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

S.A. No. 67(C) OF 2013-14

(Arising out of order of the learned CCT, Odisha,
Cuttack in First Appeal Case No. AA-DL-69/2004-05
disposed of on dated 25.07.2013)

Present: Shri R.K. Pattanaik, Chairman,
Smt. S. Mishra, 2nd Judicial Member, and
Shri P.C. Pathy, Accounts Member-I

M/s. Mahanadi Coal Fields Limited,
Jagannath Area, Talcher ... Appellant

-Versus-

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

For the Appellant : Sri A.K.Panda, Advocate.
For the Respondent : Sri M.S.Raman, Additional Standing Counsel (CT)

Date of hearing: 04.11.2020 ***** Date of order: 08.01.2021

O R D E R

The present appeal has been preferred by the dealer assessee in terms of Rule 22 of the Central Sales Tax (Orissa) Rules, 1957 (in short, 'the Rules') read with Section 78(1) of the Odisha Value Added Tax Act, 2004 (in short, 'the Act') assailing the impugned order dated 25.07.2013 promulgated in Appeal Case No. CUII- AA-DL-69/04-05 by the learned Additional Commissioner of Sales Tax (Appeal), Central Zone, Odisha, Cuttack (in short, 'FAA'), who allowed the claim in part and reduced the assessment so determined by the learned Assistant Commissioner of Sales Tax, Cuttack-II Range, Cuttack (in short, 'AA') under Rule

12(5) of the Rules on the grounds inter alia that it is illegal, arbitrary and bad in law and therefore, liable to be set aside.

2. As revealed from the record, assessment under Rule 12(5) of the Rules for the year 2003-04 was set in motion with respect to inter-State sales vis-a-vis the dealer assessee and AA, ultimately, reached at a conclusion that freight and other charges to be part and parcel of the sale price and thus, ought to have been included in the turnover and accordingly, raised additional demand to the tune of ₹22,77,040/- payable as per the terms and conditions of the demand notice. Such a decision of the AA was challenged in appeal by contending that the freight and other charges are not related to the amount received at the time of or before the delivery of the goods, more so when, separately charged and thus, cannot be a part of the sale price being contrary to the provisions of the Central Sales Tax Act, 1956 (in short, 'the Act'), if the definition of the 'sale price' as per Section 2(h) thereof is properly read, understood and appreciated in its proper perspective. But the argument of the dealer assessee as to excluding the freight and other charges from the sale price did not find favour with the authorities below and consequently, on the ground that the dealer assessee realised the alleged charges before delivery of the goods on board and by referring to the procedure for booking, despatch and billing on FOB basis ex-Paradeep Port and the fact that the responsibility with the ownership continued till boarding on ship, it was concluded that all such charges even though claimed to have been reimbursed and separately mentioned in the invoice do form part of the sale price. According to the FAA, the dealer

assessee adopted a colourable device to evade payment of taxes which is not allowed to be deducted, rather, form the part of the sale price according to its definition in Section 2(h) of the Act. The dealer assessee being unsuccessful approached the Tribunal contending that the authorities below have completely erred in law to include the amount not related at the time of or before delivery of the goods as well as when it was charged separately and cannot, thus, be a part of the sale price for determination of tax. According to the dealer assessee, cost of freight and other charges, such as, handling, service charges are not connected to the sale price nor can it be held as sums charged for anything done in respect of the goods at the time of or before delivery thereof. In other words, as per the dealer assessee, the freight and other charges which have been separately charged and reimbursed are no part of sale price but unfortunately the authorities below contemplated it so and determined as a part of sale price and resultantly, raised the additional demand which is untenable in law.

3. The learned Counsel for the dealer assessee, in course of argument, brought to the notice of the Tribunal, a copy of the invoice of the year 2003 in order to substantiate that freight, handling and service charges were independently mentioned therein for being separately charged and reimbursed which clearly and conspicuously suggested that by no stretch of imagination, such charges could form a part of sale price and as a corollary, of the taxable turnover. The learned Additional Standing Counsel for the respondent State, on the contrary, vehemently urged that there is no wrong committed by the authorities below, while

considering the freight and other charges to be part of the sale price having regard to the fact that such charges were received before delivery of goods on board of the ship and the fact that the ownership of it remained with the dealer assessee till boarding, since the despatch was on FOB basis. The aforesaid rival contentions of the parties are to be considered by the Tribunal in order to determine as to if the freight and other charges shown in the sample invoice separately and reimbursed concerning the transactions in question can be related to the sale price by looking at its definition contained in Section 2(h) of the Act.

