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

S.A. No. 160(V)/2019

(Arising out of the order of the learned ACST, Central Zone in first appeal Case No. AA-320/JPR-V/2014-15 disposed of on 29.09.2014.)

Present :- Shri A.K. Das, Chairman Shri A.K. Dalbehera, 1st Judicial Member & Shri S. Mishra, Accounts Member-II.

M/s Sushant Minerals Pvt. Ltd.,
Barbil, Keonjhar. ..... Appellant.

-Vrs.-

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

For the Appellant: : Mr. Saswat Kumar Acharya, Ld. Advocate
For the Respondent: : Mr. M.S. Raman, Ld. Addl. S.C.(C.T.)

Date of Hearing : 24.06.2021 * Date of Order : 01.07.2021**

O R D E R

The present appeal of the dealer-appellant has been directed against the impugned order of learned Additional Commissioner of Sales Tax, (Central Zone) passed on dated 29.09.2014 in Appeal Case No.AA-320/JPR-V/2014-15 confirming the order of assessment of the Learned Deputy Commissioner of Sales Tax, Barbil Circle, Barbil framed Under Section 43 of the Odisha Value Added Tax Act, involving extra tax demand of Rs.28,63,92,066.00 including penalty of Rs.19,09,28,044.00 imposed Under Section 43(2) of the OVAT Act for the period from 01.04.2008 to 31.07.2013.

2. The brief fact of the case is as follows:-

In the instant case, the dealer-appellant is a Private Limited Company engaged in raising of iron ore on contract basis in different mines as per the work orders/agreements. In the order of assessment, the Ld. DCST has pointed out that during the period of three years from 01.04.2008 to 31.07.2013 the dealer has disclosed receipt of hire charges amounting to Rs.74,09,29,889.00 from hirer for hiring of its machines as per the table below:-

Year	KJS Ahluwalia (In Rs.)	NCCL (In Rs.)	V.K. Pandey (In Rs.)	Triveni Earth Movers P. Ltd. (In Rs.)	Total (In Rs.)
2008-09	95442946	0	0	0	95442986
2009-10	123159879	0	0	40828261	163988140
2010-11	152740542	0	0	43979642	196720184
2011-12	118370230	0	0	17149936	135520166
2012-13	46466180	666000	879000	12900006	60911186
2013-14 (up to July 13)	87281227	480000	586000	0	88347227
Total	623461004	1146000	1465000	114857845	740929889

This amount is treated as consideration received towards transfer of right to use the goods on hire and thus the charges are taxed at the appropriate rate of the machineries hired as contemplated U/s.2(45)(f) of the OVAT Act. The dealer-appellant contended that since

they have paid service tax on the said receipt they are not liable to pay tax under OVAT Act. Notwithstanding the service tax collected by Central Excise Authority for the impugned period, he enforced the right of the State to levy VAT for any consideration on account of hire charges citing different case laws. Thus, he proceeded to complete the assessment on the escaped turnover of Rs.74,09,29,889.00 and taxed the same at the appropriate rate levying penalty on the tax so assessed that resulted in a total demand of Rs.28,03,92,066.00 in the assessment order.

3. Being aggrieved with the order of assessment, the dealer-appellant challenged the said order before the Hon'ble Orissa High Court. The Hon'ble High Court in W.P.(C) No.4844/2004 in their order dt.25.03.2014 directed the dealer to prefer statutory appeal and waived pre-deposit above 10% of the tax demand. Thereafter, the dealer preferred special leave petition before the Hon'ble Apex Court in SLA (C) No.10568/2014. The Hon'ble Apex Court passed order that dealer shall prefer appeal within a period of six weeks and the appellate authority shall be advised to dispose of the same appeal within a period of four months. Accordingly, the dealer filed appeal before Ld. first appellate authority on 13.06.2014. The ld. First appellate authority observed that the dealer has challenged the aforesaid demand by furnishing a narrative ground of appeal in each case of the contractee, denying liability under OVAT by self analyzing the contract/work order and citing decisions of the Hon'ble Supreme Court and Hon'ble H.C. The Finance co-ordinator

appearing for the appellant agitated before him that when the appellant paid service tax on the disputed transactions, how it would be leviable to tax under OVAT Act?

