BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 44 (VAT) of 2013-14

(Arising out of order of the learned Addl.CST, Central Zone, Odisha, Cuttack in Appeal No. Jajpur -AA- 75/2008-09, disposed of on dated 20.04.2013)

Present: **Shri A.K. Das, Chairman**
Smt. Sweta Mishra, 2nd Judicial Member
&
Shri S. Mishra, Accounts Member-II

M/s. Pattnaik Minerals Pvt. Ltd.,
Boneikala, Joda, Dist. Keonjhar ... Appellant

-Versus-

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

For the Appellant : Sri P.K. Jena, Advocate
For the Respondent : Sri D. Behura, S.C. (CT) &
Sri S.K. Pradhan, Addl.SC (CT)

Date of hearing: 05.11.2021 *** Date of order: 15.11.2021

O R D E R

The instant appeal is directed at the behest of the dealer-appellant challenging the order dated 20.04.2013 passed by the learned Addl. Commissioner of Sales Tax, Central Zone, Odisha, Cuttack (hereinafter called as 'first appellate authority') in Appeal No. Jajpur- AA-75/2008-09 thereby partly allowing the appeal and reducing the tax demand of ₹92,12,048.00 to ₹29,41,492.00 raised by

the Asst. Commissioner of Sales Tax, Jajpur Range, Jajpur Road (in short, 'assessing authority') vide its order dated 11.08.2008 for the tax period 01.04.2006 to 31.03.2007 u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act').

2. The short facts relevant for adjudication of the dispute involved in the present appeal are narrated hereunder :-

The dealer-appellant is a mine owner who is engaged in raising of iron ore lump from mines and also effects purchase of iron ore lumps from the local dealers for the purpose of intra-State as well as inter-State sales after crushing the same in their own crusher to get size iron ore. The audit team visited the business premises of the dealer on 13.02.2008 with prior notice in Form VAT-301 and in course of verification by the audit team, it was found that the dealer purchased goods worth ₹10,37,33,547.00 both from inside and outside the State of Odisha and effected sales of iron ore to the tune of ₹63,76,39,832.00. The dealer availed ITC on purchase of iron ore lumps, crusher spares, loader spares, explosives, DG spares etc. to the tune of ₹43,89,897.00 which are not admissible to the dealer. The

dealer also purchased HSD worth of ₹63,82,518.00 on the strength of 'C' form from outside the State of Odisha by utilizing Govt. Waybill. The audit team opined that in view of Section 2(45) of the OVAT Act supply of HSD on realization of cost on cost recovery basis constitutes sale on which the dealer is required to pay the tax and suggested to tax the turnover of HSD supplied to the contractors on cost recovery basis @ 20% as well as reversal of ITC u/r. 14(2) of the OVAT Rules on spare parts, loader spares, crusher spares and explosives as these are not admissible for ITC. On submission of Audit Visit Report (AVR), proceeding u/s. 42 of the OVAT Act was initiated and a notice was issued to the dealer to produce the books of account. In pursuance of said notice, the dealer appeared through its General Manager (Finance) Sri Rangadhar Mahalik and Sr. Accounts Officer Sri Deepak Kumar Mohanty and produced the books of account comprising of computerized statement of purchase, sale, stock account for verification by the assessing authority. On being confronted with the AVR, the authorized representative of the dealer explained that HSD purchased from outside the State was never supplied to the raising contractors, but were utilized for their own machineries. It

was further explained consumption of HSD was much more than what has been purchased from outside the State. He produced log book to justify that HSD purchased from outside the State was utilized for hired vehicles, Bolero, Scorpio, Marshal etc. which were their own vehicles and utilized for the purpose of mining. So far as availing ITC on spare parts, lumps and explosives, it was explained that those are inputs and consumables for which ITC was claimed correctly.

2(a). The assessing authority on verification of the books of account produced by the dealer-appellant opined that HSD has been utilized for operating of Bolero, Ambulance, Marshal, Tractor, hiring vehicles etc. which were not directly utilized for the purpose of mining and in addition to that the General Manager (Finance) of the dealer-appellant admitted before the audit team that the HSD purchased from outside the State has been supplied to the raising contractors and transport contractors and realized the value thereof on cost recovery basis. Purchase of HSD from outside the State and subsequent issue to the raising contractors on cost recovery basis constitutes sale for which

the dealer is liable to pay tax on purchase of 2,94,000 ltrs. of HSD amounting to ₹88,69,733.00 @ 20%.

2(b). D.G. spare, loader spare, crusher spare as well as explosives are not directly used for manufacturing or processing goods for sale and does not directly go into the composition of finished products for which ITC availed on these goods are reversible. The hiring charges to the tune of ₹1,07,22,167.25 received by the dealer-appellant comes under the category of other income and, therefore, it falls within the ambit of 'sale' as defined u/s. 2(45) of the OVAT Act and is exigible to tax @ 12.5%. The assessing authority calculated total tax including penalty at ₹3,48,48,247.00 out of which the dealer had already paid ₹2,12,46,302.00 as per the challans towards admitted tax. The dealer having availed ITC to the tune of ₹43,89,897.00 was required to pay the balance amount of ₹92,12,048.00 including tax and penalty. ITC on spare parts of crusher, loader and explosives to the tune of ₹26,72,426.00 being inadmissible, the said amount is to be reversed and demanded in Form VAT-604. The dealer was also required to pay interest @ 1% as provided u/s. 34(1)(c) of the OVAT Act for not paying the said amount towards admitted tax and claiming the same as ITC.

3. The dealer-appellant challenging the aforesaid findings of the assessing authority preferred appeal before the first appellate authority, who reduced the tax demand to the tune of ₹29,41,492.00 on the following findings :-

(i) The dealer-appellant during the period from 01.04.2006 to 31.03.2007 purchased diesel for an amount of ₹88,69,733.00 from outside the State of Odisha and diesel amounting to ₹6,85,65,762.00 inside the State of Odisha, which he utilized in its own plant and machineries as evident from the schedule of fixed assets and log book filed by it. It is revealed from these documents that a very small quantity of diesel had been purchased from outside the State of Odisha against declaration in Form-C which was not supplied to the contractors. The diesel purchased against 'C' form was actually used by the appellant in its own plant and machineries and whatever diesel had been supplied to the contractors were purchased from within the State of Odisha on payment of first point tax, diesel being taxable at the first point. The goods supplied

being a tax paid goods, no further tax is leviable on HSD amounting to ₹88,69,733.00.

(ii) The right of possession and effective control of the machineries given on hire remained with the appellant, therefore, there was no transfer of right in favour of the hirer. In the absence of satisfying essential requirement of Sec. 2(45)(f) of the OVAT Act, no tax can be levied on amount received by a transferor from transferee on transaction of transfer of right to use the goods. The demand raised on the score of hire charges is not legally tenable.

(iii) The assessing authority rightly disallowed the claim of ITC on explosives.

(iv) Disallowance of ITC on spare parts by the assessing authority is fully justified in view of OVAT (Amendment) Act, 2008 wherein "and shall include the component and spare parts thereof" has been substituted in the definition of "capital goods" w.e.f. 01.06.2008.

(v) The appellant is liable to pay tax and interest to the tune of ₹29,41,492.00. The extra demand including penalty amounting to ₹92,12,048.00 was deleted.

4. The dealer-appellant being further aggrieved with the aforementioned findings of the first appellate authority preferred this appeal raising various grounds but in course of hearing of the second appeal, it only confined its argument to the disallowance of ITC on explosives purchased by the appellant for the purpose of mining. The State-respondent filed cross-objection supporting the impugned order of the first appellate authority.

5. Learned Counsel for the dealer-appellant challenging the impugned orders of the forums below vehemently urged that explosives purchased by it being 'input' within the meaning of Section 2(25) of the OVAT Act, it is entitled to ITC on purchase of those goods for the purpose of mining. The mining operation cannot be done without use of explosives. Therefore, the forums below were not justified in holding that explosives used for blasting is not an input within the meaning of Section 2(25) of the OVAT Act. The dealer-appellant purchased explosives inside the State of Odisha on payment of appropriate VAT and used the same as consumables directly for blasting of earth surface for obtaining iron ore lumps. The volume of gas produced by an explosive is greater compared with volume

of the original substance and in the process, the solid rock of the earth broke into pieces which facilitate removal of rock from the bottom of the earth and, therefore, such explosives will be treated as an input for processing of iron ore lumps entitling the dealer-appellant to claim ITC on purchase of these goods. He, relying on two decisions of this Tribunal promulgated in S.A. No. 396 (VAT) of 2016-17 and S.A. No. 266 (VAT) of 2018, strenuously urged that this Tribunal having already treated the explosives used for the purpose of mining as 'input', no other different view relating to this is permissible. The judicial discipline demands that the Tribunal should follow the principles settled in the earlier decisions. He submitted to allow the appeal and set aside the impugned orders of both the forums below disallowing the claim of ITC on purchase turnover of explosives.

6. On the other hand, learned Standing Counsel (CT) for the State supporting the impugned orders of both the forums below in terms of cross-objection filed by it, vehemently urged that the explosives do not come under the definition of 'input' u/s. 2(25) of the OVAT Act. It is neither used for the purpose of manufacturing or for the

purpose of processing of iron ore. The explosive is only used for blasting the earth surface in order to extract iron ore lumps. The forums below rightly held that explosive used in blasting is neither processing nor manufacturing activity. This Tribunal in S.A. No. 266 (VAT) of 2018 on which the appellant placed reliance, concurred with the findings of the forums below holding that explosive was not 'input' as defined u/s. 2(25) of the OVAT Act in order to allow ITC on purchase of the same. In the said second appeal the Tribunal while agreeing with the findings of the forums below holding the explosive not an input to claim ITC, allowed the appeal entitling the appellant ITC on explosives on the ground that in Audit Visit Report (AVR) the audit team did not object the claim of ITC on such goods, relying upon the judgment in the case of Bhushan Power and Steel Ltd. Vs. State of Orissa, reported in [2012] 47 VST 466 (Ori.). He submitted that the order of the Division Bench of this Tribunal passed in S.A. No. 396 (VAT) of 2016-17 on which the appellant placed reliance was also taken note in S.A. No. 266 (VAT) of 2018 while arriving at a conclusion that explosive is not an 'input' as defined u/s. 2(25) of the OVAT Act. The forums below on correct appreciation of fact

and law rightly held the explosive not an 'input' as defined u/s. 2(25) of the OVAT Act and disallowed the claim of ITC on purchase of such goods. He further submitted both the forums below having not committed any illegality in disallowing the claim of ITC on explosive, the present second appeal should be dismissed and the orders of both the forums below should be confirmed.

7. We have heard the rival submissions of the learned Counsel for the parties, gone through the grounds of appeal, impugned orders of the forums below vis-a-vis the materials on record, written notes of submission and the earlier decisions of this Tribunal filed by the appellant. In view of the rival contentions of the parties, the sole dispute that arises for consideration in the present second appeal is whether explosive used for blasting of earth surface in order to extract iron ore lumps is an 'input' as defined u/s. 2(25) of the OVAT Act entitling the dealer-appellant to claim ITC on purchase of these goods. Before answering the issue involved in the present appeal, it would be gainful to take note of some relevant provisions of the OVAT Act.

Section 2(25) of the OVAT Act defines 'input' as under :

> "Input' means any goods purchased by a dealer in the course of his business for resale or for use in the execution of works contract, in processing or manufacturing, where, such goods directly goes into composition of finished products or packing of goods for sale, and includes consumables directly used in such processing or manufacturing."

Section 2(26) of the OVAT Act provides that :

> "Input tax" in relation to any registered dealer means the tax collected and payable under this Act in respect of sale to him of any taxable goods for use in the course of his business."

Section 2(27) of the OVAT Act defines 'input tax credit' as under :

> "Input tax credit' in relation to any tax period means the setting off of the amount of input tax or part thereof under Section 20 against the output tax, by a registered dealer other than a registered dealer paying turnover tax under Section 16."

The word 'manufacture" has been defined in Section 2(28) of the OVAT Act as under :

> "Manufacture' means any activity that brings out a change in an article or articles as a result 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, but does not include such activity of manufacture as may be notified."

The provisions as contemplated in Section 20 of the OVAT Act are -

"(1) Subject to the provisions of this Act, for the purpose of calculating the net tax payable by a registered dealer for any tax period, an input tax credit as determined under this section shall be allowed to such registered dealer against the tax paid or payable in respect of all sales or purchases taxable under this Act, other than sales or purchases of goods specified in Schedule C and Schedule D.

(2) The input tax credit to which a registered dealer is entitled under sub-section (1) shall be the amount of tax paid by the registered dealer to the seller on his turnover of purchase of goods during the tax period, calculated, subject to the provisions contained in sub-sections (3), (4) and (5), in such manner as may be prescribed.

