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

S.A. No. 351 (ET) OF 2005-06,

(Arising out of order of the learned ACST, Sundargarh Range,
Rourkela in First Appeal Case No. AA- 170 (RLI) ET/ 2004-05,
disposed of on dated 23.11.2005)

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

M/s Ores Enterprises (P) Ltd.,
At/PO-Koira, Dist. Sundargarh ... Appellant

-Versus-

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

For the Appellant : Sri Damodar Pati, Advocate
For the Respondent : Sri M.L. Agarwal, Standing Counsel (CT)

Date of hearing: 18.06.2020 ***** Date of order: 10.07.2020

O R D E R

Instant appeal under Section 17(1) of the Odisha Entry Tax Act, 1999 (hereinafter referred to as, 'the Act') is at the behest of the appellant questioning the legality of the impugned order dated 23.11.2005 promulgated in Appeal No. AA- 170 (RLI) ET/2004-05 by the learned Assistant Commissioner of Sales Tax, Sundargarh Range, Rourkela (in short, 'FAA') confirming the order of assessment dated 15.12.2004 directed by the learned Sales Tax Officer, Rourkela-I Circle,

Uditnagar (in short, 'AA') for the period 2003-04 on the grounds inter alia that it is palpably wrong, erroneous and suffers from serious legal infirmity and thus, deserves to be set aside.

2. The appellant is a private limited company registered under the Companies Act, 1956 and was granted RC under Section 9C of the Odisha Sales Tax Act, 1947 (in short, 'OST Act') w.e.f. 18.04.1998 for an activity, such as, crushing of minerals and ores by setting up a crusher unit. According to the appellant under Notification dated 09.01.2002 vide SRO No. 22 of 2002, the State Government excluded certain activities from the definition of Section 2(ddddd) of the OST Act later to which its RC was suo motu amended by the AA vide Order No. 4004 dated 31.07.2002 and as such, deleted it from manufacturing activity. It is contended that the appellant submitted returns as a trading unit and as ores and minerals are first point tax paid goods w.e.f. 01.04.2001, it did not pay any entry tax in respect thereof and during the assessment for the period 2003-04, all the materials were placed before the AA and on 21.12.2004, it received the impugned assessment with a demand of `10,24,190/- and being aggrieved, it appealed under Section 16 of the Act, but the FAA, without properly appreciating the fact that it is not involved in manufacturing activity, dismissed the same and confirmed the assessment dated 15.12.2004, which is bad in law. According to the appellant, stone crushing unit has been excluded as an activity of manufacture or manufacturing process vide the notification (supra) and in so far as its activity is concerned, the same is no less than

or different from a crusher unit, inasmuch as, the stone/minerals do not undergo any process of manufacture. In other words, the appellant claims that the activity which is undertaken by it is one of crushing of stone/minerals which is not per se related to manufacture or manufacturing process which is supported by umpteen number of judicial pronouncements so also the Notification dated 09.01.2002; and though stone and minerals are different subjects, but crushing activities are same and therefore, iron ore being a mineral and is put to crushing is also not a manufacturing activity and thus, the authorities below can be said to have fallen into a grave error in raising the alleged demand. It is further clarified by the appellant that only a mechanical process is carried out, a process, as a result of which, no new product other than the original in different sizes is created and as per the judicial pronouncements, to become a manufacturing activity, the product or the goods so produced must have a marketability and commercial identity of its own and sold as such. The aforesaid aspects, according to the contention of the appellant, have not been duly considered, understood and duly appreciated by the concerned authorities in its proper perspective and hence, the impugned order dated 23.11.2005 and for that matter, the order of assessment dated 15.12.2004 is totally untenable in law and therefore, it cannot be sustained.

3. The respondent State strongly justified the impugned order dated 23.11.2005 and contended that the activity which is carried out by the appellant is nothing but manufacture or manufacturing process and the iron ore is further

subjected to such process leading to production of a different and distinct commercial commodity. It is further contended that notwithstanding the State Government Notification dated 09.01.2002, it has to be held that the appellant deals or involved in manufacture or manufacturing activities and therefore, as a manufacturing unit, it is liable to collect tax under Section 26 of the Act and thus, the authorities below did commit no wrong and rightly raised the demand.

