# BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

## S.A. No. 337 (VAT) of 2017-18

(Arising out of order of the learned JCST (Appeal), Jajpur Range,
Jajpur Road in First Appeal Case No. AA/BR/441/ DCST/2011-12- VAT
disposed of on 31.08.2017)

Present: Shri R.K. Pattanaik,
Chairman

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

-Versus-

M/s. Naba Apat,
Guali, Barbil, Dist. Keonjhar ... Respondent

For the Appellant : Sri D. Behura, Standing Counsel (CT)
For the Respondent : Sri N.K. Das, Advocate

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Date of hearing: 28.01.2021 ***** Date of order: 15.02.2021

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O R D E R

State is in appeal filed under Section 78(1) of the Odisha Value Added Tax Act, 2004 (hereinafter referred to as 'the Act') assailing the impugned order dated 31.08.2017 promulgated in Appeal Case No. AA/BR/441/ DCST/2011-12-VAT by the learned Joint Commissioner of Sales Tax (Appeal), Jajpur Range, Jajpur Road (in short, 'FAA'), who overturned the assessment dated 16.02.2012 passed under Section 44 of the Act by the learned Deputy Commissioner of Sales Tax, Barbil Circle, Barbil (hence called, 'AA') on the grounds inter alia that it is unjust and improper in the facts and circumstances of the case

and therefore, liable to be interfered with thereby restoring the additional demand with penalty amounting to ₹19,24,430.00.

2. Briefly, the facts are that he dealer assessee (unregistered) was alleged to have received ₹76,97,718.00 during the year 2009-10 from M/s. T.P Sao & Sons Pvt. Ltd., Joda towards hiring charges liable to tax being a deemed sale as per Section 2(45)(f) of the Act and despite such liability w.e.f. 01.04.2009, since it failed to register itself, a proceeding under Section 44 of the Act was initiated by the AA raising a demand of ₹19,24,430.00 along with penalty. According to the AA, the dealer respondent, indeed, transferred the right to use the goods and received the amount, inasmuch as, the machineries were engaged in the mines at Joda. Later to the order of assessment dated 16.02.2012, the dealer respondent approached the FAA claiming that there was no such transfer of right to use the machineries and it only received hiring charges which cannot, therefore, be treated as a deemed sale. The FAA accepted the contention of the dealer respondent and allowed the appeal and set aside the order of assessment dated 16.02.2012. The State has reiterated its stand that the respondent dealer received the amount of ₹76,97,718.00 from M/s. T.P. Sao & Sons Pvt. Ltd., Joda towards hiring charges by transferring right to use the machineries. As per the State, the alleged transaction is nothing but a deemed sale as contemplated in Section 2(45)(f) of the Act for the fact that the terms and conditions of the agreement inter se parties suggested that the custodian and control of such machineries remained with the hirer at all relevant point of time for execution of mining work. Is it a case of receipt of hiring

charges simpliciter or a transfer of right to use the machineries of the dealer respondent receiving the alleged amount in a transaction of a deemed sale?

3. The learned Counsel for the dealer respondent by way of cross-objection contended that the impugned order dated 31.08.2017 is absolutely justified and thus, cannot be tampered with as there was no transfer of any right to use the machineries and for the fact that it was in full control and management of the machineries used and utilized at the mining site and that apart, service tax was paid in respect of the alleged transaction. The learned Standing Counsel (CT) for the State, on the contrary, contended that for the transaction in question and the manner in which the machineries were used by the hirer viz. M/s. T.P. Sao & Sons Pvt. Ltd., Joda, it is clearly proved that there was transfer of right to use it and the dealer respondent received the amount of ₹76,97,718.00 liable to be taxed as a deemed sale as defined in Section 2(45)(f) of the Act.

4. The term 'sale' is defined in Section 2(45) of the Act to mean that every transfer of property in goods excepting mortgage, hypothecation charge or pledge by one person to another in course of trade or business for cash, deferred payment or other valuable consideration, including such other additional transfers under clauses (a) to (f), which is, in fact, a transfer of right to use goods for any purpose whether or not for a specified period deemed to be a sale. In the instant case, the alleged transaction and receiving payment of ₹76,997,718.00 is alleged by the State to be a transaction of deemed sale for having transferred the right to use the machineries in favour of the hirer. The nature of engagement of

the machineries is to be considered to find out, whether, it was a transfer of right to use the same. Referring to the work order dated 30.03.2009, it is contended by the respondent dealer that the machineries were used in shifting/loading/handling of iron ore within the mines area and as such, there was no transfer of right to use agreed upon between the parties. It is contended that neither expressly nor by necessary implication, by a bare looking at the work order, transaction in question appears to be a deemed sale. Perusing the work order dated 30.03.2009, it is rather made to understand that the dealer respondent was paid with loader charges at ₹875.00 inclusive of all costs on diesel, lubricant, driver, helper and other miscellaneous expenses and was also to provide loader operator with helper at its own cost besides proper maintenance of the machineries at regular intervals to ensure smooth mining operation. From the terms and conditions of the above work order, it is clearly discernible that the dealer respondent used its machineries for the purpose of execution of mining work on receiving hire charges without any transfer of right to use it. That apart, the dealer respondent along with the work order produced copies of the service tax returns (Annexures-3 & 4), while contending that service tax was paid vis-a-vis the work which further establish that in no circumstances, possession of the machineries was ever handed over to the hirer. Referring to the self same work order, the learned Standing Counsel (CT) attempted to suggest that the machineries were handed over for mines work under the direct control of M/s. T.P. Sao & Sons Pvt. Ltd., Joda However, on a sincere reading of the work order, it clearly appears that the dealer respondent was

