

2. According to the State, the learned ACST had committed illegality while permitting exemption to the appellant under Section 5(3) of the CST Act by merely accepting 'H' form without looking into corresponding agreements of export entered by the export seller with the foreign buyers. We have perused the appellate order and have gone through the entire appeal record with reference to allegation made by the State. The relevant portion of the impugned order, is quoted below:

“Before this forum at the stage of hearing of first appeal the appellant furnished two nos. of declaration in form H bearing No.165440 and No.K.034807 issued by M/s. Core Minerals and M/s. Essel Mining and Industries Ltd. for a total amount of Rs.11,65,335.00. On scrutiny of the above forms along with statement of sales available in the record it is found that those are in order.”

3. The question that arises in the present appeal, is whether the learned Asst. Commissioner of Sales Tax, is justified in law in accepting the 'H' declaration form in the facts and circumstances of the case?

4. Having perused the appeal record, we find that one of the exporter M/s.Core minerals who had provided 'H' form to the appellant M/s. Surya Khanija, Rourkela (bearing no.165440) had indeed exported goods (iron fines) to Hejin Taixing Coking Ltd., P.R. China through vessel No, M. V. Mandakini. The export journey of the above stated goods

commenced from Paradeep Port in Odisha to Lianyungang Port in China. This is mentioned in the copy of bill of lading no.03 provided by the export seller to the penultimate seller who submitted to the learned appellate authority. Similarly, 'H' form number K034807 has been provided by export seller M/s.Essel Mining and Industries Ltd. for its export to China Ocean Shipping Industries, Zhanjiang, China through Vessel namely M.V. Spark Karina on 11.06.2002 for export sale of iron fines weighing 30946 WMT as is revealed from copy of bill of lading No.01. The above mentioned export sellers apparently provided this 'H' forms to the penultimate seller i.e. M/s. Surya Khanija, Rourkela to cover their purchases to them for meeting their export obligations.

5. It is to mention here that the Section 5(3) of the CST Act was introduced in the CST Act to mitigate the plight of the small and marginal traders who intended to sell goods in course of export through export houses. The Hon'ble Supreme Court, in case of Consolidated Coffee Ltd. Vrs. Coffee Board, (1980) 46 STC at page 167 examined the constitutional validity of Section 5(3) of the CST Act. The Hon'ble Court while interpreting the phrase 'order or agreement' in Section 5(3) of the CST Act held as follows:

“ On construction, we are of the view that by implication the expression “ the agreement” occurring in Section 5(3) refers to the agreement with a foreign buyer.”

The Hon'ble Court have relied on the observations of Shah J. in Ben Gorm Nilgiri Plantations Company (1964) 15 STC 753 (SC) that there must be an intention on the part of both the buyer and the seller to export, that there must be obligation to export, and that there must be an actual export, and further that the obligation may arise by reason of statute, contract between the parties, or mutual understanding or agreement between them or even from the nature of the transaction which links the sale to export.

6. Therefore, the Apex Court has not rigidly accepted one method of ascertaining penultimate sale and it has laid down several procedures to ascertain when a good is sold in course of export. The Hon'ble Apex Court has underlined that the intention of the parties to purchase and sale in course of export as primadona in matter of consideration a particular sale as a sale in course of export, under Section-5(3). The written agreement is not the only method of contracting. The sale of goods can arise through (i) written agreement (ii) or through words of mouth (iii) or through partly written and partly words of mouth (iv) or through mutual understanding expressed through their conducts. In the present case, the conduct of the buyer and the seller in providing and submitting the 'H' form and copy of bill of lading in respect of goods exported out of India, are evidences of subsistence of mutual understanding between the parties. Iron fines bear no market in India since India did not have any technology to process iron fines at relevant time. At that time, China had the necessary

technology to convert iron fines into different categories. Therefore, it will be futile to argue that sale of iron fines by Surya Khanija, Rourkela to its export sellers could have been diverted from the export stream and sold in domestic market. The copies of bill of lading is a proof of export journey of the goods from ports in India is sufficient to link that goods purchased by the export sellers have been loaded in ship and sent from ports in India, to buyers outside the Country. Hence, the impugned transaction has the characteristics of penultimate sale envisaged under section 5(3) of the CST Act.

7. In view of reasons stated above, we find no legal infirmity in the impugned order of the learned ACST and approve of the same. Consequently, we find no merit in the appeal made by the State and dismiss it. Cross objection filed by the dealer respondent is disposed of accordingly.

Dictated and Corrected by me,

Sd/-
(Shri S.M.Dash)
Accounts Member-III.

Sd/-
(Shri S.M.Dash)
Accounts Member-III.

I agree,

Sd/-
(Shri A.K.Das)
Chairman.

I agree,

Sd/-
(Smt. S.Mishra)
Judicial Member-II