4. According to the AA, the appellant is involved in manufacturing and sale of size iron ore and therefore, it is liable to collect entry tax and accordingly, raised the demand to the tune of `10,24,190/-. Against such demand, the appellant approached the FAA and contended that it was not justified for the fact that the activity is no manufacture and that apart, a similar activity which is undertaken by the stone crusher units stands excluded from the purview of the definition in Section 2(ddddd) of the OST Act. The appellant, before the FAA, cited a number of judicial rulings in order to prove and establish that crushing of minerals and connected activity is not a manufacture or manufacturing process since such crushing only results in production of small sized ones like the stones being crushed into chips, etc. However, the FAA did not concede to it and arrived at a decision that the appellant is a unit which continues to be in manufacturing process and the manufactured product since is quite different and distinct commercially from the original i.e. iron ore lumps, it is liable for entry tax @ 1% on the sales

turnover. Having held so, the assessment order dated 15.12.2004 was confirmed by the FAA.

5. The learned Counsel for the appellant cited a decision of the Hon'ble Court in the case of State of Orissa and others Vs. D.K. Construction and others reported in (2017) 100 VST 24 (Orissa) to contend that the subject which is being dealt with by the dealer is nothing but a mineral. In the decision (supra), ballast and grit from a quarry have been held as minerals. The contention is that iron ore lumps are basically minerals and through the crushing process, it is made into smaller sizes and as such, no new product of commercial identity is created and, therefore, no manufacturing is involved. While contending so, the following decisions, such as, Mineral Sales Corporation Vs. Commissioner of Sales Tax:(1980) 46 STC 208 (Allahabad); Commissioner of Sales Tax, U.P. Vs. Lal Kunwa Stone Crusher (P) Ltd:(2000) 118 STC 287 (SC); Divisional Deputy Commissioner of Sales Tax and another Vs. Bherhaghat Mineral Industries:(2000) 120 STC 205 (SC); and State of Maharashtra Vs. Mahalaxmi Stores:(2003) 129 STC 79 (SC) have been referred to. That apart, couple of decisions of the Tribunal by its Single and Division Benches in S.A. No. 350 (ET) 2005-06; S.A. No. 37 (ET) of 2006-07 and S.A. No. 2113 of 2005-06 respectively are cited wherein a consistent view has been maintained to the effect that the process of stone/ minerals being crushed into smaller sizes does not involve manufacture and such cannot, therefore, be considered as an end product of manufacturing activity. The learned Standing

Counsel (CT) cited a good number of rulings, details of which are to be discussed later on and it is then contended that the definition in Section 2(ddddd) of the OST Act is an artificial one, inasmuch as, manufacture involves and includes with all its grammatical variations and cognate expressions, producing, extracting, altering etc. or otherwise process or adopting goods and therefore, it is wide enough to include the case of the appellant morefully when it has not been excluded from the ambit of the Act later to the Notification dated 09.01.2002. It is contended that no such notification has, in fact, been published under the Act so as to exclude the appellant's activity. That apart, it is contended that the appellant is a manufacturer which is engaged in manufacturing activity in purchase of iron ore lumps and converts it into size iron ores and fines and one of the essential features of manufacturing is based on the doctrine of irreversibility and in the present case, after such conversion, the end product cannot be put to its original position as lumps, inasmuch as, after the conversion, the original identity of the lumps is completely lost and thus, having regard to it, there is no escape from the conclusion that manufacturing process is involved. The above rival contentions have to be meticulously examined by the Tribunal to find out and ascertain if at all the iron lumps on being crushed into smaller sizes either as ores or fines by the appellant can be said to be a manufacturing activity so as to bring it within the sweep and ambit of Section 26 of the Act for the purpose of taxation.