4. It is made to reveal from the record that the dealer assessee supplied coal to its buyers during the assessment period 2003-04 and as categorically claimed, raised invoices by showing separately freight and other charges forming no part of the taxable turnover which was not acceded to by the authorities below during the assessment. It is also impressed upon that there has been no separate contract inter se parties. From the assessment order dated 22.02.2005, it is also made to realize that the dealer assessee apparently failed to submit the control order and also the purchase orders of the buyers later to which the AA was compelled to hold that freight though recovered by way of reimbursement is to form a part of the sale price. The AA also concluded that the dealer assessee failed to satisfactorily establish that the freight charges did not relate to the sale price while engaging itself in the bargain vis-a-vis the buyers. The FAA finding no separate contract being executed between the parties and referring to a copy of the procedure for booking, despatch and billing and on the premise

that the responsibilities were assigned to the dealer assessee for loading of the goods and considering such other aspects like handling loss etc. concluded that freight and other charges must have to be held as the part of sale price albeit charged separately and reimbursed.

5. In the instant case, the seminal issue falling for consideration is, whether, the freight and other charges for transporting coal by the dealer assessee to its buyers would be a part of the sale price and hence, exigible to tax or not? As it is borne out of record, there is no agreement in writing between the parties in relation to the alleged transportation. The authorities below, apparently, by considering the conduct of the dealer assessee and the extent of responsibility it had exerted, while transporting the goods till its shipment, reached at a logical conclusion that the freight and other charges nevertheless raised separately and reimbursed still form part of the sale price. According to Section 2(h) of the Act, the 'sale price' means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery, or cost of installation in cases where such cost is separately charged. If the said provision is read and appreciated properly, it would mean that 'sale price' is the consideration for sale of goods minus any discount allowed as per the trade practices normally prevailing which is also inclusive of all such sum charged for anything done in respect of the goods at

the time of or before delivery thereof, however, cost of freight, delivery or installation shall be no part of it, if separately charged. In order to realize and understand what is the real intent and purport of the definition 'sale price' as contained in Section 2(h) of the Act, it would be profitable to refer and quote a decision of the Hon'ble Apex Court in the case of Hindustan Sugar Mills Vrs. State of Rajasthan and others reported in (1979) 43 STC 13 (SC) which is often considered to be a legal classicus on the point. In the case (supra), there was an agreement between the parties delineating in detail as to what would be the consideration price where the freight charges realized on pre-paid door delivery basis. In Hindustan Sugar Mills case ibid, it was held and observed that freight charges shall not form a part of sales turnover only if the cost of freight is separately charged and furthermore, where such cost is a part of the price but the dealer chooses to spilt it up and claimed the amount of freight as a separate item in the invoice, then, the same shall be related to the sale price. A reliance may also be placed on one more decision of the Hon'ble Apex Court reported in (2010) TIOL 69 SC- CT in the case of India Meters Ltd. Vrs. State of Tamil Nadu, wherein, it was held that when transfer of goods is at the place of the buyers to which the seller is under obligation to transport it, the freight and insurance charges form part of the sale price. Here, in the case at hand, there was shipment of goods which was carried out under the responsibility of the dealer assessee. In absence of a written contract, whether, there was an agreement or any kind of arrangement or understanding between the parties if to raise the freight and other charges not as a

part of the consideration price but separately for being realized and reimbursed by the dealer assessee. Though, in Hindustan Sugar Mills case (supra), the decision was based on the foundation that there was an agreement in writing, which on being examined indicated the freight and other charges to form part of the sale price but it greatly highlighted the details of the aspect, while examining the definition of sale price with reference to Section 2(p) of the Rajasthan Sales Tax Act, 1954 in juxtaposition to the Act. According to the aforesaid decision, the definition in Section 2(h) of the Act, a pari materia provision, is comprised of two parts. It is held therein that not all sums charged for something done by the dealer in respect of the goods at the time of or before the delivery thereof are covered by the inclusive clause; the cost of freight or delivery or cost of installation certainly represents an amount charged for transportation or installation of the goods at the time of or before the delivery and would, therefore, fall within the inclusive clause on its plain terms but it is taken out by the exclusion clause which does not operate as an exception to the first part of the definition. It is further held therein that such a clause in the second part merely enacts an exclusion out of the inclusive clause and takes out something which would otherwise be within the inclusive clause; in that case, it is therefore obvious that the exclusion clause can be availed of by the assessee, if the State seeks to rely on the inclusive clause for the purpose of bringing a particular amount within the definition of sale price; 'but if the State is able to show that the particular amount falls within the first part of the definition and is, therefore, part of the sale price, exclusion clause cannot avail the assessee