Taking into consideration all the available materials at hand and referring to relevant legal provisions of the Act and judicial pronouncements of different Hon'ble Courts, the ld. First appellate authority concluded that the consideration required by the dealer-appellant attracts levy of VAT as per his detailed observations in the exhaustive appeal order passed, justifying levy of penalty on the assessed tax.

4. Being aggrieved with the first appeal order, the dealer preferred second appeal before this Tribunal. However, the dealer received a defect notice dt.23.10.2019 from OSTT requiring the petitioner to pay another 10% of the demanded tax in terms of the amended section 78(6) of OVAT Act as he had paid only 10% of demanded tax at the time of filing of the first appeal which was challenged among other grounds by the appellant before Hon'ble Orissa High Court. The Hon'ble High Court in W.P.(C) No.28500 of 2000 in their order dtd.21.01.2021 held as under:

"13. Having considered the above submissions, it appears to this Court that it would be appropriate to direct the OST to take up hearing of the Petitioner's appeal No.160(V)/2019 without insisting on the further 10% pre-deposit by the Petitioner. It is ordered accordingly. The OST would

examine the question whether in the light of the judgment of the Bombay High court in ***Anshul Impex*** *(supra),* the Petitioner's contention that the amendment to Section 78(6) of the OVAT Act would apply prospectively is legally tenable. The OST would proceed to hear the Petitioner's Second Appeal on merits on all the grounds urged therein and dispose it off by a reasoned order not later than 5th July, 2021. Till then, no coercive steps shall be taken against the Petitioner."

The Hon'ble Court inter-alia has directed OSTT to examine the question as to whether in the light of the judgments of the Bombay H.C. (Nagpur Bench) in Anshul Impex Pvt. Ltd. Vs. State of Maharashtra decided on 28th Sept' 2018, the dealer's contention that the amendment to section 78(6) of OVAT Act would apply prospectively is legally tenable. In order to answer the aforesaid question, one has to go through the relevant provisions of the Statute as amended taking into consideration the applicability of aforesaid judgment to the present case:

Section : 78(6) of the OVAT Act as amended vide Law Deptt. Notification No.6677-1-Legis-19/2017-L dt.21.06.2017 effective from 21.06.2017.

"6.The Tribunal shall not entertain any appeal preferred by a dealer unless it is accompanied by satisfying proof of payment of twenty per centum of the tax or interest or both in dispute as determined under sub-section (7) of section 77:

Provided that, on payment of twenty per centum of the tax or interest or both, in dispute, realization of the balance tax, interest or penalty, as the case may be, under dispute shall be deemed to be stayed in full till disposal of the appeal by the Tribunal.

Explanation-The payment of twenty per centum of the tax or interest or both in dispute shall be such including the amount deposited under sub-section (4) of section 77."

Accordingly, after filing of second appeal by the dealer-appellant on 19.08.2019, the petitioner received a defect notice on dtd.23/10/2019 from the OSTT requiring the petitioner to pay another 10% of the demanded amount in terms of the amended section 78(6) of the OVAT Act.

It is now pertinent to go through the order of Hon'ble Mumbai High Court in Anshul case noted Supra for applicability of ratio of its judgment to the present case. In the case of Anshul Impex Pvt. Ltd. Vrs. State of Maharashtra in Sales Tax Appeal No.2 of 2018, the Hon'ble Bombay High Court, Nagpur Bench observed that the assessment order relating to financial year 2010-11 was passed on 30.10.2014 against which the dealer-appellant filed review petition on 13.04.2017. The review order came on 27.07.2017 raising some demand therein. However, the said review order was challenged by the dealer-appellant before the Tribunal by filing appeal on 25.09.2017. In between, amended provisions of section 26(6B) of Act of 2002 came into effect from

15.04.2017 having prospective effect. However, the Tribunal by holding the said provision, dismissed the appeal. Hence, the dealer filed writ before the Hon'ble Bombay High Court. The Hon'ble Bombay high Court in their judgment dtd.28.09.2018 held as under:-

