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

S.A. No. 38 (ET) of 2007-08

(Arising out of order of the learned ACST, Cuttack-II Range, Cuttack, in First Appeal Case No. AA- 353/ET/DL/2005-06, disposed of on dt. 31.01.2007)

Present : **Smt. Suchismita Misra, Chairman**
Smt. Sweta Mishra, 2nd Judicial Member
&
Shri Prabhat Ch. Pathy, Accounts Member-I

M/s. N.T.P.C. Ltd.,
TSTPP, At- Deepsikha,
PO- Kaniha, Talcher, Angul. . . . Appellant

- V e r s u s –

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

For the Appellant … Mr. A.K. Panda, Advocate
For the Respondent … Mr. S.K. Pradhan, Addl. S.C. (CT)

Date of hearing: 17.06.2019 **** Date of order: 17.06.2019

O R D E R

This appeal is directed against the order dated 31.01.2007 passed by the Appellate Authority, Cuttack-II Range, Cuttack (in short, "first appellate authority") in First Appeal Case No. AA- 353/ET/DL/2005-06 confirming the order of assessment passed by the Assessing Authority, Dhenkanal Circle, Angul (in short, 'assessing

officer') in respect of the dealer-assessee under the Odisha Entry Tax Act, 1999 (in short 'OET Act') for the period from 01.04.2005 to 31.12.2005.

2. The facts leading to this appeal, as revealed from the case record are that the dealer i.e. M/s. N.T.P.C. Ltd. (TSTPP), Kaniha, Talcher is engaged in generation of thermal electricity and sells the same. For generation of electricity the dealer uses coal which it procures from MCL and MMTC Ltd. Admittedly there is no adverse report against the dealer for the period from 01.04.2005 to 31.12.2005. However, as it utilizes coal for generation of thermal electricity and coal is a scheduled goods under the OET Act and as such liable for payment of ET @ 1% on its entry to the local area, the assessing officer after examining all the relevant papers determined that the dealer was supposed to pay `10,78,67,410.35 towards entry tax for the period of assessment commencing from 01.04.2005 to 31.12.2005. However, it had paid entry tax of `2,94,73,142.00 only u/R. 11(2) of the OET Rules and further had paid entry tax to the extent of `3,92,43,162.00 at the time of purchasing coal from MCL and MMTC Ltd. which were allowed to be adjusted and the dealer was asked to pay the balance amount of `3,91,51,106.00 towards entry tax as per the terms and conditions of the demand notice issued by the assessing officer.

Being aggrieved with the said order of assessment the dealer preferred an appeal on the ground that the assessing authority committed an error in completing the assessment under the OET Act. The assessing officer instead of coming to a conclusion that coal is a raw material for Thermal Power Unit generating electricity following the principles laid down by the Hon'ble Apex Court as well as Hon'ble High Court treated the same as a scheduled goods liable for entry tax @ 1%. The first appellate authority, however, did not agree with the contention advanced by the dealer-assessee and held that as mentioned in Form No.48 coal alongwith charcoal, fire wood, fine oil, coal gas and other fuels was shown as fuel in generation and transformation of electricity. Thus, he rejected the claim of the dealer that coal was used as a raw material for generation of electricity and upheld the order of assessment.

3. Being aggrieved with the aforesaid order of the first appellate authority the dealer-appellant has come up with this appeal on the grounds that the first appellate authority while ignoring the judgments rendered by the Hon'ble High Court and Hon'ble Supreme Court on 'interpretation of raw material' had erroneously come to a conclusion that coal is a fuel for generation of electricity in Thermal Power Plant. Both the assessing officer as well as the first appellate authority failed to understand the process involved in generation of

electricity which certainly requires generation of steam as an intermediary goods for which the coal is required as a raw material for production of steam. The first appellate authority without justifying his conclusion that coal was only used as fuel in the business unit of the dealer and not as a 'raw material' for the finished product passed the impugned order in a very whimsical and arbitrary manner in order to raise the demand to serve the interest of Revenue.

4. The State as respondent has not filed cross-objection in this case. Learned Addl. Standing Counsel (CT) appearing on behalf of the State, however, contended that the dealer – N.T.P.C. Ltd., Talcher had purchased coal and used the same in generation of power for distribution. Coal being used as fuel was consumed in the process of generation of power and as such cannot be considered as a raw material as claimed by the dealer-appellant. It was further submitted by the State that the first appellate authority had rightly disallowed set off tax while holding that coal was used as fuel and not a raw material in production or generation of electricity. Therefore, this second appeal preferred by the dealer has no merit at all.