6. As a manufacturing unit, every manufacturer of scheduled goods, who is registered under the VAT Act (earlier OST Act) substituted vide OST Amendment Act, 2005 w.e.f. 19.05.2005 shall, in respect of sale of its finished products effected by it to a buying dealer or person either directly or through an intermediary, collect by way of tax an amount equal to the tax payable on the value of the finished product under Section 3 thereof in the prescribed manner. As such, there is no definition of 'manufacture' in the Act. According to Section 2(q) of the Act words and expressions used therein and not defined in the Act, but defined in the VAT Act (earlier OST Act) shall have the meaning respectively assigned to them in that Act. So, the expression 'manufacture' which has no definition in the Act must receive the one assigned to it in OST Act or VAT Act, as the case may be. The definition of 'manufacture' is assigned in Section 2(28) of the VAT Act. Similarly, such definition of 'manufacture' is indicated in Section 2(ddddd) of the OST Act. It seems that there has been a considerable change in the definition of 'manufacture' in OST Act and VAT Act, wherein, it means any activity that brings out a change in an article or articles on account of some process, treatment, labour and results in transformation into a new and different article so understood in commercial parlance having a distinct name, character and use which is quite at variance from the OST Act. However, in the present case, since the assessment is of the year 2003-04, the Tribunal is to apply the definition of 'manufacture' as appearing in Section 2(ddddd) of the OST Act. The above is highlighted only to

show the paradigm shift in the definition of 'manufacture' in Section 2(ddddd) of the OST Act to the one in Section 2(28) of the VAT Act. The real definition of 'manufacture' as envisaged in Section 2(ddddd) of the OST Act has thus, to be properly understood so as to address the rival claims of the parties.

7. In M/s. Saraswati Sugar Mills Vs. Haryana State Board and others: reported in AIR 1992 SC 224, the Hon'ble Apex Court explained the distinction between 'manufacture' and 'processing' observing that the construction of words and the meaning to be given for such words shall normally depend on the nature, scope and purpose of the statute in which it is occurring and to the fitness of the matter to the statute and further held that if a matter is processed, the product may not lose its original character, while in manufacturing, something is necessary to be brought into existence which is different from that which originally existed in the sense that the thing produced is a commercially different article; and thus, a statute is required to be interpreted strictly and the definition clause must be examined in a correct perspective giving the meaning of each word contained therein. In the decision (supra), it is also observed that manufacture implies a change but every change is not a manufacture and yet, every change of an article is the result of treatment, labour and manipulation and the essential point, thus, is that in manufacturing something is brought into existence which is different from that which originally was and the thing produced is by itself a commercially different commodity, whereas, in the case of processing, it is not necessary to

produce a commercially distinct article, inasmuch as, processing essentially effectuates a change in the form, contour, physical appearance, or chemical combination or otherwise by artificial or natural means and in its more complicated form involves progressive action in performing, producing or making something (Ref : Corn Products Refining Co. Vs. Federal Trade Commission: (1944) CCA 7). The above ruling clearly defines what a manufacture is all about so also processing and the finer distinction between the two. As regards the definition in Section 2(ddddd) of OST Act, 'manufacture' means involving variety of activities like production, extraction, alteration, ornamentation, adoption etc. including processing, unless such other manufacturing activities excluded by the State Government by a notification. It is no doubt that an artificial definition of 'manufacture' is prescribed in Section 2(ddddd) of the OST Act. If a unit is involved in manufacturing, processing or in such activities as indicated in Section 2(ddddd) of the OST Act, all such activities are to be treated as manufacture or manufacturing process. The learned Standing Counsel (CT) cited series of decisions reported in (2006) 147 STC 594 (SC); (2000) 117 STC 117 (MP); (2009) 19 VST 545 (SC); (2002) 125 STC 101 (SC); (1988) 71 STC 362 (Gauhati); (1998) 111 STC 188 (SC); (1999) 112 STC 207 (SC); (1992) Supp (1) SCC 290 (SC); (1981) 47 STC 369 (SC); (1988) 71 STC 112 (SC); CEE (1990) SCC 51 (SC); (1986) 61 STC 30 (Rajasthan); (1993) 90 STC 174 (SC); (1999) 116 STC 343 (Madras); (1995) (II) OLR 318 (Orissa); (1999) 113 STC 507 (SC); (2014) 68 VST 498 (SC); (1987) 64 STC 42 (SC); (1989) 74

