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

Present: Smt. Suchismita Misra, Chairman,
Sri Subrata Mohanty, 1st Judicial Member
&
Sri R.K. Pattnaik, Accounts Member-III

S.A. No.309 of 2007-08

(From the order of the ld. ACST, Jajpur Range, Jajpur Road,
in First Appeal Case No. AA-157/CUIII/06-07,
disposed of on 20.02.2007)

For the assessment period: 2003-04

S.A. No.310 of 2007-08

(From the order of the ld. ACST, Jajpur Range, Jajpur Road,
in First Appeal Case No. AA-153/CUIII/06-07,
disposed of on 20.02.2007)

For the assessment period: 2002-03

M/s. Mahasakti Granite Crushing Plant (P) Ltd.,
At:- Baghua, P.O.- Sanagada Mukundapur,
Via.- Jenapur, Dist.- Jajpur. ... Appellant

- V e r s u s -

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

For the Appellant : Mr. Damodar Pati, Advocate
For the Respondent : Mr. M.L. Agarwal, S.C.

Date of Hearing: 23.05.2019 ******** Date of Order: 23.05.2019

O R D E R

Challenge in these appeals is the orders dtd.20.02.2007 passed by the Asst. Commissioner of Sales Tax, Jajpur Range, Jajpur Road, the first appellate authority, thereby confirming the order of assessing authority by

dismissing appeals of the dealer in assessment u/s.12(4) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as, OST Act) for consecutive period of assessment 2002-03 and 2003-04. The prayers in these appeals are to set aside the order of both the fora below and to allow the appropriate deduction towards labour and service charges and to levy tax on appropriate rate on the goods claimed to be mineral.

For sake of convenience, both these appeals are taken up together as same issues are involved based on identical facts.

2. According to the assessing authority, the dealer is doing business in crushing of stones into stone chips, metals etc. through his stone crushing unit and is engaged in selling the same in course of his business activities. Assessment u/s.12(4) of the OST Act of the dealer's unit for the consecutive assessment periods like 2002-03 and 2003-04 were taken up and decided on 14.07.2005 vide two separate orders. But the fact remains, both the orders are replica of one another in the assessments. The authority has held that, the dealer has sold metals to South Eastern Railway, Khurda Road to the tune of Rs.2,57,02,110.00 for the assessment period 2002-03 and to the tune of Rs.1,54,08,613.00 for the assessment period 2003-04. According to the dealer the above amount includes transporting charges, labour charges, stacking materials, wagon loading and unloading, royalty charges etc. The dealer's claim of the amount towards the aforesaid labour and service charges were turned down by the assessing authority placing reliance on the decision in the matter of **M/s. P.K. Satapathy v. State of Orissa [1999] 116 STC 494 (Ori.)**. The assessing authority hold the entire amount received by the dealer is against supply of materials and accordingly without giving any deduction towards labour and service charges the GTO and TTO were determined. Further, the assessing authority imposed tax @ 12% on the metals resulting thereby the total tax due by the dealer for the assessment period 2002-03 at Rs.30,02,040.96, surcharge @ 10% was also levied on it, whereas the admitted tax to the tune of Rs.9,66,078.00 was deducted therefrom. In ultimate calculation, the

dealer was asked to pay the balance tax due of Rs.23,36,167.00. Similarly, for the assessment period 2003-04 tax @ 12% at Rs.17,96,976.12, surcharge @ 10% was also levied on it, whereas the admitted tax to the tune of Rs.6,47,116.00 was deducted therefrom. In ultimate calculation, the dealer was asked to pay the balance tax due of Rs.13,29,558.00.

3. Being aggrieved with the assessments and demand raised, the dealer knocked the door of the first appellate authority vide two numbers of separate appeals. The first appellate authority dismissed both the appeals vide order dtd.20.02.2007 prepared separately. The first appellate authority has also upheld the view of the assessing authority with the findings that, all the labour and incidental charges covered under supply contract of the dealer, so the dealer is not entitled to any kind of deduction towards labour and service charges. As a result, the demand of tax raised by the assessing authority remained undisturbed.

When the matter stood thus, being unsuccessful before both the fora below the dealer preferred the present second appeals.