"Perused of impugned judgment reveals that the order which was challenged before the Tribunal is dated 27/7/2017, i.e. after amended provision came into effect on 15/4/2017, thus the Tribunal held that appellant was statutorily bound to deposit an amount equal to per cent of the balance amount of disputed tax as a pre-condition for admission of appeal. However, the Tribunal has failed to consider the fact of initiation of review proceedings on 13/4/2017 as stated above when admittedly amended provisions were not in force. Having considered the facts and for the reasons aforesaid, it is clear that amended Section 26(6B) of the Act of 2002 requiring appellant to deposit 10% of the disputed tax is not applicable to appellant since list started in the year 2011 while effect of amendment is prospective with effect from 15/4/2017. Accordingly, question no.1 framed as aforesaid is replied holding that the Tribunal has committed an error in dismissing the appeal as not maintainable for no payment of amount aforesaid, i.e. 10% of the amount assessed.... Further it is held that relevant date to hold applicability of amended provisions or otherwise shall be the date on which proceedings were initiated and not the date of decision."

The above judgment followed the judgment of Hon'ble Apex Court in case of M/s. Hoosein Kasam Dada (India) Ltd. In the aforesaid case of Hoosein Kasam Dada Vrs. State of Madhya Pradesh , AIR 1953 SC 221 the Hon'ble Supreme Court in identical facts relating to a similar amendment in the C.P. and Berar Sales Tax Act, 1947 has categorically held that the pre-existing right of appeal is not destroyed by the amendment, if the amendment is not made retrospective by express words or necessary intendment. The fact that the pre-existing right of appeal continues to exist must, in its turns, necessarily imply that the old law which created that right of appeal must also exist to support the continuation of that right. As the old law continues to exist for the purpose of supporting the pre-existing right of appeal, that old law must govern the exercise and enforcement of that right of appeal and there can then be no question of the amended provision preventing the exercise of that right. The Hon'ble Apex Court in the aforesaid set of circumstances thus observed that for the purpose of accrual of right of appeal, the relevant date is of initiation of the proceedings and not the date of the decision."

In the present case, the date of assessment order is 31.01.2014 and the date of the order of first appellate authority is 29.09.2014. Both the dates fall prior to the amendment of Section 78(6) of the OVAT Act which came into force on 21.06.2017 requiring pre-deposit of 20% of tax U/s. 78(6) for an appeal to be admitted before the

OSTT. Applying the ratio of judgments of aforesaid two cases, it appears that the dealer-appellant is not liable to make further deposit of 10% of disputed tax. Be it as it may, in the pre-amended era i.e. before 21.06.2017, the dealer was supposed to deposit 20 per centum of the tax or interest or both, in dispute at the time of filing appeal before the **first appellate authority** as per section 77(4) of OVAT Act. Since, the dealer has paid 10% of the tax demand at the time of filing of first appeal, the Hon'ble Orissa High Court in W,P. (C) No.4844/2014 in their order dtd.25.03.2014 directed the dealer to prefer statutory appeal and waived pre-deposit above 10% of the tax demand. Moreover, the Hon'ble Orissa High Court in W.P.(C) No.28500 of 2020 decided on 21.01.2021 has directed the OSTT to take up hearing of the petitioner's appeal No.160(V)/2019 without insisting on the further 10% pre-deposit by the petitioner which was ordered accordingly. This issue is now settled by the Tribunal in the instant case as per above observation.

5. After having a patient hearing to the averments made by both the rival parties & going through all the relevant materials available in record, the Tribunal further observes as follows:

1) That, the entire controversy is on transfer of right to use the goods as a limb of sale under the OVAT Act. Before adjudicating on facts involved in the instant case, we may look at the relevant legal provisions and different settled case laws. The Tribunal observes that in order to be deemed sale of transfer of right to use of goods, the title

to goods is not transferred but when transfer of right to use goods takes place, it attracts VAT and moreover, the goods must be movable or capable of being movable goods irrespective of the fact that for operation, the goods has have to be fixed to the earth. It is by insertion of clause (f) to Section 2(45) of OVAT Act that transfer of right to use any goods become taxable. The said sub-section reads as follows:

Section 2(45) : Sale

a) Xxx; b)xxx; c)xxx; d)xxx: e)xxx

f) A transfer of right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

(This clause is parmetria to sub-clause 'd' of clause 29A of Article 366 of constitution).