STC 401 (SC); (2015) 35 GSTR 402 (SC); (1996) 102 STC 592 (Orissa); (1960) 11 STC 698 (SC); (1998) 108 STC 258 (SC) and (1993) 91 STC 408 (SC) to satisfy the Tribunal that the case of the appellant is nothing but deals in manufacturing activity. In all the aforesaid decisions, there has been conversion of goods from one form to another, end product being quite distinct and separate from the original, possessing a new commercial identity. It is contended that doctrine of irreversibility rules to identify a particular process to be manufacturing as the original product is totally lost or destroyed. The decision of the Hon'ble Apex Court (supra), which has initially been cited by the Tribunal, conspicuously explains what a manufacture or processing to be and what are the tests to be applied. If the said doctrine is applied to the present case, then also the Tribunal is of the considered view that the iron ore lumps after being subjected to crushing do not lose its original identity or that identity is not completely lost and the only difference which is noted is, with regard to its size or form. In other words, the original identity of iron ore lumps remains intact, even after it is being subjected to crushing, with end products of iron size ores or fines. The learned Standing Counsel (CT) cited a decision in the case of Sonebhadra Fuels Vs. CTT reported in (2006) 147 STC 594 (SC), wherein, it is held that the definition of 'manufacture' in Section 2(e-1) of the U.P. Trade Tax Act carries a meaning which is of expansive in nature. As earlier discussed, there is no denial to the fact that a definition of 'manufacture' in a statute like the Act is to be understood in the context it is used and with its widest amplitude. A decision in

Maa Sarala Wine Traders Vs. Union of India: (2009) 22 VST 170 (MP)(FB) is also cited by the State, wherein, packing and bottling of liquor has been held as a manufacturing activity. In the decision (supra), it is held that whether an activity amounts to manufacture or not, it is incumbent to take note of any process which is incidental or ancillary to the completion of the final product, whether, it be excisable or not. According to the Tribunal, a distinctly different commercial commodity or goods of commercial value quite different from the original suggests it to be a manufacturing activity and in that context, packing and bottling of liquor was treated so by the Hon'ble Apex Court in the case (ibid). In Kumar Motors Vs. CST reported in (2007) 5 VST 646 (SC), mounting of body on auto rickshaw is held as a manufacturing activity and the above ruling cited by the learned Standing Counsel (CT) is distinguishable since because the activity led to creation of a new marketable product. In the decision (supra), it is held by the Hon'ble Apex Court that not only a new product is brought into existence which amounts to manufacture, but it also includes some amount of alterations in the original product. However, in the present case, no new product of distinct commercial identity is created by crushing and therefore, it would be difficult to hold the activity to be a manufacture. It is undoubtedly not a case of alteration, either.

8. As per the State, the definition of 'manufacture' in OST Act is of broad ambit and the legislature in its wisdom delisted some of the manufacturing activities from the scope of said definition in order to do away with grant of

exemption in entries, such as, 30F, 30FF, 30FFF etc. which is suggestive of the fact that the legislature admitted the units as manufacturing activities on the one hand and on the other, to deny exemption, delisted it for the purpose of taxation. It is also contended that such delisting of activities is confined and applicable for the purpose of OST Act and cannot be extended to the Act, inasmuch as, had the legislature intended so, then a separate notification would have followed suit. Admittedly, stone crushing unit is not included as an activity of manufacture or manufacturing process vide the notification (supra). Such exclusion via Notification dated 09.01.2002 as to the activities not to be within the definition of 'manufacture' in Section 2(ddddd) of the OST Act does not, however, obviate from considering, whether, a particular activity involves manufacturing or not. It may be the intention of the legislature to delist certain activities to deny exemptions but then, it does not in any way preclude to consider an activity if to be manufacture or manufacturing process lying within the meaning and definition of Section 2(ddddd) of the OST Act. Whether, entry tax is to be collected as per Section 26 of the Act and if at all, such a collection in respect of a unit involved in manufacture or manufacturing process or otherwise can still be the subject matter of adjudication, notwithstanding retention or exclusion of certain activities by a notification. It would not be fully competent to arrive at a conclusion that since stone crushing unit is no more an activity of manufacture or manufacturing process vide Notification dated 09.01.2002 (SRO No.22 of 2002) that automatically drives one to treat the