4. The contentions of the dealer are, it has executed a contract with composite nature. The contract consists of two part, such as, supply part and service part. The dealer has received a sum of Rs.51,90,173.00 against supply of ballast material and has received Rs.1,94,83,853.00 towards labour and service charges for the assessment period 2002-03. Similarly, for the assessment year 2003-04, the dealer has received value of ballast at Rs.32,86,454.00 and has received a sum of Rs.1,15,05,812.00 toward labour and service charges. It is claimed that, the dealer is not liable to pay tax on the labour and service component. It is further contended that, the ballast is a mineral against which the dealer is liable to pay tax @ 4% but the authority has erroneously imposed tax @ 12%.

5. The appeal is heard without cross objection from the side of the Revenue, whereas, the Revenue has supported the findings of the fora below in the argument.

6. The substantial questions raised for decision in this appeal are,

(i) whether the first appellate authority is wrong in confirming the order of the assessing authority by imposing tax @ 12% on the ballast/metals supplied by the dealer;

(ii) whether both the authorities below are wrong in treating the goods and service rendered by the dealer under a composite contract as supply contract against which the entire amount received by the dealer is exigible to tax.

7. The argument of the Revenue is squarely based on the decision of the Hon'ble Court in **M/s. P.K. Satapathy v. State of Orissa [1999] 116 STC 494 (Ori.)**. At the cost of repetition it may be mentioned here that, the contract executed between the parties such as dealer and the South Eastern Railway are not produced for perusal. Revenue has failed to produce the LCR. Orders of the fora below are not specific about the nature of contract in between the dealer and the South Eastern Railway. Both the fora below have gone in a slipshod manner without discussing the details of the transactions between the dealer and the South Eastern Railway. As it appears from the orders of both the fora below that, the dealer had executed works contract under the South Eastern Railway. Under the works contract, the dealer had supplied materials to the Railway and in addition to supply the dealer has performed ancillary works like transporting, stacking of the materials, wagon loading and unloading etc. Claim of the dealer is, the contract is a divisible contract and the value of the goods supplied is distinct from the value of the service provided under the contract. On the other hand, argument of the Revenue is, the entire work such as supply and labour/service should be treated as one i.e. supply contract and the entire amount received against the contract is exigible to sales tax. Almost it is remained undisputed that, the contracts in question have got two components, one is supply of metal/ballast and other is service part. In **Anamolu Seshagiri Rao & Co. Vs. State of Andhra Pradesh, [1980] 45**

STC 388 (AP). The decision in **Anamolu Seshagiri Rao** (supra) was decided on the basis of dominant intention test which is vividly discussed by the Apex Court in **Kone Elevator India Pvt. Ltd. Vs. State of Tamil Nadu and others [2014] 71 VST 1 (SC)**. The Constitutional Bench of the Hon'ble Supreme Court in **Kone Elevator India** (supra) has noted the decisions rendered post amendment of Article 366, Clause (29A) of the Constitution and held that it is open to the States to segregate works contract into two separate components or contracts by legal fiction, viz. contract for sale of goods involved in the works contract and for supply of labour and services. On the question of dominant nature test, the Hon'ble Supreme Court culled out four concepts, which are extracted as under:-

> "At this juncture, it is condign to state that four concepts have clearly emerged. They are (i) the works contract is an indivisible contract but, by legal fiction, is divided into two parts, one for sale of goods, and the other for supply of labour and services; (ii) the concept of "dominant nature test" or, for that matter, the "degree of intention test" or "overwhelming component test" for treating a contract as a works contract is not applicable; (iii) the term "works contract" as used in clause (29A) of article 366 of the Constitution takes in its sweep all genre of works contract and is not to be narrowly construed to cover one species of contract to provide for labour and service along; and (iv) once the characteristics of works contract are met with in a contract entered into between the parties, any additional obligation incorporated in the contract would not change the nature of the contract."
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> (Emphasis supplied)

Affirming the earlier three-Judges Bench decision, in ***Larsen and Toubro Limited Vs. State of Karnataka, reported in [2013] 65 VST 1 (SC)***, the Hon'ble Court further held as under:-

> "Considered on the touchstone of the aforesaid two Constitution Bench decisions, we are of the convinced opinion that the principles stated in *Larsen and Toubro* as reproduced by us hereinabove, do correctly enunciate the legal position. Therefore, "the dominant nature test" or "overwhelming component test" or "the degree of labour and service test" are really not applicable. if the contract is a composite one which falls under the definition of works contracts as engrafted under clause (29A)(b) of article 366 of the Constitution, the incidental part as regards labour and service pales into total insignificance for the purpose of determining the nature of the contract."

