BEFORE THE DIVISION BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A.No. 53/2015-16

(From the order of the ld.DCST (Appeal), Sambalpur Range, Sambalpur, in Appeal No. AA.456(SAI) of 1992-93, dtd.24.07.2015, confirming the order of Assessing Officer)

Present: Sri S. Mohanty & Sri R.K. Rout
2nd Judicial Member Accounts Member-II

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

-Versus-

M/s. Chhotnagpur Coal Carrier, Ainthapali, Dist. Sambalpur. ... Respondent

For the Appellant :Mr. S.K. Pradhan, Addl. Standing Counsel (C.T.)
For the Respondent : None

(Assessment period : 1991-92)

Date of Hearing: 27.07.2018 *** Date of Order: 27.07.2018

ORDER

Revenue has assailed the order of the learned First Appellate Authority/Deputy Commissioner of Sales Tax (Appeal), Sambalpur Range, Sambalpur (in short, FAA/DCST) in remand Appeal No.AA.456(SAI) of 92-93 dtd.24.07.2015 wherein and whereby the FAA has deleted the demand of tax and surcharge raised by the Assessing Officer/Sales Tax Officer, Sambalpur-I Circle, Sambalpur (in short, AO/STO).

2. The facts in brief leading to this appeal are : the Taxing authority assessed the dealer, a works contractor for the assessment period 1991-92. During the period under assessment,

the dealer had received a sum of Rs.17,89,857/- from South Eastern Railway for the job of earthwork under a works contract vide Agreement No.59/BBP-TIMR/CE/COM/SER/89. Further, the AO found that, the dealer has received a sum of Rs.8,00,003/- from M/s. T.P. Minerals, Sambalpur stated to have received towards hire charges of the excavator given by the dealer. The AO on application of Sec.2(g)(iv) treated the said amount under the definition of 'sale' exigible to tax, assessed the dealer. As a result, the said amount was added to the GTO of the dealer calculated at Rs.25,89,860/-. Deduction towards labour and service charges @62% for the works contract, a sum of Rs.11,09,711/- was deducted from the GTO thereby the TTO was calculated at Rs.14,80,149/-. The tax payable on this amount was calculated to Rs.1,23,206.20. 10% of it was added as surcharge as per Sec.5-A of the OST Act i.e. calculated to Rs.12,320.62. Accordingly, the total tax due was determined at Rs.1,35,526.82. The amount of tax already paid of Rs.35,797/- was adjusted and then amount of Rs.99,730/- was raised to be paid by the dealer.

3. The dealer preferred first appeal, which was ended with confirmation of the order of AO. Then in second appeal preferred by the dealer, this Tribunal had remanded the matter back to FAA for the reappraisal. In the said remand appeal, the ld.DCST(Appeal), Sambalpur Range, Sambalpur as First Appellate Authority, deleted the amount of Rs.8,00,003/- from the GTO of the dealer as he has not treated the same towards hire charges received by the dealer. Resultantly, the tax due was re-calculated and the dealer was found to be entitled for refund of Rs.8,591/-. On the backdrop above, State has come up with this second appeal with the contention like, the FAA has gone wrong in accepting the

affidavit filed by the dealer stating therein that, the amount of Rs.8,00,003/- was not received as hire charges. Conversely, the FAA should have enquired the source from which the dealer had received that amount. It is further contended that, the order of the FAA is confusing and cryptic, hence needs to be set-aside.

4. At the outset, it is apt to mention here that, the impugned order was passed by the FAA on the basis of the remand order by this Tribunal in S.A.No.807/1994-95. Though the order of this Tribunal is not available but the impugned order contains the direction of this Tribunal and on the basis of that direction, the FAA has assessed the dealer.

5. The crux of the dispute between the parties as it emerges from the facts narrated above, during the assessment period, the dealer was found to have received an amount of Rs.8,00,003/- from M/s. T.P. Minerals. The assessment order as it reveals, the dealer had initially taken a plea that, the amount received from M/s. T.P. Minerals towards freight charges of the excavator. The dealer was giving his excavator to different parties when he was going without work and the amount mentioned above was received as hire charges. Accordingly, the AO treated the same as 'sale' within the meaning of Sec.2(g)(iv) of the OST Act.

> **"Sec.2(g)**
> **xx xx xx xx**
>
> (iv) transfer of the right to use any goods for any purpose (whether or not for a specific period) for cash, deferred payment or other valuable consideration;

On application of the provision above, he treated the amount as amenable to tax and added the same to the GTO whereas before

the FAA the dealer had filed an affidavit to the extent that, the amount was not received towards hire charges and the said affidavit was sworn by M/s. T.P. Minerals.

6. Learned Counsel for the Revenue, Mr. Pradhan argued for the Revenue has submitted that, the FAA should not have relied upon the affidavit sworn by M/s. T.P. Minerals, since the affidavit is not conclusive and since it is not made clear by the dealer what was the source from which it received the amount of Rs.8,00,003/-, then the said amount should not have kept out of the tax net. No doubt if it is found that, the dealer had given his excavator to others and received hire charges from them, then the amount received towards hire charges falls under the category of Sec.2(g)(iv). However, since the FAA has accepted the plea of the dealer, surprisingly the FAA is found silent about the source of the amount with the dealer. When the dealer had shown the amount in his books of account, he should have explained how and from whom and in which head he had received the same. Undisputedly, the dealer is a works contractor. He had undertaken job work under the South East Railway and received a particular amount. As against that amount, the deduction @62% towards labour and service charges was allowed and such deduction was remained undisputed. If the dealer had received any amount from any other sources, which is not taxable then he is to explain why he had entered the said amount in his books of account. As it revealed from the order of the AO, the dealer had taken a plea that, he had received that amount as hire charges but he took a contrast plea before the FAA and he filed an affidavit that, the amount was not received as hire charges. The authenticity of the affidavit was not considered properly by the FAA. The FAA being an extended forum

of assessment was duty bound under law to give a reason why the amount was mentioned in the books of account of the dealer and the reason must be supported with good evidence and sanction of law. It is believed that, if the FAA had verified the return of the dealer to M/s. T.P. Minerals. The truth behind the receipt of the amount by the dealer could have unearthed the return of M/s. T.P. Minerals for the relevant period must have reflected the said amount. Thus, it is held that, the FAA has gone in a slipshod manner and swayed by the remand order of this Tribunal on earlier occasion. To put it in other way, the impugned order is found to be not sustainable in the eye of law. In consequence thereof, it is held that, the matter should be remanded back to the FAA again with a direction to further his enquiry about the source of Rs.8,00,003/- in the hands of the dealer from the evidence laid by the dealer and on verification of the relevant documents of M/s. T.P. Minerals. Accordingly, it is ordered.

The appeal is allowed. The matter is remanded back to the FAA for re-assessment as per the observation herein above. He is requested to make all endeavours to decide the appeal within a period of four months.

Dictated and Corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

Sd/-
(S. Mohanty)
2nd Judicial Member

I agree,

Sd/-
(R.K. Rout)
Accounts Member-II