appellant as a manufacturer. Whether, the appellant is involved in manufacture or manufacturing process or not all is to be independently enquired into and investigated upon irrespective of the notification in question. Thus, for the above, the appellant since not being included alongside stone crushing units under the Notification dated 09.01.2002 is, therefore, to be treated as a manufacturer would not be fully justified. It may be that the activity of the appellant is more or less similar or akin to that of a stone crushing unit. But, the real test to be applied is, whether any activity of manufacturing is really involved in the production of iron size ores and fines, while the iron lumps are subjected to a mechanical process. In the decisions of Hon'ble Apex Court in Lal Kunwa Stone Crusher (P) Ltd. and Bherhaghat Mineral Industries (supra), it has been categorically held and observed that stone/minerals on being crushed with the resultant end products like smaller stones, chips/powder does not involve manufacture or such a process cannot be construed as manufacture. As previously discussed, manufacture may or may not result in a new product being formed but by the process by which it is subjected to, a product of distinct commercial identity must result so as to make it taxable. In all the cases cited by the State, a process has been subjected to the original product which happens to be the raw materials leading to the production of distinct goods one of different commercial identities and value. In fact, the original form of the products in almost all the cases referred to by the learned Standing Counsel (CT) stood transformed into a new one with a distinct and different

commercial identity and under such circumstances, the Hon'ble Apex Court held the activities as manufacture or manufacturing process. It is not a case of processing of the iron ore lumps or by or on account of the crushing, it results in a completely new and different commercial commodity. It is also not that the original identity of iron ore lumps is altogether lost or diminished or extinguished, when it results in small forms of iron size ore and fines. In other words, only a smaller form of iron ores are created by crushing the lumps and as such, no other process, it is really subjected to and as a result of such activity, no new product is formed or produced with a distinct commercial identity and in such view of the matter, the activity of the appellant cannot, therefore, be treated as manufacturing within the definition of Section 2(ddddd) of the OST Act. At the cost of repetition, it is stated that the decisions of the Hon'ble Apex Court upon which reliance has been placed by the learned Standing Counsel (CT) are all related to manufacturing activities unlike the appellants'. Like for instance, in Ashirwad Ispat Udyog case (ibid), iron and steel scrap subjected to mechanical process for being conveniently utilized in rolling mills and foundries has been treated as manufacturing activity, where the end product found to be having a distinct commercial identity and saleability; in Jagannath Cotton Company case (supra), waste cotton used as a raw material in the production of cotton was treated as an activity of manufacture. In all the cited cases, either raw material have been used and subjected to mechanical processes or processing, or such other activities like alteration, etc. leading to production of

new and identifiable goods of commercial viability. But, in the instant case, no such activity is really undertaken. In other words, the iron ore lumps are merely put to crushing without being subjected to any other mechanical processes leading to the production of its smaller forms in the shape of iron size ores and fines and therefore, in the considered view of the Tribunal, it cannot be treated as an activity of manufacture as defined in Section 2(ddddd) of the OST Act. Thus, the inevitable conclusion of the Tribunal is that the authorities below misdirected themselves in arriving at a conclusion that the appellant to be a manufacturer for the purpose of taxation under the Act.

9. Hence, it is ordered.

10. For the above reasons, the appeal stands allowed. As a logical sequitur, the impugned order dated 23.11.2005 promulgated in Appeal No. AA-170 (RLI) ET/ 2004-05 is hereby set aside. Resultantly, the assessment for the period 2003-04 vis-a-vis the appellant is quashed. Simultaneously, the cross-objection is disposed of.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(Smt. S. Mishra)
2nd Judicial Member

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