

BEFORE THE ODISHA SALES TAX TRIBUNAL: CUTTACK
(Full Bench)

S.A. No. 123(ET) of 2014-15

(Arising out of order of the learned Addl. CST (Central Zone),
Odisha, Cuttack in First Appeal Case No. AA- Angul-13/2010-11
disposed of on dated 16.08.2014)

Present: Shri R.K. Pattanaik, Chairman,
Smt. S. Mishra, 2nd Judicial Member, and
Shri P.C. Pathy, Accounts Member-I

M/s. NTPC Limited,,
AT-Talcher Super Thermal Power Station,
P.O. Deepshikha, Kaniha, Dist-Angul ... Appellant

-Versus-

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

For the Appellant : Sri A.K. Panda, Advocate
For the Respondent : Sri M.S. Raman, Additional Standing Counsel (CT)

Date of hearing: 19.11.2020 ***** Date of order: 27.01.2021

ORDER

Instant appeal under Section 17(1) of the Odisha Entry Tax Act (in short, 'the Act') is at the behest of the dealer assessee questioning the legality and judicial propriety of the impugned order dated 16.08.2014 promulgated in Appeal Case No.AA-Angul-13/2010-11 by the learned Additional Commissioner of Sales Tax, Central Zone (in short, 'FAA'), who allowed the appeal in part but disallowed the claim that it is involved in a manufacturing activity, while demanding entry tax vis-a-

vis the assessment period 01.04.2005 to 31.12.2008 directed in terms of Section 9C of the Act pursuant to an order dated 10.02.2010 passed by learned Deputy Commissioner of Commercial Taxes (LTU), Angul Range, Angul (in short, 'AA') on the ground that the decision to the aforesaid extent is excessive, arbitrary and untenable in law and thus, deserves to be set aside in the interest of justice.

2. In fact, the challenge by the dealer assessee is confined to the issue of concessional rate of tax on coal. According to the learned Counsel for the dealer assessee, generation of electricity is exempted from entry tax and the coal is a raw material for such generation of power which is nonetheless a manufacturing activity but unfortunately, the FAA reached at a contrary decision by wrongly interpreting the provisions of the Act and of Odisha Entry Tax Rules, 1999 (in short, 'the Rules'). It is also contended that the dealer assessee is a manufacturer and is engaged in production/ generation of electricity and coal is used as a raw material but by misinterpreting the law, the FAA declined to treat such activity as a manufacture and disallowed the concessional rate of tax as admissible. Per contra, the respondent State justified the impugned decision of the FAA and contended that the Act has not defined the expression 'manufacture' and as per Rule 2(1)(c) of the Rules, a dealer, who is in the business of manufacture as defined in the Odisha Value Added Tax Act, 2004 (in short, OVAT Act') is a manufacturer and according to Section 2(28) of the OVAT Act any activity that brings out a change in an article on account 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 to be an activity of the manufacture. Further contended that insofar as coal is used, it is to run the steam turbine to drive the generators and since the electricity is not a manufacturing activity, no such new article is produced thereby and hence, the dealer assessee's claim that it is used as raw material and therefore, entitled to concessional rate of tax is totally erroneous and baseless.

3. The learned Counsel for dealer assessed cited an earlier decision of the Tribunal in S.A.No.133(ET) of 2006-07 involving the same parties for the assessment year 2004-05 and contends that coal is a raw material for generation of electricity and such production/ generation of electricity is indeed a manufacturing activity. The learned Additional Standing Counsel justified the reasoning attributed in the impugned order dated 16.08.2014 and would contend that as electricity is not a manufacturing activity, no new article is, thus, produced and insofar as, the use of coal is concerned, the dealer assessee is not entitled to receive any concession as to rate of tax. The rival contentions of the parties are to be critically examined by the Tribunal. In the order dated 26.03.2019 of the Tribunal in S.A. No.133 (ET) of 2006-07, it has been concluded that generation of power is a manufacturing activity and therefore, the dealer assessee for having used coal as a raw material for its production cannot be held liable to pay additional tax, while referring to a decision of the Hon'ble Court in the case of Odisha Power Generation Corporation Ltd. Vrs. State of Odisha and Another reported in (2015) 81 VST 138 (Orissa). In the decision

supra, the Hon'ble Court held and observed that when the process is involved in the manufacturing/ generation/ production of electricity in a thermal power plant, it can safely be said that coal is a raw material for production/ generation of power, inasmuch as, in view of the definition of 'manufacture' as provided in Section 2(28) of the OVAT Act read with Rule 2(1)(c) of the Rules and Section 2(q) of the Act, the generation of electricity using coal as a raw material shall qualify as a manufacturing activity.

4. It is profitable to quote a decision of the Hon'ble Supreme Court rendered in the case of Commissioner of Sales Tax Vrs. M.P. Electricity Board reported in 1968 (11) TMI 85 (SC), wherein, it has been categorically held that electricity falls within the definition of goods as defined under Sales of Goods Act, 1930. Again, in one more decision, the Hon'ble Apex Court in the State of A.P. Vrs. National Thermal Power Corporation Ltd. reported in 2002 (4) TMI 694 (SC) held that electricity is that the production/generation, transmission, delivery and consumption are simultaneous and almost instantaneous. It is further held therein that electricity as goods comes into existence and consumed at the same time, the event of sale in the sense of transferring of property in goods merely intervened as a step between generation and consumption. While elaborating further, it has been categorically observed by the Hon'ble Apex Court that the term 'production' and 'generation' may be used interchangeably; in the case of electricity and generation of electricity can also be termed as production of power, inasmuch as, the term production and

manufacture signify the same meaning, rather, the word 'production' has a wider connotation than the expression 'manufacture'; while every manufacture can be categorised as production, every production need not amount to manufacture. In other words, appreciating the above rulings, it would clearly and conspicuously suggest that the process of generation of electricity is akin to manufacture or production of an article or thing. As earlier mentioned, the Tribunal (FB) by its order dated 26.03.2019 taking note of the decision of the Hon'ble Court *ibid.* has accepted power generation as a manufacturing activity, wherein, coal is used as a raw material. A raw material which is purchased for a manufacturing activity is liable to tax at a concessional rate i.e. @0.5% subject to declaration furnished in Form E-15. Thus, for the reasons discussed hereinabove, it has to be held that the FAA erroneously and by wrongly interpreting the provisions of the Act in juxtaposition to OVAT Act rejected the concessional rate of tax on coal as was claimed by the dealer assessee and resultantly, raised additional tax, which, in the considered view of the Tribunal is liable to be set aside.

5. Hence, it is ordered.

6. In the result, the appeal stands allowed. As a logical sequitur, the impugned order dated 16.08.2014 passed in Appeal No. AA-Angul-13/2010-11 is hereby set aside to the extent indicated above. The cross-objection filed by the respondent State is accordingly disposed of. Consequently, the AA is directed to recompute the tax liability vis-a-vis the dealer assessee for the alleged period of

assessment and to pass an appropriate order in accordance with law preferably within a period of three months from the date of receipt of a copy of the above order.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree,

Sd/-
(Smt. S. Mishra)
2nd Judicial Member

I agree,

Sd/-
(P.C. Pathy)
Accounts Member-I