. Act as it may move on iron flats made into a chain, such as a caterpillar vehicle or a military tank, inasmuch as, both move from one place to another, but not suitable for use on roads. If a vehicle is having tyres, pneumatic or otherwise but adaptable for use on roads is a motor vehicle and accordingly taxable, but if nature of vehicle is such, which may move on from one place to another but not designed and adapted for being used on roads, it is not a motor

vehicle, so to say. For instance, a bulldozer having tyres pneumatic or not, can ply on roads and as such made adaptable and is a motor vehicle as defined in Section 2(28) of the M.V. Act, however, if it is mounted with chain wheels, like a caterpillar vehicle or a military tank, with ordinary sense prevailing, it has to be held as not to be a motor vehicle, because it is not meant or designed and adapted for use upon roads. In the former case, tax is to be levied as a motor vehicle and in the latter, not as such and in that case, the vehicle may have to be categorized as machinery and equipments used for variety of purposes. Such is the legislative intent as discernable from Section 2(28) of the M.V. Act. A vehicle which is not intended to be used on public roads or having not been adapted for such a use cannot be termed as a 'motor vehicle' and there the distinction lies and interpretation demands. In the case at hand, the learned Counsel for the respondent contended that the earth moving machineries used in the execution of the works contract were fitted with chain mounted wheels and not the normal tyres and therefore, not adaptable for use on roads and not even registered, the fact, which was duly considered by the FAA. The learned Standing Counsel (CT) contended that all the dumpers, excavators, road rollers, bulldozers, etc. used in the execution of works irrespective of the nature of wheels are motor vehicles exigible to tax @ 12% being vehicles falling under a specific entry vide Serial 2 of Part-III of the Schedule. If the vehicles used in the execution of the works contract mounted with tyre wheels, pneumatic or otherwise, or fitted with chains like caterpillar vehicles or military tank, such classification would decide and determine the rate of tax. The list of vehicles

allegedly used by the respondent finds a mention in the record but from that, without proper examination, it would be difficult to find out and ascertain what kind of vehicles they were and whether, were fitted with tyre wheels or chained one in order to distinguish the adaptability of its use on roads or otherwise. As it is made to appear, the learned Standing Counsel (CT) clearly denied the contention that the alleged vehicles to be motor vehicles. Rather, the argument was that as per Section 34 of the Act, burden of proof lies on the respondent to establish the vehicles in question as not liable to tax under Part-III of the Schedule. The FAA does appear to have concluded that the earth moving machineries and other vehicles fall in the category of Part-II and so exigible to tax @ 2% without elaborately describing the nature of the vehicles and whether, they are adaptable or not for use on public roads. Such a determination is absolutely necessary and unless and until classification of the alleged vehicles is made clear and apparent, as to what would be the rate of tax leviable for it, can hardly be assessed by the Tribunal. If the alleged vehicles are adapted for use upon roads, as is claimed by the appellant, then the rate of tax would be @ 12% and if not so adaptable as put forth by the respondent, the rate of tax on the vehicles would certainly be less. In other words, the vehicles and earth moving machineries and its classification would decide the category to which, if Serial 9 of Part-II or Serial 2 of Part-III of the Schedule, they belong to. At the cost of repetition, it is stated that a determination on such a point is absolutely required. Such a determination shall have to be in terms of the law laid down by the Hon'ble Apex Court keeping a distinction in mind vis-a-vis the

classification of the alleged vehicles with reference to its adaptability for use upon roads as defined in Section 2(28) of the Act.

8. To turn back to the submission of the learned Standing Counsel (CT), it is urged that the legislature in its wisdom amended the Act and the Schedule by Orissa Act 2 of 2004 w.e.f. 01.06.2004 as per which Section 2(h) of the M.V. Act was amended and the following words 'excluding any tractor, earth mover, excavator, bulldozer or road roller' were added and simultaneously, Part-III of the Schedule was deleted and the above words so included in Section 2(h) of the M.V. Act were included in Serial 9 of Part-II thereof, but in so far as the instant case is concerned, it related to the assessment periods prior to the aforesaid amendment and as such, the new definition to Section 2(h) of the M.V. Act and as far as inclusion and deletion in entries of Part-II and Part-III respectively are concerned, the same are definitely inapplicable. Obviously, the amended provision of the M.V. Act and the Schedule are not to apply to the case in hand since it were given effect to from 01.06.2004. The authorities below were obliged to consider the case of the respondent as per the old law. The FAA while disposing of the appeals seems to have applied the amended law instead, as by then, it had already been enforced being oblivious of the fact that the assessments belong to the periods of 2001-02.