in absolute control and management with its machineries which were admittedly used inside the mining area of M/s. T.P. Sao & Sons Pvt. Ltd., Joda.

5. During an elaborate deliberation on deemed sale as to if the alleged transaction falls within the ambit of Section 2(45)(f) of the Act, the learned Counsel for the dealer respondent cited number of rulings including a decision of the Hon'ble Apex Court in the case of State of A.P. and another Vs. Rashtriya Ispat Nigam Ltd. reported in (2002) 126 STC 114 (SC), wherein, it has been held and observed that hire charges so received not being on account of transfer of right to use goods cannot be construed as consideration for the sale of machineries and be subjected to levy of tax. Other decisions which are relied upon by the dealer respondent reported in (1998) 108 SCC 234 (Patna); (2006) 146 STC 343 (Gauhati); (2009) 22 VST 70 (Gauhati); (2009) 22 VST 136 (Gauhati); and (2009) 25 VST 522 (Orissa) are equally to the effect that in case of effective control, custody and possession of goods/machineries with the contractor, no transfer of right to use such goods takes place. One more decision of the Hon'ble Apex Court in the case of Bharat Sanchar Nigam Ltd. Vs. Union of India reported in (2006) 145 STC 91 (SC) is placed reliance on, wherein, the essential ingredients of the deemed sale have been highlighted with the following attributes, such as, there must be goods available for delivery; must have a conscious ad idem as to the identity of the goods; transferee should have a legal right to use the goods with all consequences of such use; for the period during which the transferee has such legal right, it has to be in exclusion to the transferor which means not merely a licence to use the

goods but a transfer of right to use which is a necessary concomitant; and 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. In fact, unless the above conditions are fully satisfied, there cannot be a transfer of right to use the goods. In the instant case, as per the work order and the fact that the dealer respondent raised bill on service tax for having engaged the machineries in the mines area clearly suggest that the possession and control on the machineries remained with it. Having appreciated the terms and conditions of the services provided by the dealer respondent and keeping in view the fact that the machineries engaged in the mines of the hirer where under the absolute control and management of the dealer respondent, it cannot be treated as a transaction transferring the right to use such machineries. Rather, it is clearly established that the dealer respondent was in charge of the machineries all along and engaged it in the mines work receiving the hire charges as agreed upon.

6. The dealer respondent is shown to have paid and deposited the service tax in support of which copies of the returns as at Annexures-3 & 4 have been produced. It is contended that the State cannot demand VAT once again as the settled law is that payment of such taxes are mutually exclusive by referring to the decisions reported in 2005 (181) ELT 156 (SC), 2006 (2) STR 161` (SC), 2006 (3) STR 608 (SC), (2008) 12 VST 371 (SC) and (2015) 77 VST 547 (Tripura). In the decisions supra, it has been categorically held that payment of service tax and VAT since are mutually exclusive cannot be levied for the self same transaction. The

learned Standing Counsel (CT) for the State contends that payment of service tax which has wrongly been accepted cannot invalidate demand of VAT. However, such contention is not substantiated by the State. From the evidence in support of payment of service tax as at Annexures-3 & 4, it is clearly made to realise that the dealer respondent deposited such tax and as such, raised bills for having utilized the machineries inside the mining area of the hirer. Under the above circumstances, when the work is covered under the mining services and the dealer respondent having paid the service tax and as per the work order bills were raised, it was not proper for the AA again to demand VAT. The aforesaid aspect was duly appreciated by the FAA, who arrived at a logical conclusion that such demand was not according to law besides the subjective satisfaction that the alleged transaction to be only hiring of machineries and not transferring the right to use of the same by the hirer having found that the mining work was undertaken with absolute control and management of machineries by the dealer respondent being fully corroborated by the terms and conditions of the work order. The Tribunal after having gone through the materials on record and being conscious of the settled position of law on the subject matter, as discussed herein above, finds no ground or reason to differ with the opinion expressed by the FAA to hold that the alleged transaction vis-a-vis the dealer respondent for the relevant period is not at all a case of transferring the right to use the machineries engaged in the mining work.

7. Hence, it is ordered.

8. In the result, the appeal stands dismissed. As a logical sequitur, the impugned order dated 31.08.2017 passed in Appeal Case No. AA/BR/ 441/DCST/2011-12-VAT is hereby confirmed. The cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman