

BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No. 145 (V)/2016-17 & S.A. No.69(ET)/2016-17

(Arising out of the order of the learned Addl.CST, (North Zone), Cuttack in first appeal Case No. AA-106101510000554/2015-16 & AA-108101510000555/2015-16 disposed of on 08.06.2016.)

**Present :- Shri A.K. Das, Smt. Sweta Mishra, & Shri S. Mishra,
Chairman 2nd Judicial Member Accounts Member-II.**

M/s. Jay Jagannath Steels & Power Ltd.,
Rourkela.

..... Appellant.

-Vrs.-

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

..... Respondent.

For the Appellant:

:Mr. S.C. Agarwal, Advocate.

For the Respondent:

:Mr. D. Behura, Standing Counsel(C.T.)

Date of Hearing : 04.08.2021

Date of Order : 25.08.2021

ORDER

Since parties are same and a common tax period is involved, the aforesaid appeals are hereby disposed of in a combined manner.

S.A. No. 145(V)/2016-17

2. Present appeal u/s. 78(1) of the Odisha Value Added Tax, 2004 (hereinafter referred to as 'the Act') is at the behest of the dealer-assessee challenging the impugned order dated 08.06.2016 promulgated in Appeal Case No. AA-106101510000554/2015-16 by the Ld. Additional Commissioner of Sales Tax, (North Zone) (hereinafter referred to as 'FAA') who reduced the demand of Rs.5,45,49,051.00 raised by the Ld. Deputy Commissioner of Sales Tax, Rourkela-II Circle, Panposh (in short 'LAO')

in assessment order passed on 07.08.2015 framed u/s. 43 of the Act relating to the period 01.04.2011 to 31.08.2013 to Rs.2,65,68,936.00 that includes both tax and penalty.

S.A. No.69(ET)/2016-17

3. Instant appeal u/s. 17(1) of the Odisha Entry Tax, 1999 (hereinafter referred to as 'the OET Act') is at the behest of the dealer-assessee challenging the impugned order dated 08.06.2016 promulgated in Appeal Case No. AA-108101510000555/2015-16 by the Ld. Additional Commissioner of Sales Tax, (North Zone) (hereinafter referred to as 'FAA') who reduced the demand of Rs.1,25,52,260.00 raised by the Ld. Deputy Commissioner of Sales Tax, Rourkela-II Circle, Panposh (in short 'LAO') in assessment order passed on 07.08.2015 framed u/s. 10 of the OET Act relating to the period 01.04.2011 to 31.08.2013 to Rs.69,07,923.00 that includes both tax and penalty.

In fact, the instant dealer-company is engaged in manufacturing and sale of sponge iron, iron ore fines and coal fines having its manufacturing unit at Belpada, Bamara and administrative office at Rourkela.

Upon receipt of tax evasion report (in short, 'TER') bearing No.03/51 dated 31.01.2014 wherein purchase and sale suppression of Rs.40,02,25,635.00 was alleged, the case was reopened u/s.43 of the OVAT Act and U/s. 10 of OET Act for the above tax periods.

The Investigating Officers constituted under SIT comprising of officers of Sales Tax Department, Mining Department and Vigilance

(Sales Tax) in pursuance with order of Hon'ble High Court, visited the business premises of the dealer on 14.08.2013 and seized some incriminating documents. The Team cross verified the documents with books of account. Some transactions were tallied and particularly some purchase of iron ore and sale of sponge iron were allegedly not accounted for. The Investigating Team observing that the material accounts was unreliable, made an attempt to estimate the actual production and found that it did not tally with disclosed production. Accordingly, after proper verification, they found both purchase and sale suppression of above amount as per following findings:

- a. Discrepancy unearthed in two cases of seized documents containing 130 nos of seized documents relating to computer particulars out of which slip No.63 a handwritten incoming report of raw materials dated 13.08.2013 and slip no.71 relates to computer typed sheet of the vehicles wise receipt of iron ore and coal.
- b. Discrepancies unearthed in two cases of seized documents relates to one luxury Premium Spiral Pad containing 4 hand written pages out of which page No 1 & 2 which relates to vehicle wise receipt of coal and iron ore from 04.08.2013 to 12.08.2013 totaling 118.070 MT. of coal and 60.01 MT of iron ore.
- c. Discrepancies unearthed in 20 cases of seized documents relate to one Mayur Duplicate book containing 46 hand written pages as per the vehicle analysis report which indicates quantity of sponge fines and lumps loaded in the said vehicle.