to take the amount in question out of the definition of the sale price. In fact, the Hon'ble Apex Court held in categorical terms that in case the amount of freight forms a part of the sale price within the meaning of the first part of the definition, it is not necessary for the State to invoke the inclusive clause, inasmuch as, the exclusion clause under such circumstances would be irrelevant and cannot be called in aid by the assessee. Having understood the ratio laid down by the Hon'ble Apex Court in the decision (supra), the Tribunal is of the humble opinion that in case of an agreement in place or any arrangement without it, if it is discernable therefrom that freight and other charges though separately indicated in the invoice and raised but form part of the consideration for transporting goods, it would be a part of the sale price. It depends on the contract or conduct of the parties with the assigned responsibilities verily determinable while considering, whether, the freight and other charges either shown separately or reimbursed form part of sale price. If a dealer splits up the consideration price and shows the freight and other charges separately reimbursable does not necessarily lead to a logical inference that it is no part of the consideration price. That apart, reimbursement not being a part of sale price must have to be proved and clearly established by mentioning in detail as to in what manner such payment was made by the buyers. In the present case, as earlier discussed, there appears absence of a contract between the parties on the alleged transportation. The dealer assessee furnished a copy of the invoice of the year 2003, which of course subject to verification prima facie reveal freight and other charges been separately stated. By showing it separately as to the freight and

other charges under the head reimbursement without more would not also be sufficient to take it out from the purview of consideration price. As to what was the agreement, if not in writing and if at all the parties really contracted to exclude the freight and other charges from the sale price and accordingly reimbursed by the dealer assessee are to be elaborated examined and discussed in threadbare, which in the considered view of the Tribunal, an exercise does not appear to have been undertaken by the authorities below. A conclusion simply by referring to the copy of procedure for booking, despatch and billing on FOB basis showing the responsibility of the dealer assessee vis-a-vis the goods in shipment may not possibly be a correct approach to hold that the freight and other charges since incurred at the time of or till delivery of the goods is a part of the consideration price. It is also not evident from the record as to how the reimbursement was accomplished as against the claim of the State that the charges were realized before the delivery of the goods. The reimbursement of such charges and evidence in that respect shall have to be taken into account apart from other aspects in order to determine, whether, the freight and other charges did really inclusive or exclusive of the sale price, as is alleged by the respective parties. Having regard to the totality of the circumstances and considering the fact that the dealer assessee allegedly advanced an argument to the effect that the freight and other charges were separately raised and reimbursed by producing a copy of the sample invoice of the year 2003, the Tribunal is of the considered view that all such aspects of the matter are required to be meticulously looked into in order to do substantial justice

to the parties. In other words, the Tribunal is of the logical conclusion that the matter needs re-examination in great detail by referring to the materials on record.

6. Hence, it is ordered.

7. In the result, the appeal is allowed. As a logical sequitur, the impugned order dated 12.09.2001 promulgated in Appeal No. No. CUII- AA-DL-69/04-05 vis-a-vis the assessment period 2003-04 with respect to the dealer assessee is hereby set aside. Consequently, the matter is remitted back to the AA for a determination, whether, the freight and other charges did really form the part of the sale price, keeping in view the settled position of law, as discussed herein above and in the light of the observations of the Tribunal by providing a reasonable opportunity to the dealer assessee and to complete the entire exercise and pass appropriate order in accordance with law preferably within a period of three months from the date of receipt of the above order. The cross objection is accordingly disposed of.

Dictated & Corrected by me

(R.K. Pattanaik)
Chairman

(R.K. Pattanaik)
Chairman

I agree,

(Smt. S. Mishra)
2nd Judicial Member

I agree,

(P.C. Pathy)
Accounts Member-I