BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 30 (ET) of 2011-12

(Arising out of order of the learned DCST, Jajpur Range, Jajpur Road in First Appeal No. AA- 314 CU-III - 10-11, disposed of on dated 23.04.2011)

Present: **Shri A.K. Das, Chairman**
Shri S.K. Rout, 2nd Judicial Member
&
Shri M. Harichandan, Accounts Member-I

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

-Versus-

M/s. Mishrilal Mines (P) Ltd., Jajpur Road, Jajpur ... Respondent

For the Appellant : Sri M.L. Agarwal, S.C. (CT
For the Respondent : Sri B.N. Mohanty, Advocate

Date of hearing: 29.06.2022 *** Date of order: 20.07.2022

O R D E R

Instant appeal, at the behest of the State, is directed against the order dated 23.04.2011 passed by the learned Deputy Commissioner of Sales Tax, Jajpur Range, Jajpur Road (hereinafter called as 'first appellate authority') in Appeal No. AA- 314 CU-III – 10-11 thereby reversing the order of assessment dated 28.04.2010 passed by the Asst. Commissioner of Sales Tax, Jajpur Circle, Jajpur Road (in

short, 'assessing authority') raising an extra demand of ₹6,30,165.00 in the assessment framed u/s. 9 of the Odisha Entry Tax Act, 1999 (in short, 'OET Act') for the period 01.04.2003 to 31.03.2004.

2. Shorn of unnecessary details, the facts relevant for adjudication of the present second appeal are that the dealer-assessee was engaged in mining activities of chrome ore and it was assessed u/s.7 of the OET Act for the period 2003-04 on 10.02.2005. Thereafter on the basis of objection raised by the A.G. (Audit) for levy of entry tax at a lower rate, the assessment was reopened u/s. 9 of the OET Act and notice was issued to the dealer-assessee for reassessment. At the time of hearing, the assessing authority confronted the objection raised by the A.G. (Audit) to the learned Advocate for the dealer-assessee to the effect that the dealer-Company effected purchase of 5 nos. of tippers to the tune of ₹42,01,100.00 during the year under assessment and paid tax @ 2% instead of 8% as per Part-III of ET Rate Schedule. It was explained by the learned Advocate for the dealer-assessee that since the tippers were mining equipments, which run only in mining area, the same would be taxable as machinery and not as motor

vehicles. The assessing authority on hearing the learned Counsel for the dealer-assessee and considering the A.G. (Audit) objection vis-a-vis the statutory provisions governing the field, held that in view of Entry No. 64 of the OST Rate Chart, the tippers are taxable @ 8%. The assessing authority accordingly raised the extra demand of ₹6,30,165.00, which includes penalty of ₹3,78,099.00.

2(a). The dealer-assessee challenging the aforesaid demand raised by the assessing authority preferred appeal before the first appellate authority, who reduced the tax demand raised by the assessing authority holding that the opening of assessment u/s. 9 of the OET Act was illegal and bad in law as the provision contained in the said section only provides for opening of assessment of tax on escapement of turnover; that treating the scheduled goods 'excavator' as 'motor vehicle' was illegal as the same does not come under the definition of 'motor vehicles' enshrined under M.V. Act, 1988; that the goods are only equipments used in enclosed premises, i.e. mining; and that entry No. 64 of the OST Rate Chart clearly speaks that 'excavator' is earth moving machinery.

2(b). The State being aggrieved with the aforesaid findings of the first appellate authority holding the excavator taxable under Part-II of the Entry Tax Schedule as per entry at Sl. No.9, preferred the present second appeal. The dealer-assessee filed cross-objection supporting the impugned order of the first appellate authority.

3. The learned Standing Counsel (CT) for the State supporting the order of the assessing authority vehemently urged that the first appellate authority under misconception of law treated the tippers as machinery and calculated entry tax @ 2% under Part-II of the Schedule on flimsy and unreasonable ground. The first appellate authority while reversing the finding of the assessing authority has not assigned any valid reason and in an erroneous manner ignored the law laid down by the Hon'ble Apex Court in the case of Bose Abraham v. State of Kerala, reported in (2001) 121 STC 614 (SC), and other judicial pronouncements. The order passed by the first appellate authority is illegal, arbitrary and against the sanction of law for which the same needs interference of this Tribunal. In this connection, learned Standing Counsel (CT) also relied on the decision of **Full Bench of this Tribunal passed in**

S.A. No. 104 (ET) of 2008-09 disposed of on 29.03.2022 (State of Odisha Vs. M/s. D.N. Balabantray). He submitted to set aside the impugned order of the first appellate authority and restore that of the assessing authority.