5. In course of hearing learned Counsel appearing on behalf of the dealer-assessee again reiterated that the order passed by the first appellate authority is not in consonance with the statute. The first appellate authority should not have treated coal as fuel for

generation of electricity in Thermal Power Station without taking into account the functional activities involved in generation of electricity and necessity of coal in the said process. The first appellate authority also did not follow the guidelines given by the Hon'ble Apex Court in various judgments involving the decision to be taken in respect of raw materials in different cases but held that coal in this particular activity of production of electricity energy was used as fuel only which did not form an integral part of the product itself i.e. electricity. He thus urged before the Bench to set aside the orders passed by the assessing officer as well as the first appellate authority while holding that the coal was used only as a raw material for production of electricity in the establishment of the dealer-assessee and as such the dealer is liable to pay entry tax @ 0.5% only instead of 1%. Learned Counsel for the dealer-assessee also pointed out that in another case i.e. in S.A. No. 13(ET) of 2006-07 this Tribunal have already taken a decision that coal is a raw material for the purpose of production of electricity and further the activity of generating electricity in a Thermal Power Plant by using coal has to be treated as manufacturing activity.

6. In course of hearing the appeal learned Counsel for the dealer-assessee in order to fortify his argument cited the order of the Hon'ble Court passed in STREV No. 80 of 2007. For better appreciation, we would like to quote the order of the Hon'ble Court here.

Quote : "Learned Counsel for the petitioner submits that this matter is covered by the judgment of this Court in the case of Odisha Power Generation Corporation Ltd. Vs. State of Odisha and Another, (2015) 81 VST 138 (Orissa).

In view of the submission made, this STREV is disposed of in the light of the decision of this Court in the case of Odisha Power Generation Corporation Ltd. Vs. State of Odisha and Another, (2015) 81 VST 138 (Orissa)." Unquote.

Further, in the case of Odisha Power Generation Corporation Ltd. Vs. State of Odisha and Another, reported in [2015] 81 VST 138 (Orissa) Hon'ble Court have been pleased to hold categorically that when the process involved in manufacturing/generation/production of electricity in a thermal plant, use of coal in the said process has to be taken as a raw material. For better appreciation portions of the above judgment are quoted here.

Quote : "When the process that are involved in manufacturing/ generation/production of electricity in a thermal plant as narrated in the preceding paragraph is considered in the light of above observation of the honourable Supreme Court, it can safely be concluded that coal is a raw material for production/generation of electricity". Unquote.

It was also held in the said decision that-

Quote : "In view of the definition of "manufacture" as provided in section 2(28) of the 2004 Act read with rule 2(1)(c) of the 1999 Rules and section 2(q) of the 1999 Act, the activity of generating electricity in a thermal power plant by using coal would qualify as a manufacturing activity". Unquote.

7. The State-respondent could not advance any plausible argument countering the aforesaid contention of the dealer-assessee. Therefore, following the principles laid down in the above decisions of Hon'ble Apex Court and Hon'ble High Court and since the only issue in this appeal which requires to be resolved is whether coal has to be treated as raw material for the purpose of generation of electricity in a Thermal Plant and as such exigible to tax @ 0.5% instead of 1%, it has to be held that coal is nothing else but a raw material so far as the dealer's establishment is concerned and since it is submitted by the dealer-assessee that on demand it had paid entry tax @ 1% and urged for refund of the excess amount to it towards entry tax, it has to be held that the order of assessment as well as the impugned order deserve to be set aside out rightly with a direction for fresh computation of liability of the dealer-assessee towards entry tax.

8. In the result, the appeal filed by the dealer-assessee is allowed. Therefore, the order passed by the first appellate authority confirming the order of assessment is hereby set aside. The matter is remitted back to the assessing officer with a direction to recompute the

entry tax liability of the dealer-assessee afresh pertaining to the relevant period keeping in view the aforesaid observations of this Tribunal within three months from the date of receipt of this order.

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

Sd/-
(Smt. Sweta Mishra)
2nd Judicial Member

I agree,

Sd/-
(Prabhat Ch. Pathy)
Accounts Member-I