Section 2(46) : Sale Price

Clause f: In relation to transfer of right to use any goods for any purpose (whether or not for a specified period), the consideration or the hire charges reused or receivable for such transfer shall be Sale Price.

As such, the contract/agreement/ work order between the provider and recipient for supply of goods has to be seen and analysed properly with conduct of parties and attending circumstances to infer on transfer of right to use the goods.

In this regard, the Hon'ble Apex Court in case of BSNL Vrs. UOI reported in BSNL Vrs. UOI (2006) 3STT 245 (2006) 3 VST 95 (SC) has laid down the test to constitute the transaction for the transfer of right to use the goods. The Hon'ble Apex court held that to satisfy transfer of right to use the goods, the following are to be looked into:

"a) There must be goods available for delivery;

b) There must be consensus ad idem (means used of a word in a legal document which though mis-spelt can be accepted as that for which it clearly stands) as to the identity of the goods.

c) The transferee should have a legal right to use the goods- consequently all legal consequences of such use including any permissions or licenses required there of should be available to the transferee.

d) For the period during which the transferee has such legal right, it has to be exclusion to the transferor – this is necessary concomitant of the plain language of the transfer of the right to use and not merely a license to use the goods.

e) Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others".

Accordingly, it reveals the fact that "Right to possession" and "effective control" together are the key elements, the presence (or lack) of which have to be established with reasonable certainty for a

decision to be reached regarding whether the matter has to be treated as a transaction of service or deemed sale. And when both "right to possession" and "effective control' of the tangible goods have been supplied to another person for use are being retained by the supplier of goods, the situation becomes one where service is rendered rather than sale is effected.

On critical and minute examination of copies of four nos. work orders entered with different parties & filed by the dealer-appellant with relevant documents like copies of service tax returns; few challans of service tax deposit and service bills, it is revealed that both the "right to possession" and "effective control" of goods supplied lied with the dealer-applicant and not with respective contractees that exclusively falls under the domain of service tax.

In this connection, the judgment of Hon'ble Orissa High court in W.P.(C) NO.196 of 2012 delivered on 17.11.2014 is noteworthy whose ratio of judgment is squarely applicable to the present case. For better appreciation, the said judgment is reproduced below:-

"17.11.2014 Heard Mr. Mohanty, learned counsel for the petitioner and Mr. Raman, learned counsel appearing for the Revenue.

2. Challenging in the present writ petition has been made to the order of assessment dated 29.10.2011 passed under Section 43 of the OVAT Act, 2004 for the period from 1.4.2007 to 31.1.2009 under Annexure-8.

3. It is submitted on behalf of the petitioner that the petitioner's contention before the Assessing Officer was that the petitioner was providing hiring services and such services was recognized to be a taxable service under the provisions of Service Tax as per provisions of Section 65(105)(zzzzj) of the Finance Act, 2008 with effect from 16.05.2008, but the same was not accepted.

4. Learned counsel for the petitioner has filed an additional affidavit before this Court enclosing therein the assessment order passed under Section 42(4) of the OVAT Act, 2004, wherein the subsequent period, i.e., from 1.2.2009 to 31.8.2010, the Department has accepted the nature of transaction to be covered as a taxable service under the service tax as per provisions of Section 65(105)(zzzzj) of the Finance Act, 2008 and therefore, the same being a taxable service under the Service Tax Act is exempted from VAT.

5. In view of the aforesaid facts, it is contended by the learned counsel for the petitioner that for the period from 16.05.2008 to 31.1.2009, the activities of services rendered by the petitioner having become taxable under the Finance Act, 2008, it is no longer available to be levied under OVAT Act.

6. Mr. Raman, learned counsel appearing for the Revenue fairly submits that since the impugned order of assessment under Annexure-8 covers the period from 1.4.2007 to 31.1.2009, the order of assessment passed by the Assessing Officer has to be reconsidered in view of the fact that the petitioners activity has been covered under provisions of Service Tax as per the provisions of Section 65 (105)(zzzz) of the Finance Act, 2008 with effect from 16.05.2008 and for the subsequent periods, the activities of the petitioner have been accepted as a taxable service under the Finance Act, 2008.