4. Per contra, learned Counsel for the dealer-respondent supporting the impugned order of the first appellate authority vehemently urged that the first appellate authority has passed reasoned order while reversing the finding of the assessing authority that tippers are motor vehicles and are taxable under part III of the schedule. The first appellate authority did not commit any illegality in levying entry tax @ 2% treating the tippers as machinery under Part-II of the Schedule. The assessing authority on erroneous interpretation of different provisions of the OET Act and the law laid down by the Hon'ble Apex Court in case of Bose Abraham ibid, levied entry tax @ 8% treating the tippers as motor vehicle. He submitted to dismiss the appeal and confirm the impugned order of the first appellate authority.

5. Before addressing on the issue involved in the present second appeal, it is worthwhile to narrate some relevant facts for effective adjudication of the case. There is

no dispute that the dealer-assessee brought 5 nos. of tippers from outside the State to local area for ₹42,01,100.00 for use in the mining area on payment of entry tax @ 2% treating the same as 'machinery' as per Entry No. 9 of Part-II of the Schedule. The assessing authority charged entry tax @ 8% holding it as 'motor vehicles' under Part-III of the Schedule, which was negatived by the first appellate authority reducing the demand raised by the assessing authority. It is pertinent to mention here that the first appellate authority while considering the legality of the order of assessment passed by the assessing authority has discussed about the excavator which was not at all in dispute between the parties. The whole dispute centres around the issue whether the tippers brought by the dealer-assessee were exigible to entry tax @ 2% under Part-II of the Schedule as 'machinery' or @8% under Part-III of the Schedule as 'motor vehicles'. But, the first appellate authority on erroneous appreciation of facts involved in the matter, decided the question whether excavator is 'machinery' or is 'motor vehicle' as defined in the M.V. Act, 1988. This is a factual error committed by the first appellate authority while adjudicating the dispute subject matter of

present lis. Be that as it may, in the present second appeal we are concerned on the issue whether the tippers brought by the dealer-assessee from outside the State is taxable @ 2% or @ 8% being motor vehicle. The factual error committed by the first appellate authority can be rectified by us being the final court of facts.

6. We have heard the rival submissions of the parties, carefully gone through the orders passed by the fora below, grounds of appeal vis-a-vis the materials on record. The sole dispute raised in the present appeal is whether tippers brought by the dealer-respondent from outside the State are exigible to entry tax @ 2% under Part-II of the Schedule being machinery or those are exigible to tax @ 8% under Part-III of the Schedule being motor vehicle. There is no dispute in the present case that the dealer-respondent brought Tippers from outside the state of orissa and used it in mining area. There is no dispute at bar that if Tipper would come within the definition of 'motor vehicle', it would be exigible to entry tax @ 8% as per Part-III of the Schedule, or else would be exigible to entry tax @2% as machinery. So, before answering the question whether the Tippers are motor vehicles or machineries, it would be worthwhile to

refer to some relevant provisions for effective adjudication of the dispute.

7. Section 3(3) of the OET Act, which is a charging provision, specifically deals with levy of entry tax on motor vehicle, which is quoted hereunder :-

> "(3) Notwithstanding anything contained in sub-sections (1) and (2), but subject to the provisions of this Act, there shall be levied and collected a tax on the entry of any motor vehicle into any local area for use or sale therein which is liable for registration in the State of Orissa under the Motor Vehicles Act, 1988 (59 of 1988), and rate of tax shall be at such rate or rates as may be specified by the State Government by notification on the purchase value of such motor vehicles."

Before amendment of Section 2(h) of the OET Act by Orissa Act 2 of 2004 w.e.f 01.06.2004 the term 'motor vehicle' was defined in clause (28) of Section 2 of the Motor Vehicles Act, 1988 as under :-

> Section 2(28) of the Motor Vehicles Act defines -
>
> "Motor vehicle or vehicle means any mechanical propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chasis 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 4 wheels fitted with engine capacity of not exceeding 35 cubic centimetres."

8. On conjoint reading of provisions discussed herein above, it is crystal clear that for the purpose of levying entry tax u/s. 3 of OET Act the vehicle must have entered into the local area for purpose of use or sale therein and it must be liable for registration in the state of Orissa under the Motor Vehicles Act, 1988. 'Motor Vehicle' means any mechanical propelled vehicle adapted for use upon roads 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 4 wheels fitted with engine capacity of not exceeding 35 cubic centimetres. The Hon'ble Apex Court in case of **Bose Abraham ibid, referring to the judgments in case of Bolani ores Ltd. Vs. State of Orissa, reported in (1974) 2 SCC 777 and Central Coal Fields Ltd. vs. State of Orissa, reported in AIR 1992 SC 1371,** interpreting the term 'motor vehicle' as defined u/s. 2(28) of the Motor Vehicles Act and 'motor vehicle' as defined under Kerala Tax on Entry of Motor Vehicles into Local Areas Act, 1994,