- d. Discrepancies unearthed of the seized documents slip no-09 which relate to receipt of iron ore of 20MT in vehicle no OR 14K5727 and OR 14 S 4565.
- e. Discrepancies unearthed of the seized documents slip no 36 & 37 computer generated information sheet of receipt of iron ore on dated 13.08.2013 to the order of 18.880 MT and 9.740MT totaling to 28.620MT.
- f. Discrepancies unearthed regarding production and sales of sponge iron to the order of 71.310MT from the raw materials purchased prior to the operative period.
- g. Discrepancies unearthed on physical verification of stock with book stock where in suppression of sale of sponge iron has been determined at 327.236 MT of sponge iron and 1852.415 MT of iron ore fines valued at Rs.83,41,635.00.
- h. Discrepancies unearthed by calculating the production of sponge iron through use of SION calculated at Rs.38,58,09,730.00.

4. At the assessment stage, the dealer produced books of account, relevant documents, written submission with cited case laws and argued that the allegations made in the TER are bad in law inasmuch as that out of 130 nos of seized slips, in 128 nos, no discrepancies could be noticed. Moreover, although these slips quantify the raw materials, there is no evidence of sale or transportation. Against such contention, the LAO observed that the dealer has admitted to have not accounted for in his books of account of few alleged transactions and moreover he could

not submit necessary documentary evidences nor any tangible explanations for the rest of the allegations to substantiate its claim. On volumetric method of weighment by the team in which discrepancy was noticed, the dealer challenged such weighment not being rational because of eye estimation and further stated that it is within percentage of tolerance in differences noticed by IOs. However, the LAO observed that when the dealer has admitted the shortage and adjusted the tolerance, the ITC availed thereon should have been reversed as provided in the periodical return of the Act. Further, he observed that the dealer has not maintained any grade-wise consumption of raw materials in his books of account in order to ascertain the actual consumption in production of finished goods resulting in application of SION to determine the production. Accordingly, he upheld the allegations made in the TER and estimated the turnover on following parameters :-

	Item	Quantity (in MT)	Value (in Rs.)
1	Suppression on the basis of seized documents	357.31 MTs	60,74,270.00
2	Suppression established on basis of stock discrepancies	327.236 MTs of sponge iron 1852.415 MTs of iron ore fine	83,41,635.00
3	Suppression established on SION basis	22694.69 MTs	38,58,09,730.00
		Total	40,02,25,635.00

Thus, the LAO raised a demand of Rs.5,45,49,051.00 including penalty for the material period against which the dealer preferred first

appeal. At this appeal, after detail verification of books of account, written notes of submission, different cited case laws, arguments rendered by the dealer vis-à-vis allegations made in the TER and demand raised in the assessment order, the ld. FAA estimated the turnover as under

Sl No.	Findings on suppression	Estimation of turnover by LAO	Remarks of FAA
1	a) Unaccounted for purchase Iron ore :108.63 MT Coal :149.46 MT b) Unaccounted for sale Sponge iron : 286.00 MT	(a) Iron ore and coal was converted to sponge iron of 71.31 MT (b) Sponge iron : 286 MT Total Value :60,74,270.00	Iron ore and coal converted to sponge iron hypothetically.
2	Stock discrepancy		
	Shortages: 1) Iron ore :368.227 MT 2) Coal : 1844.032 MT 3) Dolomite : 44.086 MT 4) Coal fines (excess) : 829.196 MT Excess: Iron ore fines : 829.196 MT	a) Shortage of iron ore, coal, dolomite and coal fines excess were taken into consideration and converted to sponge iron of 613.236 MT. From there unaccounted for sale of 286 MT as in 1(b) was deducted. Balance amount of 327 MT was held as suppression of Rs.55,63,012. b) Excess iron ore fines was value at Rs.27,78,623.00 Total suppression :83,41,635.00	a) Sponge iron was calculated by hypothetical ratio. b) Excess iron ore fines can be construed as purchase out of account of iron ore fines or from crushing of iron ore by which fines were generated but not accounted for.
3	Suppression on basis of SION	Differential production was worked out for the year 2011-12, 2012-13 and 2013-14 (up to 13.08.2014) Quantifying suppressed sponge iron of 22649.09 MT	It is also a hypothetical calculation, contrary to the fact that some iron ore were further processed to obtain sizes to be

		valued at Rs.38,58,730.00	fed into kiln along with ready made sizes. Ratio of SION could be relevant when all raw materials in form of usable sizes in kiln.
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From the above table, the ld. FAA further observed that “essentially unaccounted purchase and sale of raw materials and finished products was found from incriminating documents (at Sl.No.1 of the table). Besides, factual finding was made in stock discrepancies (Sl. No.2). But estimations were made by applying SION on iron ore and adding the value of excess iron fines (sl.no.1 and 2). But in sl. No.3, the entire production during 2011-12 to 13-14 (upto 13.8.14) was recalculated by applying SION (Iron ore : Sponge iron as 1.6 : 1 MT) because consumption of iron ore in those period was more than the ratio of 1.6 MT per 1MT of sponge iron. The series of calculation by applying SION again and again in respect of each findings of suppression of raw materials was actually presumptive calculations and unreasonable.” (page-20-21).