8. Guided by the ratio laid down by the authorities above, here it is to be seen that, the dealer has only supplied the goods on the strength of contract or he has done any other work in furtherance to supply of the goods under the contract. The dealer has claimed deduction of labour and service charges for a particular amount in the appeal memo but, the claim amount towards labour and service charges was not raised before both the fora below. Contract has not been placed for perusal of the Tribunal. So, it will be unsafe to form an opinion definitely that, the contract is a composite contract or a supply contract only. The Constitutional Bench of the Apex Court has categorically held that, once there is a composite contract, it has to be treated as works contract, for it is not a sale of goods or chattel simplicitor. As per the authorities below, the contract is a supply contract only. The orders of both the fora below are very cryptic. It has not categorically answered the grounds taken by the dealer that, the dealer had engaged labour and service along with supply of the goods to perform the job under the contract. In that case it is believed that, the contract and the nature of work undertaken by the dealer need to be verified so as to ascertain if it was a composite contract or not. If it is simply a supply contract, then the dealer is not liable for deduction towards labour and service charges as claimed. In that view of the matter, this is a fit case where

the matter should be remitted back to the assessing authority for verification of the contract and connected documents on production by the dealer and then it is incumbent upon the assessing authority to decide whether the dealer is entitled to any discount towards labour and service charges as claimed.

9. The next question raised for decision is, what should be the rate of tax on the sale of ballast/metal. Learned Counsel for the dealer draws the attention of the Tribunal in entry at Sl. No.117 of the Rate Chart which depicts the rate of tax for ores and minerals @ 4%. The authority in State of Orissa v. D.K. Construction (2017) 100 VST 24 (Ori.) their Lordships of our own High Court has categorically held that, the ballast are covered under Sl. No.117 of the tax rate chart i.e. @ 4%. So, avoiding further decision of this question it can safely be said that, rate of tax @ 12% on the ballast in hand is not appropriate, hence not sustainable. It is held that, the assessing authority is to re-determine the tax liability on levy of tax @ 4% only.

10. From the discussion above, it is held as follows.

11. Both the appeals are allowed on contest. The impugned orders are set aside. The matter is remitted back to the assessing authority for assessment afresh as per observation hereinabove. It is made clear that, while determining the nature of contract relating labour and service charges if any, the assessing authority should not be influenced by any of the observation made hereinabove relating to the contract between dealer and the Railway in particular.

Dictated & corrected by me,

Sd/-
(Subrata Mohanty)
1st Judicial Member

Sd/-
(Subrata Mohanty)
1st Judicial Member

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

Sd/-
(R.K. Pattnaik)
Accounts Member-III

This order arises out of a petition u/s.20 of the OET Act for rectification, review and recall of the final order dtd.25.02.2019 passed in S.A. No.43(ET)/2011-12 moved by the appellant-dealer.

2. The petition is within time.

This substratum of the assessee's grievance in this rectification petition are, a set of documents submitted with prayer u/s.102 of the OVAT Act read with Rule 34 of the OET Rules for acceptance of the same as additional evidence were not properly considered by the Tribunal while passing the final order and while passing the order, the earlier decision of this Tribunal involving identical issues was not taken into consideration. Thereby, leading to erroneous conclusion in the appeal, hence the order should be reviewed and recalled invoking provision u/s.20 of the OET Act. Section 20 of the OET Act reads as follows.

> "20. Rectification of mistakes.-
> (1) With a view to rectifying any mistake apparent from the record, the assessing authority, appellate authority or revising authority may, at any time, within five years from the date of an order passed by it, amend such order :
>
> ***Provided that*** an amendment which has the effect of enhancing an assessment or otherwise increasing the liability of the assessee shall not be made unless the assessing authority, appellate authority or revising authority, as the case may be,

has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard.