categorically held that 'excavators' and 'road rollers' are motor vehicles falling within the ambit of definition of 'motor vehicle' contained in Section 2(28) of the Motor Vehicles Act. This Tribunal while considering the question whether the first appellate authority was correct in holding 'dumper, dozer and excavator' engaged by the dealer as motor vehicles, held that these vehicles would not be exempted from entry tax. Further, in case of **M/s. B. Seenalah & Co. (Projects) Ltd., Balasore Vs. State of Odisha (S.A. No. 139 (ET) of 2005-06 decided on 08.10.2021)**, this Tribunal while considering the question whether the first appellate authority was justified to levy tax @ 12% on the value of tipper, earth excavator and wheel loader, under Part-III of the OET Schedule as 'motor vehicle' or the same are to be taxed @ 2% under Part-II of the Schedule as 'machinery', held that the vehicles which moved on rubber tyres are to be accepted as 'motor vehicle' as per Section 2(28) of the Motor Vehicles Act and affirmed the view of the first appellate authority for levying tax @12% under Part-III of the Schedule treating 'tipper, earth excavator and wheel loader' as motor vehicles. In the present case, the dealer-respondent paid entry tax @ 2% under Part-II of the

Schedule treating the Tipper brought it by from outside the State as 'machinery'. The dealer-assessee did not explain as to why it treated these vehicles as 'machinery' instead of 'motor vehicle' as defined in Section 2(28) of the Motor Vehicles Act. The first appellate authority while reversing the judgment of the assessing authority did not assign any cogent reason for treating the Tipper as machinery and levying tax accordingly. It erroneously did not apply the judgment of the Hon'ble Apex Court in case of Bose Abraham (supra) to the facts and circumstances of the present case. On carefully going through the judgment of the Hon'ble Apex Court in case of ***Bose Abraham*** *ibid*, we are of the unanimous view that this decision is applicable to the facts and circumstances of the present case. When a vehicle is brought from outside the State into the State of Odisha for use and kept for a period exceeding 12 months, it is required to be registered with the State Transport Authorities having jurisdiction. The dealer-assessee did not raise any dispute with regard to the requirement of registration of the Tipper brought from outside the State to the local area, with the concerned authority. The first appellate authority also did not give any finding as to

whether the Tipper brought from outside are required to be registered in the State of Odisha for the purpose of use herein or not. It simply accepted the submission of the learned Counsel for the dealer-assessee that Tippers brought by it to the local area are machineries and reversed the finding of the assessing authority to the effect that the Tippers are 'motor vehicle' within the definition of Section 2(28) of the Motor Vehicles Act and are exigible to entry tax @ 8% as per entry no.64 of the OST rate chart being schedule item under Part-III of the Schedule to the OET Act as 'motor vehicle'. It is not the case of the dealer-assessee that Tippers are vehicles of special type adapted for use only in factory or any other enclosed premises or a vehicle having less than four wheels or it moved on iron flat made into a chain such as caterpillar vehicle or military tank. The Tipper brought by the dealer-assessee in the present case from outside the State are suitable and fit for use on roads. Therefore, in our view, it would come within the definition of 'motor vehicle' u/s. 2(28) of the Motor Vehicles Act as held by the assessing authority. The finding of the first appellate authority that Tipper brought by the dealer-assessee from outside the State were exigible to tax @ 2% under Part-II of

the Schedule is not based on the materials on record and is on erroneous appreciation of the law laid down by the Hon'ble Apex Court in ***Bose Abraham*** *ibid* and other judicial pronouncements and on erroneous interpretation of the term 'motor vehicle' as defined in Section 2(28) of the Motor Vehicles Act. In course of hearing of the appeal, the learned Counsel for the dealer-assessee argued that for the purpose of levying entry tax u/s. 3 of the OET Act, the goods must have been brought to the local area from outside the local area for the purpose of consumption, use or sale therein. In the present case, there is no dispute that the dealer brought Tipper from outside the State for use in mining operation. Therefore, it is exigible to entry tax u/s. 3(3) of the OET Act. Learned first appellate authority illegally reversed the finding of the assessing authority that Tipper brought by the dealer-assessee were motor vehicles within the definition of Section 2(28) of the Motor Vehicles Act for the purpose of levying tax @ 8% as per entry no.64 of the OST rate chart being schedule goods as per entry no 2 of Part-III of the Schedule appended to the OET Act thereby levying tax @ 2% treating the same as 'machinery' as per entry No. 9 of Part-II of the

Schedule. Therefore, the impugned order of the first appellate authority is not sustainable in the eye of law.

9. In view of the foregoing discussions, the appeal filed by the State is allowed, the impugned order of the first appellate authority is set aside and the order of the assessing authority raising tax demand of ₹6,30,165.00 is hereby restored. Cross-objection filed by dealer respondent is accordingly disposed of.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

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

I agree,

Sd/-
(M. Harichandan)
Accounts Member-I