(3) Input tax credit shall be allowed for purchases made within the State from a registered dealer holding a valid certificate of registration in respect of goods intended for the purpose of –

(a) sale or resale by him in the State;

(b) use as inputs or as capital goods in the manufacturing or processing of goods, other than those specified in Schedule A and Schedule C and Schedule D for sale;

(c) sale of goods subject to levy of tax at zero rate under section 18;

(d) for use as containers for packing of goods, other than those exempt from tax under this Act, for sale or resale; or

(e) transfer of stock of taxable goods other than by way of sale, to any place outside the State:

Provided that –

(a) the input tax credit on purchases intended for the purpose of clause(s) shall only be allowed in respect of the amount of tax paid or payable in excess of tax at the rate of four per centum;

(b) the goods purchased are used partially for the purposes specified in this sub-section, input tax credit shall be allowed proportionally to the extent they are used for such purposes; and

(c) where a registered dealer sells or despatches goods, both taxable and exempt under this Act, the input tax credit shall be allowed proportionally only in relation to the goods which are not so exempt.

xx xx xx"

8. On conjoint reading of the above provisions, it emerges that the input tax credit shall be allowed for purchases made within the State from a registered dealer holding a valid certificate of registration in respect of the goods intended for the purpose of use as inputs or as capital goods in the manufacturing or processing of goods. In the instant case, the dealer claimed that he used the explosives for blasting earth surface during the mining operation in order to extract iron ore lumps, therefore, it is an 'input' within the definition of Section 2(25) of the OVAT Act. Section 2(25) of the OVAT Act defines 'input' as to any goods purchased by the dealer in course of business for sale or for use in execution of works contract, in processing or manufacturing where such goods directly goes into the composition of finished products or packing of goods for sale, and includes consumables directly used in such processing or manufacturing. The Hon'ble Apex Court in case of **Chowgule & Co. Pvt. Ltd. Vs. Union of India, reported in [1981] 47 STC 124 (SC), at pages 130-131** while defining the word manufacture and processing observed as follows :-

> "The point which arises for consideration under the first question is as to whether blending of ore in the

course of loading it into the ship through the mechanical ore handling plant constituted manufacture or processing of ore. Now it is well-settled as a result of several decisions of this Court, the latest being the decision given on 9th May, 1980, in Civil Appeal No. 2398 of 1978, Deputy Commissioner of Sales Vs. Pio Food Packers that the test for determining whether manufacture can be said to have taken place is whether the commodity which is subjected to the process of manufacture can no longer be regarded as the original commodity, but is recognised in the trade as a new and distinct commodity. This Court speaking through one of us (Pathak, J.) pointed out : "Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place." The test that is required to be applied is : does the processing of the original commodity bring into existence a commercially different and distinct commodity ? On an application of this test, it is clear that the blending of different qualities of ore possessing

different chemical and physical composition so as to produce ore of the contractual specifications cannot be said to involve the process of manufacture, since the ore that is produced cannot be regarded as a commercially new and distinct commodity from the ore of different specifications blended together. What is produced as a result of blending is commercially the same article, namely, ore though with different specifications than the ore which is blended and hence it cannot be said that any process of manufacture is involved in blending of ore.

It still remains to consider whether the ore blended in the course of loading through the mechanical ore handling plant can be said to undergo processing when it is blended. The answer to this question depends upon what is the true meaning and connotation of the word 'processing' in section 8(3)(b) and rule 13. This word has not been defined in the Act and it must therefore be interpreted according to its plain natural meaning. Webster's Dictionary gives the following meaning of the word "process" : "to subject to some special process or treatment, to subject (especially raw material) to a process of manufacture, development or preparation for the market, etc., to convert into marketable form as livestock by slaughtering, grain by milling, cotton by spinning, milk by pasteurising, fruits and vegetables by sorting and repacking." Where therefore any commodity is subjected to a process or treatment with a view to its "development or preparation for the market", as, for

example, by sorting and repacking fruits and vegetables, it would amount to processing of the commodity within the meaning of section 8(3)(b) and rule 13. The nature and extent of processing may vary from case to case; in one case the processing may be slight and in another it may be extensive; but with each process suffered, the commodity would experience a change. Wherever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. The nature and extent of the change is not material. It may be that camphor powder may just be compressed into camphor cubes by application of mechanical force or pressure without addition or admixture of any other material and yet the operation would amount to processing of camphor powder as held by the Calcutta High Court in Sri Om Prakas Gupta v. Commissioner of Commercial Taxes. What is necessary in order to characterise an operation as "processing" is that the commodity must, as a result of the operation, experience some change. Here, in the present case, diverse quantities of ore processing different chemical and physical compositions are blended together to produce ore of the requisite chemical and physical compositions demanded by the foreign purchaser and obviously as a result of this blending, the quantities of ore mixed together in the course of loading through the mechanical ore handling plant experience change in their respective chemical and physical compositions, because what is produced