On examination of purchased figures on iron ore submitted by the dealer, the FAA observed that the dealer has purchased different sizes of iron ore of different grades out of which 5-18 mm is the ideal size which could be directly fed into kiln for manufacturing of sponge iron. But, all purchases of iron ore of different grades were not ready for direct feeding into kiln and some required for further processing. As such, for 100MT use of iron ore, 44.01% of sponge iron was produced for the

material period whereas IOs calculated it at 58.28% . Further, the dealer has purchased different grades of coal (Gr. E & F), reducing imported coal purchases during the impugned period. He observed that the appellant industry being a sponge iron unit was accountable to Mining regulation and Excise regulation in which capable of open evasion was not possible. But as there was evidence of purchase and sales not accounted for, the turnover was to be re-estimated. Thus, he calculated the money value of actual suppression of discrepancy by taking an average value as stated at page 25 -26 of his order:-

Sl No.	Period	Goods	Rate	Value
1	Purchase Aug 13	Iron ore : 108.63 MT	3000/-	3,25,890/-
2	Purchase Aug 13	Coal : 149.46 MT	2000/-	2,98,920/-
3	Sale (March 13 and April 13)	Sponge iron : 286 MT	7000/-	20,02,000/-
4	Aug 13	IOF : 1862.41 (SGT) MT	1500/-	27,78,615/-
5	Aug 13	Iron ore : 368.227 MT	3000/-	11,04,681/-
6	Aug 13	Dolomite :44.086 MT	976/-	43,027.94
7	Coal fines (Aug 13)	CF : 829.196 MT	1000/-	8,29,196/-
8	Coal (Aug 13)	1844.032 MT	2000/-	36,88,060/-
			Total	110,70,389.94

The suppressed value comes to Rs.1,10,70,390/- and the materials suppression related to transactions of 3 months i.e. March 2013 and April 2013 (sale of sponge iron), August 13 (unaccounted for purchase and stock discrepancy) considering the fact that the appellant is a big industry

and subject to many regulatory departments, the scope of evasion was less likely and considering the fact that assessment covered 29 months in which suppression was proved in the transactions in 3 months, reasonably the turnover can be estimated by 20 times of suppressions applying ratio of judgment of Hon'ble Apex Court in case of H.M.Esufali reported in (1973)32STC 77(SC).Accordingly, he re-estimated the turnover by taking 20 times of the suppressed value that comes to Rs.22,14,07,800.00 on which he calculated tax & penalty payable at Rs.2,65,68,936.00 and passed order in that way.

5. Being further aggrieved by the above order, the dealer has come up in second appeal before the Tribunal.

During the course of hearing, the Ld. Counsel for the dealer appellant, relying on grounds of appeal, written notes of submission with cited case laws, argued mainly on two grounds:

1. Illegality of determination of turnover of Rs.1,10,70,389.94 by Ld.FAA.
2. Illegality of enhancement of turnover to 20 times U/s43 of OVAT Act.

6. Per contra, the Ld. Counsel for the State argued in favour of 1st appellate order, being just, proper & in accordance with provisions of the statute.

However, in order to arrive at a sound logical conclusion, the afore-mentioned issues are dealt in properly vis-à-vis the materials available in this record including lower forums records & after giving a patient hearing to rival contentions of both the parties involved.

The Tribunal, thus, observes as follows:

- a. It is a fact that the SIT comprising of officers of Sales Tax Department, Mining Department and Sales Tax Vigilance paid a surprise visit to the business premises of the appellant on 14.08.2013 and seized some incriminating documents which were cross verified with his books of account with relevant documents produced. After proper examination, they found purchase suppression of iron ore and coal to the tune of 108.63 MT and 149.46 MT respectively. Further, they detected unaccounted sale of sponge iron of 286.00MT. Against above allegations, the appellant could not furnish any satisfactory explanations with corollary evidences before the Id. FAA and accordingly the suppressions were established. Before the Tribunal, the Id. Counsel for the appellant could not submit any plausible explanation with necessary documents to nullify the above charges. As such, we confirm the purchase suppression of iron ore of 108.63 MT; coal of 149.46 MT and sale suppression of sponge iron of 286.00 MT.
- b. It is further viewed that on a volumetric measurements of goods, the IOs found shortage of iron ore fines of 1852.41 MT; of iron ore of 368.227 MT; of dolomite of 44.086 MT ; of coal of 1844.082 MT and excess of coal fines of 829.196 MT. Before both the fora below, the appellant had contended that volumetric measurement cannot be taken as precision method of stock taking when tape measurement in case of measuring ores and minerals has been accepted by Mining and Excise Departments. Moreover, the percentage of