(2) Where an order has been considered and decided in any proceedings by way of appeal or revision relating to an order referred to in sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend order under that sub-section in relation to any mater other than the matter which has been so considered and decided.

(3) An order passed under sub-section (1), shall be deemed to be an order under the same provision of law under which the original order the mistake in which was rectified had been passed."

The provision u/s.20 above is similar to the provision under Section 81 of the OVAT Act and u/s.254(2) of the I.T. Act. The rectification petition is objected by the Revenue as not maintainable. The argument of the Revenue is, in the garb of correction of mistake the assessee wants to recall the earlier order which is passed on merit on contest of full hearing to the parties.

2. Perused the order-sheet in the appeal case record. on 13.12.2018, the assessee had filed a petition u/r.102 of the OVAT Act for acceptance of some documents. The case was posted to 24.12.2018 for objection and hearing. On 24.12.2018, the Bench was collapsed, on 05.02.2019 the final hearing of the appeal was taken up and the order was passed on 25.02.2019 by dismissing the appeal of the dealer. From the orders passed referred to above, it is found that, no specific order regarding acceptance of documents were passed but, the fact remains in the final hearing, the documents were taken into consideration in view of the rival submissions. The xerox copy of the documents advanced as additional

evidence are considered in the final hearing. So, even though no specific order was there but, it can safely be construed that, the documents were formed a part of record and perused in the final hearing.

While taking part in the final hearing, the dealer had not raised this point that, a specific order was not passed regarding acceptance of the documents causing prejudice to him. It is only when the final order passed and is decided not in his way, the assessee wanted to raise a plea which is a procedural one. However, it is believed that, there is no procedural irregularity in considering the acceptance of additional evidence in the final hearing by this forum.

The conduct of the dealer here was speculative, to put it mildly. The dealer has calculatedly choose not to question the acceptance of additional evidence by a specific order in the final hearing. But, in a later stage, after final order passed only has made an unsuccessful attempt by this application which is bad both in law and facts.

The next plea of the dealer is, in the final order, earlier order of this Tribunal in identical matter decided vide S.A. No.110(ET) of 2011-12 decided on 21.12.2018. Since the dealer has imported the goods brought into the local area not for any purpose covered under Entry Tax Act like use, consumption and sale, therein in the local area, in that view of the matter the Bench has wrongly decided the question of law relatable to facts involved in this case. So, according to the dealer this is a mistake apparent on the face of the record is to corrected as per Sec.20 of the OET Act.

3. Learned Counsel for the dealer placed in the matter of Deva Metal Powders Pvt. Ltd. v. Commissioner, Trade Tax, U.P. [2007] 10 VST 751 (SC) to explain the meaning of term “mistake”. In the same decision the Apex Court has observed that, the mistake to be rectified must be one apparent from the record. a decision on a debatable point of law was a disputed question of fact is not a mistake apparent from the record. The plain meaning of the word “apparent” is that, it must be something which appears to be so ex facie and it is incapable of argument or debate. It, therefore, follows that a decision on a debatable point of law or fact or failure to apply the law to a set of facts which remains to be investigated cannot be corrected by way of rectifications.

The next decision relied by the dealer is, Asst. Commissioner of Income Tax v. Sourastra Kutch Stock Exchange Ltd. [2008] 305 ITR 227 (SC), wherein it is held that-

> “The core issue, therefore, is whether non-consideration of a decision of jurisdictional court (in this case a decision of the High Court of Gujarat) or of the Supreme Court can be said to be a “mistake apparent from the record”? In our opinion, both - the Tribunal and the High Court - were right in holding that such a mistake can be said to be a “mistake apparent from the record” which could be rectified u/s.254(2).”

With due respect to the authority it can be said that, the decision of this Tribunal at earlier time is not the decision of a jurisdictional court referred to in the decision by the Apex Court. So, there is no violation of any judicial

pronouncements by the authority while arriving at a conclusion in the final order in the case in hand.