7. Considering the submission of the learned counsel for the parties, we are of the view that this is a fit case where the impugned order of assessment for the period 1.4.2007 to 31.1.2009 should be quashed and the matter should be remanded back to the Assessing Officer for fresh assessment during aforesaid period for purporting transaction to be covered as a taxable service under the provisions of Service Tax as per the provisions of Section 65 (105)(zzzz) of the Finance Act, 2008 with effect from 16.05.2008. We, therefore, quash the impugned order of assessment under Annexure-8 and remand the matter back to the Assessing Officer for fresh assessment during the aforesaid period within a period of three months from the date of appearance of the petitioner before him. For this purpose, the petitioner-assessee is directed to appear in person or through counsel before the Assessing Officer on 8.12.2014 and produce a certified copy of this order along with all relevant records."

Taking into consideration the aforesaid judgment, in the present case, it is further observed as below:-

a) That, the dealer-appellant has entered agreements with different parties in which it is clearly reflected that under no circumstances possession of the property is handed over to the clients for their exclusive use. On the other hand, the dealer-appellant has the obligation of operating, maintaining the machinery under its disposal and throughout the validity of the contract retain the possession and the clients are only entitled to avail the services provided by the petitioner either on hourly or quantity basis which is out and out a service contract between the dealer-appellant and

the concerned clients. The activity of service is recognized by the Parliament under Finance Act to be the taxable service liable to Service Tax under the aforesaid provisions of the Finance Act 1994. Therefore, what is paramount is existence of taxable event under a taxing statute to enable the authority to invoke the provision for levy of tax.

b) That, the objective of OVAT Act and Rules framed there-under being determination of actual tax liability with due regard to the provisions of law under the OVAT Act and Rules and furthermore to apprise the relevant provisions of law to the dealer-assessee, it is not reasonable, proper and lawful to proceed on a erroneous non-existent provision and even without substantiating how the petitioner incurs the tax liability under the OVAT Act when the dealer is adducing evidence emphatically claimed to have been discharging tax liability on the very same subject under the provisions of Finance Act by making payment of Service Tax.

c) That, it is relevant to point out here that State legislature enjoys power to levy tax on sale and purchase as contemplated under Entry 54 List II, VIIth schedule of the Constitution of India. The expression “sale” is defined under the Constitution which has undergone amendment under the 46th Amendment of the Constitution amending the provisions of Article 366 (29-A) of the Constitution. Therefore, no tax could have been imposed unless

sale takes place within the scope of the aforesaid amended provisions of the Constitution under Article 366 (29-A) read with Entry 54 List II, VIth schedule of the Constitution of India.

d) That, in the present case, it is relevant to observe that levy of tax on services falls within the domain of Entry 93, List 1 of the VII schedule of the Constitution of India and the Union legislature which has the exclusive power to levy the tax on the said subject. The state legislature is thus denuded of its constitutional legislative power to levy tax on activity of service failing under the aforesaid Entry 93 of List-I of the 7th Schedule of Constitution of India, therefore, the exercise of power of present Assessment to levy sales tax on hiring services not involving any sale cannot be subject matter of present assessment. Keeping in view the aforesaid constitutional limitations and mandates of law, the imposition of Sales tax to prior period of 16/05/2008 is also not permissible. Since Hiring of Equipments is covered under service tax w.e.f. 16/05/2008 by insertion of provision 65(105)(zzzzj) the prior period of 16/05/2008 is also obviously covered under Services and the period from 01/04/2008 to 15/05/2008 the dealer-appellant is also not liable for payment of Sales Tax as per order of Hon'ble High Court of Orissa Cuttack noted supra. Hence, it is ordered.

6. The appeal filed by the dealer-appellant is allowed in full and the demand raised by the Ld. First Appellate Authority for the impugned period is reduced to Rs. Nil.

The case 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/-
(A.K. Dalbehera)
1st Judicial Member