

BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL:CUTTACK

S.A.No.109(V)/2016-17

(Arising out of the order of the learned Addl.CST Odisha, Cuttack in First Appeal Case No. Jajpur-AA-139/2007-08, disposed of on 29.04.2016)

Present: Shri A. K. Panda
Judicial Member-I

Shri P.C. Pathy
Accounts Member-I

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

-Versus-

M/s. Kalinga Mining Corporation,
At.P.O- Jurudi, Keonjhar. ... Respondent.

For the Appellant: : Mr. M. L. Agarwal. S.C. (C.T.)
For the Respondent: : None.

Date of Hearing: 23.05.2018 ***** Date of Order: 25.05.2018

ORDER

This second appeal has been filed by the Revenue against the order passed by the learned First Appellate Authority/ Additional Commissioner of Sales Tax, Cuttack (in short, 'the Id. FAA/Addl.CST') in first appeal case no. Jajpur-AA-139/2007-08 on 29.04.2016 quashing the assessment order passed by the learned Assessing Authority/Assistant Commissioner of Sales Tax, Jajpur Range, Jajpur Road (in short, 'the Ld. AA/ACST') raising demand of Rs.9,66,939.00 on 09.01.2008 for the period 01.04.2005 to 31.03.2006 under section 42 of the Odisha Value Added Tax Act, 2004 (in short, 'the OVAT Act').

2. The dealer-respondent in the instant case is engaged in operating mines, raising of lumps and crushing of lumps at their own crusher and has sold size iron ore and lumps inside and outside the State. The instant dealer has sold iron ore fines in course of export. The Id. AA/ACST completing assessment on the basis of Audit Visit Report (AVR) has raised demand of Rs.9,66,939.00

including penalty imposed u/s.42(5) of the OVAT Act to the tune of Rs.5,54,966.00 and interest of Rs.21,364.00 levied u/s. 34(1)(c) of OVAT Act. Raising, production and sale of iron ore and fines have been undertaken by M/s. ACCPL and M/s. Kalinga Mining Corporation. It is learnt that during 2005-06 M/s. ACCPL was engaged as raising contractor. The mines and crusher are located at the same area. The sale made by M/s. ACCPL and M/s. Kalinga Mining Corporation under the OVAT Act only was submitted separately and in a consolidated manner. But after judgment of the Hon'ble High Court of Orissa dated 24.01.2007, M/s. Kalinga Mining Corporation has got the exclusive right for operation, production and sale of minerals. It has been observed by the Ld. AA/ACST in the assessment order that the sale turnover submitted by M/s. Kalinga Mining Corporation includes royalty while arriving at the sale value but the sales effected in case of M/s. ACCPL does not include royalty @ Rs. 27/- per M.T. Accordingly the royalty to the tune of Rs. 69,36,826.00 calculated on total quantity of sales effected by M/s. ACCPL and added to the basic amount of Rs.19,88,91,588.71 so as to determine the sale turnover on the score, which resulted in demand of Rs. 9,66,939.00 including penalty imposed u/s. 42(5) of the OVAT Act and interest of Rs.21,364.00 calculated on admitted tax withheld to the tune of Rs.1,02,057.00. This led the instant dealer to come in first appeal before the ld. Addl.CST, Odisha, Cuttack.

The Ld. Addl.CST on careful consideration of the grounds of the instant dealer quashed the assessment order and allowed the appeal in full viewing it as illegal to add royalty amount to determine the sale turnover as the sale effected by the instant dealer at a price is inclusive of royalty. Further it is held that the levy of interest without allowing opportunity of hearing as required under Rule 39 of OVAT Rule is liable for deletion.

3. Being aggrieved with the order of the ld. Addl.CST the State as preferred appeal with the grounds as follows:

The order of the ld. Addl.CST is unjust and improper for the explanation contained in 2(46)(d) of the OVAT Act says that “any amount of duties, charges, taxes levied and leviable under any Act (other than tax levied or leviable under this Act) in respect of such goods shall be included in the sale price”. In this light royalty is to be included in sale price but the learned Addl.CST has ignored the provision pertaining to determination of sale price as defined under the OVAT Act. Royalty is a duty or tax but as the ld. Addl.CST has quashed the legitimate demand without application of mind, the order of the Ld. AA/ACST may be restored.

The dealer-respondent has not filed any cross objection. Despite due service of notice for hearing neither the dealer-respondent appeared nor caused production of relevant evidence at the time of hearing before the Bench.

4. Mr. M. L. Agarwal, the learned Standing Counsel (C.T.) appearing on behalf of the Revenue reiterated the grounds of appeal already filed and urged for restoration of order of the learned AA/ACST. He took the contention that non-incorporation of royalty charges to the basic amount is not to be treated as sale price of the goods in view of the codal provision under the OVAT Act. He forcefully took the contention that the assessment order of the Ld. AA/ACST being proper may be restored and the order passed by the ld. Addl.CST is to be set aside. He was permitted to furnish written submission as sought for. He has raised the following point in the written submission filed before the Bench.