4. The next decision relied by the dealer is Ram Das Upadhayay v. Deputy Director of Education decided on 11.06.1998, reported in 1998 Supreme (All.) 1231. Here also the Hon'ble Court held that-

> "The error must be blatant or obvious which needs no discussion. Mere error or wrong view is certainly no ground as a Court has jurisdiction to decide rightly or wrongly. Mere erroneous decisions are not liable to be reviewed and only errors apparent on the face of the record are liable to be reviewed and such errors must stare on in the face, where no elaborate arguments are necessary to pin point those errors."

The dealer has also relied decision in Harendra Prasad Sahu v. OSTT (1996) 103 STC (Ori.) in support of his contention. This decision relates to a recalling of exparte order but not any order passed on merit. Per contra, learned Standing Counsel for the Revenue argued that, provision u/s.20 empowers the Tribunal to take care of clerical mistake apparent on the face of the record. The jurisdiction under the provision cannot encroach upon the merit of the case which amounts to review of own order by the Tribunal. It is not permissible as decided by the Hon'ble Court in State of Orissa Vrs. Members of the Sales Tax Tribunal 37 (1971) CLT 897 (Orissa), Sanyasi Charan Jena Vrs. Raicharana Jena, reported in 79 (1995) CLT 446.

If we take consideration of the authorities relied by the dealer himself, we found there is little scope to review or recall the final order in the case in hand as the decision arrived at in the final order is conscious application of law into the facts of the case.

Nonetheless, the order of the Tribunal cited by the appellant is not identical to the case at hand in the facts and circumstances of the case. In Parsion Devi v. Sumitri Devi : (1997) 8 SCC 715, where dealing with the scope of a review under Order XLVII, Rule 1 CPC, the Court declared:-

> "Under Order 47, Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47, Rule 1 CPC. In exercise of the jurisdiction under Order 47, Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be "an appeal in disguise"."
> (emphasis supplied) To the same effect is the decision of the Supreme Court in Ajit Kumar Rath v. State of Orissa & Ors. : AIR 2000 SC 84, where the Court said :
> "A review cannot be sought merely for a fresh hearing or arguments or correction of an erroneous view taken earlier. The power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it."

The Supreme Court in Meera Bhanja v. Nirmala Kumari Choudhary: AIR 1995 SC 455, where the Court, while dealing with the scope of review, has observed:-

> "The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, CPC. The review petition has to be entertained only on the ground of error apparent on the fact of the record and not on any other ground. An error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. The limitation of powers of courts under Order 47 Rule 1, CPC is similar to the jurisdiction available to the High Court while seeking review of the orders under Article 226."

5. The Tribunal has taken into consideration the grounds of appeal, additional evidence, additional grounds of appeal and all other materials placed before it including written note of submissions by the dealer-appellant.

The additional evidences submitted in shape of few copies of sale invoices supporting claim of sale of hard cooking coal from Paradip Port to outside the State of Odisha in support of the additional grounds of appeal are itself contradicting the original grounds of appeal (para-6), wherein it has been contended that all the imported coals were converted to coke before sale within and outside the State of Odisha. Hence considering all the evidences, grounds, additional written submission, the Tribunal has observed in its order "However, the appellant had never raised this issue before LAA or the FAA which are now being brought before this forum and as such are new facts and contrary to the contention of the dealer-appellant taken before the FAA in the grounds of appeal."

6. Accordingly, the averment taken in the application for rectification of mistake apparent from the second appeal order that, the petition filed with additional evidence and additional grounds of appeal were overlooked and passed without consideration of the petition filed u/r.102 of the OVAT Rules read with Rule 34 of the OET Rules is without any basis.

Further, as discussed above, the application for rectification here in this appeal in hand is nothing but intended to recall the order passed on merit which is not permissible under law. Hence, it is held that,

the petition for rectification u/s.20 of the OET Act is bad both in law and fact. Accordingly, it is ordered.

7. The petition stands rejected as devoid of merit.

(R.K. Pattnaik)
Accounts Member-III

(R.K. Pattnaik)
Accounts Member-III

I agree,

(Suchismita Misra)
Chairman

I agree,

(Subrata Mohanty)
1st Judicial Member