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

S.A. No. 254 (ET) of 2005-06

(Arising out of order of the learned ACST, Cuttack-II Range, Cuttack, in First Appeal Case No. AA- 456/ET/DL/2004-05, disposed of on dt. 17.09.2005)

Present : **Smt. Suchismita Misra**, **Chairman**
Shri Subrat Mohanty, 1st Judicial Member
&
Shri Prabhat Ch. Pathy, Accounts Member-I

M/s. N.T.P.C. Ltd.,
T.T.P.S., Talcher Thermal, 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. M.S. Raman, Addl. S.C. (CT)

Date of hearing: 06.06.2019 **** Date of order: 06.06.2019

O R D E R

This appeal is directed against the order dated 17.09.2005 passed by the Asst. Commissioner of Sales Tax, Cuttack-II Range, Cuttack (in short, "first appellate authority") in First Appeal Case No. AA- 456/ET/DL/2004-05 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 2003-04.

2. The facts as revealed from the case record are as follows :-

The dealer-assessee in the instant case M/s. N.T.P.C. Ltd (T.T.P.S.), Talcher, Angul, a Government of India undertaking is engaged in generation and distribution of thermal power. As required by the assessing officer the General Manager (Finance) of dealer-assessee had appeared before him (the assessing officer) and produced the documents such as inward slip register, statement of scheduled goods receipt and reconciliation statement with Mahanadi Coalfields Ltd. (MCL) etc. In course of examination of the books of account of the dealer-assessee the assessing officer found that the dealer had made entry of scheduled goods into the local area from inside and outside the State of Odisha amounting to `14,15,68,142.00 and `58,36,42,479.00 respectively and further it had purchased coal worth `104,03,73,822.00 from MCL and paid entry tax @ 0.5% treating the said coal as raw material for generation of electricity. The assessing officer disallowed the claim of the dealer in this point on the ground that coal is not a raw material for generation of electricity and as such had taxed the same @1% while holding that the coal was brought by the dealer-assessee not as a raw material for production of electricity but to be used as fuel for generation of electricity. Apart from this coal the dealer had also

purchased HSD, NFO, DAO etc. worth `7,64,65,441.00 from I.O.C. Ltd. and used the same as fuel. Therefore, after examination of the balance sheet of the dealer-assessee the assessing officer detected some discrepancy to the tune of `16,71,728.00 in its purchase of fuel and then added this amount to the TTO of the dealer while holding that the said amount had been generated from undisclosed source. The assessing officer taxed the aforesaid amount @ 1%. He also noticed that the dealer had purchased electric cable worth `8,48,888.00 during the period commencing from May, 2003 to December, 2003 and had paid entry tax @ 1% though as per the schedule the electric cable is exigible to tax @ 2%. So he levied tax @ 2% on the electric cable purchased by the dealer-assessee. The assessing officer after due calculation held the dealer-assessee liable to pay tax amounting to `1,60,33,243.91 and as the dealer had already paid a sum of `1,08,68,121.00 out of the aforesaid amount, a demand notice was sent to it for making payment of the balance amount of `51,65,123.00 towards its tax liability for the relevant period.

Being aggrieved with this order the dealer-assessee preferred an appeal before the first appellate authority on the ground that the assessing officer should have considered the coal, purchased by

it, as a raw material for generation of electricity and as such should not have demanded the differential tax on this score. The assessing officer arbitrarily concluded that there was a discrepancy of `16,71,728.00 relating to purchase of fuel and then added the same in the TTO of the dealer-assessee without even giving an opportunity to the dealer-assessee to explain the same before him. That apart, the dealer-assessee cited a decision of Hon'ble Apex Court rendered in the case of Mafatlal Industries Ltd. Vs. Nadiad Nagar Palika and another, [2000] 118 STC 494 (SC) before the first appellate authority and urged for taking a decision in the instant case following the ratio of the aforesaid judgment. The first appellate authority, as revealed from his order, after going through the impugned order of assessment very carefully and the grounds of appeal as well as the case law cited held that coal used by the dealer for generating electricity could not be treated as a raw material since it did not directly go into the composition of the finished product and further the dealer-assessee was not a manufacturer of scheduled goods.

The first appellate authority also concluded that the figures reflected in the audited balance sheet which were prepared by the Chartered Accountant of the dealer-Company had to be accepted as true and final and since the discrepancy between the audited balance sheet and the purchase value of the goods shown by the dealer were

not reconciled, he (the first appellate authority) held that the conclusion drawn by the assessing officer to add a sum of `16,71,728.00 to the TTO of the dealer was correct. So far as the misclassification of electric cable worth `8,48,888.00 is concerned the first appellate authority held that as per Entry No.2 of the Part-II of Schedule of the OET Act electric cable is to be taxed @ 2%. Therefore, tax levied on this goods by the assessing officer was also correct.

3. The dealer-assessee being aggrieved with the above findings of the first appellate authority preferred 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 not a raw material for generation of electricity. 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 being used as raw material for production of steam. The first appellate authority also interpreted the Section 26 of the OET Act treating the dealer as not a manufacturer of the scheduled goods and passed the impugned order in a very whimsical and arbitrary manner in order to raise the demand for the interest of Revenue.

4. The State as respondent has filed its cross-objection mentioning therein that the dealer-appellant i.e. N.T.P.C. Ltd., Talcher Thermal had purchased coal and coke 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. The State further submitted that the first appellate authority had rightly disallowed set off tax while holding the coal as fuel. 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 in the instant appeal that coal was used only as a raw material for production of electricity in the establishment of the dealer-assessee. 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 had already taken a decision that coal is a raw material and further the ongoing activities for generation of electricity in a Thermal Power Plant using coal has to be taken as manufacturing activity/process.

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.

7. Learned Addl. Standing Counsel (CT) appearing on behalf of the State fairly conceded that in the decision rendered 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.

8. In view of the aforesaid position of law regarding the status of coal as a raw material in generation of electricity in a Thermal Plant and when it is found that the dealer-assessee had purchased coal from MCL by paying entry tax @ 0.5% for the purpose of using that coal as raw material for production of electricity, it (the dealer) cannot be held liable to pay further tax as demanded from it by the assessing officer in respect of its using coal in the process of manufacture.

9. In the result, the present appeal filed by the dealer-assessee has to be allowed so far as the concession claimed by it with regard to its use of coal as raw material for generation of electricity is concerned. Therefore, the tax liability of the dealer-assessee has to be calculated again in view of the above observation of this Tribunal following the decision of the Hon'ble Court as quoted above. In the circumstances the order passed by the first appellate authority confirming the order of assessment is hereby set aside. The matter is remanded to the assessing officer for fresh assessment keeping in view the aforesaid observations of this Tribunal within three months from the date of receipt of this order. Cross-objection is disposed of accordingly.

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

Sd/-
(Subrat Mohanty)
1st Judicial Member

I agree,

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