> by such blending is ore of a different chemical and physical composition. When the chemical and physical composition of each kind of ore which goes into the blending is changed, there can be no doubt that the operation of blending would amount to "processing" of ore within the meaning of section 8(3)(b) and rule 13. It is no doubt true that the blending of ore of diverse physical and chemical compositions is carried out by the simple act of physically mixing different quantities of such ore on the conveyor-belt of the mechanical ore handling plant. But to our mind it is immaterial as to how the blending is done and what process is utilised for the purpose of blending. What is material to consider is whether the different quantities of ore which are blended together in the course of loading through the mechanical ore handling plant undergo any change in their physical and chemical compositions as a result of blending and so far as this aspect of the question is concerned, it is impossible to argue that they do not suffer any change in their respective chemical and physical compositions."

9. The Hon'ble Apex Court in the aforesaid decision while defining the term 'manufacture' held that manufacture is the end result of one or more process through which the original commodity is made to pass and there may be several stages of processing or different kind of processing at each stage, as a result of which, the original

commodity experiences a change. It is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. Further, it was held in order to characterize an operation as 'processing', the commodity must as a result of the operation, experience some change. If the case of the appellant would be tested in the light of the aforesaid decision, it cannot be said extraction of iron ore lumps by blasting of earth surface using explosives is an act of manufacturing or processing. In the mining operation, the appellant-dealer used explosives to extract iron ore lumps by blasting the earth surface and as a result of this operation, no manufacturing activity or processing was done. Even if for the sake of argument we hold that act of blasting of earth surface in order to extract iron ore lumps would come within the definition of 'processing' or 'manufacturing', still then it would not be fall within the definition of 'input' as defined u/s. 2(25) of the OVAT Act as the explosive used for blasting does not directly go into the composition of finished products. The explosive used also cannot be said to be

consumables which directly use in such processing or manufacturing. The claim of the dealer-appellant that explosive used for blasting, is an 'input' as defined u/s. 2(25) of the OVAT Act entitling him ITC u/s. 20 of the said Act on any angle, cannot be accepted.

10. Learned Counsel for the dealer-appellant relying upon the order of this Tribunal passed in S.A. No. 266 (VAT) of 2018 and S.A. No. 396 (VAT) of 2016-17 vehemently urged to allow his claim of ITC on purchase turnover of explosives which was strongly objected to by the learned Standing Counsel (CT) for the State on the ground that the explosive is not an 'input' as defined u/s. 2(25) of the OVAT Act and this Tribunal in S.A. No. 266 (VAT) of 2018 concurred with the findings of the forums below that explosive is not an 'input' for claiming ITC on purchase of the same. On going through the orders passed in S.A. No. 266 (VAT) of 2018 in case of M/s. Pattnaik Minerals Pvt. Ltd. Vs. State of Odisha, we find that this Tribunal taking note of the order passed in S.A. No. 396 (VAT) of 2016-17 concurred with the findings of the forums below that the goods which are used even as consumable since not utilizing in processing or manufacturing, purchases made therefor on

payment of tax cannot be deducted as ITC. The Tribunal in S.A. No. 266 (VAT) of 2018 allowed the claim of ITC on purchase of explosives on the ground that such claim of the dealer-appellant was not objected in the AVR by the audit team and, therefore, the forums below could not have travelled beyond the AVR in disallowing the claim of ITC of the dealer-appellant. But in the instant case, in the AVR the claim of ITC was seriously objected by the audit team as the same is not permissible under law. So, the facts and circumstances of both the cases are different and distinct. The explosive purchased by the dealer-appellant for blasting of earth surface in order to extract iron ore lumps not being an 'input' within the definition of Section 2(25) of the OVAT Act, the forums below did not commit any illegality in disallowing the claim of ITC of the dealer-appellant on such purchases.

11. For the foregoing discussions and reasons ascribed, we are of the unanimous view that explosives used in mining operation for blasting of earth surface in order to extract iron ore lumps is not 'input' within the meaning of Section 2(25) of the OVAT Act and such act of blasting by the dealer-appellant would not come within the definition of

'manufacturing' or 'processing' in order to claim ITC on such goods. Hence, the appeal filed by the dealer-appellant stands dismissed and the impugned order of the forum below is hereby confirmed. Cross-objection filed by the State-respondent is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(Sweta Mishra)
2nd Judicial Member

I agree,

Sd/-
(S. Mishra)
Accounts Member-II