9. It is apt to mention here that in the year 2000, the term 'construction equipment vehicle' was inserted into the Central Motor Vehicles Rules, 1989 (herein after referred to as '1989 Rules') vide Rule 2(ca) of the 1989 Rules which defines rubber tyred (including pneumatic tyred), rubber padded, or still drum wheel

mounted, self-propelled, excavator, loader, backhoe, compactor roller, dumper, motor grader, mobile crane, dozer, fork lift truck, self-loading concrete mixture, or any other construction equipment vehicle or combination thereof designed for off-highway operation in mining, industrial undertaking, irrigation and general construction, but modified and manufactured with 'on or off' or 'on and off' highway capabilities with an explanation appended to it stating that a construction equipment vehicle shall be a non-transport vehicle the driving on the road of which is incidental to the main off highway function and for a short duration at a speed not exceeding 50 kms. per hour, *but such vehicle does not include other purely of highway construction equipment vehicle designed and adopted for use in any enclosed premises*, *factory or mine other than road network not equipped to travel on public roads on their own power*. (Emphasis supplied)

On a careful perusal of the above provision, it shows that though various types of motor vehicles are declared to be construction equipment vehicles (in short, 'CEVs') even if they are designed for off-highway operation in mining or other similar places, but with a rider or qualification to the effect that such vehicles must be modified and manufactured with on or off or on and off highway capability which means merely because a vehicle is fitted with rubber or pneumatic tyres, it cannot be treated as a CEV unless it is shown that though the same is designed for off-highway operations but are modified and manufactured with on or off or on and off highway capability. The last part of the above definition upon which emphasis has been supplied indicates that vehicles which are purely off-

highway CEVs designed and adopted for use for specified purposes not equipped to travel on public roads are excluded there from. So, considering the definition of Section 2(h) of the M.V. Act as it was prior to amendment of 2004 read with Rule 2(ca) of the 1989 Rules, it has to be considered, whether, the vehicles of the respondent engaged in the contract work were motor vehicles or not. It is summed up that a vehicle which is exclusively designed for off-highway purposes and not adaptable to use on public roads are certainly to be excluded from the definition of 'motor vehicle' and also 'construction equipment vehicle' as defined in Section 2(h) of the M.V. Act and Rule 2(ca) of the 1989 Rules. In other words, classification of a vehicle determines as to if it belongs to the category of motor vehicle or otherwise for the purpose of registration and/or taxation. In the considered opinion of the Tribunal, the above aspect is to be elaborately dealt with before levying tax in respect of the subject vehicles of the respondent which were in use for the execution of works contract at the relevant point of time.

10. Such an exercise is really indispensable and for that, the materials on record are to be examined in detail. With all respect and humility, it is concluded by the Tribunal that the FAA failed to consider the aforesaid aspects before taking a call and imposing tax on the subject vehicles. The contention of the State that each and every earth moving machineries to be motor vehicles cannot be comprehended and at the same time, without taking into account specificity and classification of the vehicles as to whether they are specially designed and exclusively for off-highway purposes and not so adaptable for its use upon roads, it

cannot straightaway be accepted that the vehicles are not motor vehicles, but are machinery and equipments falling under Serial 9 of Part-II of the Schedule as put forth by the respondent. The Tribunal having regard to the fact that the FAA without considering the above aspects as universally applied the rule that all the earth moving machineries must be motor vehicles, it is deemed just and expedient that a fresh adjudication in that respect is essential to do complete justice. The Tribunal is also of the view that the FAA must examine and inspect the materials to classify the subject vehicles by extending an opportunity to the respondent to demonstrate that the vehicles are not motor vehicles or CEVs as defined in Section 2(h) of the M.V. Act and Rule 2(ca) of 1989 Rules respectively and if necessary, to call upon the respondent to furnish additional evidence so that a complete and final decision thereon can be rendered, the purpose being to determine the rate of tax to be levied on the subject vehicles, whether, it should be @ 2% or 12%, as the case may be.

11. Hence, it is ordered.

12. In the result, the appeals stand allowed. As a necessary corollary, the impugned order dated 31.05.2005 in Appeal Nos. AA- 05/BA-2002-03-ET and AA-293/BA-2002-03-ET with respect to the assessment periods vis-a-vis the respondent is hereby set aside. Consequently, the matter is remitted back to the FAA for a fresh determination as regard the vehicles in question used and utilized in the execution of the works contract as to its classification, whether, adaptable for use upon roads or not as defined in Section 2(28) of the M.V. Act and if at all, are

CEVs for exclusive use in off-highway purposes other than the vehicles not meant for public roads and decision, if they are motor vehicles exigible to tax under Serial 2 of Part-III of the Schedule, or have to be treated as machinery and equipments falling under Serial 9 of Part-II thereof after considering the materials on record bearing in mind the settled principles of law besides the observations of the Tribunal, as above and ensure its disposal preferably within a period of three months from the date of receipt of the above order.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(A.K.Dalbehera)
1st Judicial Member

I agree, Sd/-
(R.K. Pattnaik)
Accounts Member-III