difference is well within the degree of tolerance. However, it is observed that the appellant could not produce any purchase order to verify and ascertain the percentage of tolerance therein. Further, when the appellant has admitted the shortages and adjusted the shortages towards tolerance, the input tax credit availed thereon should have been reversed as provided under the OVAT Act. Column 21(iv) of the periodical return under OVAT Act specifies for such reversal whereas the LAO found blank against that column in the periodical returns of the impugned period. In this case, the mining officers, representing the SIT, are experts in mining regulation and have taken the measurements in his presence which cannot be brushed aside and the difference as found in stock should stand against the appellant without any iota of doubt. Hence, in our considered opinion, the above suppression is established.

Accordingly, the money value of actual suppression or discrepancy estimated at Rs.1,10,70,390.00 by the ld. FAA and reflected in his order dated 08.06.2016 in a tabular form (page 25) is now confirmed by the Tribunal being just, proper and in accordance with the provisions of statute as the average value of different commodities suppressed, has been taken from the books of account of the appellant.

7. Now coming to enhancement of actual turnover for a best judgment assessment by rejecting the books of account, the Tribunal relied on the relevant provision of the statute. As per section 43(1) of the

OVAT Act, if the whole or any part of the turnover of the dealer in respect of any tax period or tax periods has escaped assessment etc., the assessing authority will proceed to assess to the best of his judgment the amount of tax due from the dealer. In the instant case, the ld. FAA has enhanced the actual suppression by 20 times to assess the appellant, being the extended forum of assessment. However, a question may crop up in mind as to whether the enhancement made by the ld. FAA is reasonable having a proper nexus to actual suppression.

i. Addressing on the above question, it is observed by the Tribunal that there must be a proper nexus between actual suppression and enhancement made, taking into consideration the volume of transaction and other relevant factors involved. In this connection, the Tribunal refers to the following case laws of Hon'ble Apex Court on the principles of best judgment assessment:

- a) In case of State of Kerala Vrs. C.Velukutty reported in (1966) 17 STC 465 (SC), it is held by the Hon'ble Apex Court that Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon arbitrary caprice of a judge but on settled and invariable principles of justice. Though there is an element of guess work in a best judgment assessment, it shall not be a wild one, but shall have a reasonable nexus to the available materials and the circumstances of each case.
- b) The Hon'ble Supreme Court in case of CST Vrs. H.M.Esufali H.M. Abdulali reported in (1973) 32 STC 77 (SC) held that there must be

some guess work in estimating an escaped turnover. The authority should arrive his conclusions in best judgment without any bias but on a rational basis. It should not be vindictive or capricious. If the estimates by the authority is bonafide estimate and is based on rational basis the fact that there exists no good proof in support of that estimate is immaterial.

8. Taking into consideration the above judgments along with nature of goods dealt in, which are being subject to many regulatory departments; volume of suppression vis-à-vis annual turnover disclosed for the material year; materials suppression being related to transactions of three months i.e. March 2013 and April 2013 (sale of sponge iron), August 2013 (unaccounted for purchase and stock discrepancy) & impugned period relating to 29 months; modus operandi of dealer-appellant and circumstantial evidences produced, the Tribunal now reasonably reduces the enhancement to ten times of actual suppression detected. Accordingly, the Tribunal estimate the suppression at Rs.11,07,03,900.00 on which the appellant is liable to pay prescribed tax and penalty under both OVAT Act and OET Act.

ii. No separate findings are rendered with regard to entry tax liability in view of the discussions made herein above.

9. Hence, it is ordered.

Thus, the appeals stand allowed. As a necessary corollary, the impugned orders dtd. 08.06.2016 passed in Appeal Nos. AA-106101510000554/2015-16 & AA-108101510000555/2015-16 are

hereby set-aside. Consequently, the matters are sent back to the LAO to issue fresh re-computation order with demand notice under both the Acts separately in the light of findings and observations of the Tribunal noted supra preferably within a month from the date of receipt of this order.

The cross objection filed by the State is disposed of accordingly.

Dictated & corrected by me,

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

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

I agree,

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(Sweta Mishra)
2nd Judicial Member