1. The goods have been sold by the dealer-respondent by billing from two units i.e. from (i) KMC and (ii) ACCPL. The sale price in case of KMC includes the amount of Royalty paid, in sale price while effecting sale of goods. Whereas, in case of sales from ACCPL, it does not include the Royalty paid in the sale price, only basic price is charged. The position has been highlighted in the assessment order in tabular form at pages 4 and 5 of the order. In first appeal, the appellate authority has deleted the addition of

royalty charged by adding the same to the price of billing of ACCPL, which is illegal and on wrong notion.

The dealer in first appeal had taken the stand that the royalty does not form part of sale price, by citing judgments. Therefore the Revenue submits that it is includable in sale price:-

That a colourable device has been adopted by the dealer and the dealer has indulged in under-invoicing on sale of goods which is proved by itself from the billing of two units. Reliance is placed on. The following decisions of the Hon'ble Apex Court.

- (i) Mcdowells & company Ltd. V. CTO-(1985) 59 STC 277 (SC).
- (ii) KAIL LTD V. State of Kerala-(2017) 97 VST 441 (SC).

As per the following judgment the sale price of commodity includes totality of price of all expenses incurred to be chargeable.

- (i) E.I.D. Parry Ltd. V. Asst. Commissioner of CT-(2000) 117 STC 457 (SC)
- (ii) Ponni Sugar (Erode) Ltd. V. DCTO-(2005) 142. STC 543 (SC)
- (iii)BOC India. V. State of W.B. – (2010) 34 VST 448(cal)
- (iv)CCT. V. KTC Automobiles (2016) 88 VST 257 (SC)
- (v) Commissioner of Central Excise V. Hindustan Safety Glass Works Ltd-(2005) 4 RC 663 (SC).

The case is heard. In absence of the dealer-respondent the appeal is disposed of on exparte on merit inasmuch as a decade has already elapsed in the meantime and it is not prudent to linger the case any further.

5. Heard the ld. Standing Counsel (C.T.) on behalf of the Revenue, gone through the impugned orders of the learned forums below and grounds filed by the Revenue and written submission filed at the time of hearing. On perusal of the assessment record, it is noticed that the dealer has not included royalty amount to the basic amount disclosed in respect of the

raising contractor i.e. ACCPL and the dealer failed to furnish the details of royalty paid for the impugned period. The Authorised Representative admitted before the Ld. AA/ACST that the returns filed do not tally with statement and the difference in turnover is due to calculation mistakes. The observation of the Ld. Addl.CST that "Thus when it is found that the goods has sold at a price including of royalty amount and there having no other material to say that the price fixed or offered to merchant buyer or purchasing industrial units is not inclusive of royalty element, it is illegal to add royalty amount to determine sale turnover. Therefore, addition of Rs.69,36,826.00 to enhance the sale turnover for levy of tax is deleted and return figures is accepted. So also levy of interest amount of Rs.21,364.00 for withheld admitted tax is not maintainable in the eyes of law because the dealer-appellant has not been allowed an opportunity to show-cause in the matter as required under provision in rule 39 of OVAT Rules. Therefore, same is liable to be deleted and deleted as such".

Perused the connected appeal record. There is no evidence available in the record regarding the finding of the fact that goods sold pertaining to ACCPL includes royalty amount and there is no such agreement available in the appeal record to come to such a conclusion that the royalty amount has already been included in the sale price of goods. There is non-availability of agreement in respect of supply order issued by ACCPL to the purchasing firm to the effect that the sale value determined by the ACCPL is inclusive of royalty amount. Hence, the contention of the Ld. Standing Counsel (C.T.) in this connection is considered to be a fact worth considering in view of the provision contained under section 2(46)(d) of the OVAT Act. However, the finding of the Ld. Addl.CST regarding deletion of interest is just and proper and in accordance with the provision under the law inasmuch as no show-cause notice was marked to have been issued before levy

of interest under section 34(1)(c) of the OVAT Act. Hence the deletion of interest by the Ld. Addl.CST is sustained. However, there is no incongruity on the part of the learned ACST in adding royalty amount to determine the sale price in respect of sales effected on account of ACCPL in accordance with the provision contained under the law.

6. As a result, the appeal is partly allowed and the order of the Ld. Addl.CST is set aside and the matter is remanded to the Ld. AA/ACST to re-compute tax liability in accordance with law, keeping in view the observations made above within a period of four months from the date of receipt of this order in accordance with the provisions under the law.

Dictated and Corrected by me.

Sd/-
(P.C. Pathy)
Accounts Member-I

Sd/-
(P.C. Pathy)
Accounts Member-I

I agree,

Sd/-
(A. K. Panda)
Judicial Member-I