BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

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

S.A. No. 999 of 2006-07

(Arising out of order of the learned Asst. Commissioner of Sales Tax, Sambalpur Range, Sambalpur, in First Appeal Case No. AA-374 (SA-II) of 2005-2006, disposed of on dated 29.06.2006)

M/s. IDCOL Cement Ltd,
Now known as The Associate Cement Companies Ltd,
Bargarh Cement Works,
At:- Cementnagar, P.O.- Bardol,
Dist.-Bargarh-768038. ... Appellant

-Versus-

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

S.A. No. 199 (ET) of 2006-07

(Arising out of order of the learned Asst. Commissioner of Sales Tax, Sambalpur Range, Sambalpur, in First Appeal Case No. AA-373 (SA-II.ET) of 2005-2006, disposed of on dated 29.06.2006)

M/s. IDCOL Cement Ltd,
Now known as The Associate Cement Companies Ltd,
Bargarh Cement Works,
At:- Cementnagar, P.O.- Bardol,
Dist.-Bargarh-768038. ... Appellant

For the Appellant : Sri S. Ray, Advocate
For the Respondent : Sri D. Behura, S.C. (CT)

Date of hearing:18.10.2021 *** Date of order: 29.10.2021

O R D E R

Both the second appeals are heard analogously and disposed of by this common order as both the cases involve common question of fact and law.

2. The dealer-appellant filed S.A. No.999 of 2006-07 challenging the order dated 29.06.2006 passed by the learned Asst. Commissioner of Sales Tax, Sambalpur Range, Sambalpur (hereinafter called as 'first appellate authority') in First Appeal Case No. AA-374 (SA-II) thereby confirming the order of assessment dtd.10.01.2006 passed by the Sales Tax Officer, Sambalpur II Circle, Bargarh (in short, 'assessing authority') raising tax demand of Rs.48,12,998.00 for the tax period 2002-03. It also preferred S.A. No.199(E.T.) of 2006-07 assailing the order dtd.29.06.2006 passed by the learned Asst. Commissioner of Sales Tax, Sambalpur Range, Sambalpur (hereinafter called as 'first appellate authority') in First Appeal Case No. AA-373 (SA-II.ET) of 2005-2006, thereby confirming the order of assessment dtd.10.01.2006 passed by the Sales Tax Officer, Sambalpur II Circle, Bargarh (in short, 'assessing authority') raising tax demand of Rs.4,93,683.00 for the same period.

3. The facts and circumstances of the case giving rise to the present appeals are that, the appellant M/s. IDCOL Cement Ltd. (present known as The Associated Cement Companies Ltd., Bargarh Cement Works), Bardol, Bargarh is engaged in manufacturing of cement using lime stone, granulated, slag, gypsum, iron ore and fly ash as raw materials and fire bricks and grinding media as consumables. The appellant-company met its requirement of lime stone from its own quarry located at Dungri and all other raw materials, consumables and fuel were purchased by the company. In response to the notice issued u/s.12(4) of the Orissa Sales Tax Act, 1947 (in short, the OST Act), the authorised representative of the dealer appeared and produced the books of account consisting of computerised statement of purchase, sale and stock before the Sales Tax Officer who examined the same with returns filed by the dealer and on such examination the assessing officer found that the company utilised Rs.1,73,72,338 nos. of P.P. bags and 32,257 nos. paper bags for sale of cement and during the year 2002-03 the dealer-company has shown 47,660.706 MT, 851531.00 MT, 868093.300 MT, 1596.277 MT and 29,502.129 MT of cement as opening balance, production sale, self consumption and testing and closing balance respectively. The GTO was determined at Rs.154,86,16,680.20, cash discount and exempted sales, sales to DRDAs were shown at Rs.3,13,63,288.17 and

Rs.39,55,63,288.17 and Rs.39,55,40,942.14 respectively. STC was shown at Rs.11,64,62,396.91 and TTO was arrived at Rs.100,52,50,052.98. The learned assessing officer allowed claim of deduction on account of cash discount as the same was in order and consignment with the provision of law. The assessing officer did not accept the revised return filed by the dealer-company incorporating the turnover of Khariar branch of the unit as the same was not filed within the stipulated time of three months from the due date and imposed interest @ 10% per annum for a period of ninety days on the said amount which was calculated at Rs.33,356.00. So far as the dealer's claim of exemption from payment of sales tax on sale of cement worth Rs.39,55,40,942.14 to various DRDAs inside the State under the administrative control of Government of Odisha, Panchayatiraj Department, the learned assessing officer allowed to avail exemption from payment of sales tax in respect of Rs.39,30,77,981.30 as against the claim of Rs.39,55,40,942.00. The learned assessing officer further disallowed the claim of set off of tax amounting to Rs.53,44,194.00 representing the tax paid on purchase of HSD, lubricants, gas, electrical goods, wielding rods and coal utilised in manufacturing of cement on the ground that no set off was claimed by the dealer-company in any of the returns filed by him during the year in question, that the detail account in respect of utilisation of the said materials could not be produced

during the assessment and that the coal and electricity have been utilised as fuel by the dealer-company as revealed from the balance sheet submitted during the assessment not as consumables or raw materials. The learned assessing officer determined the GTO at Rs.152,85,26,569.01 and after allowing deduction of Rs.39,30,77,981.30 and Rs.11,76,70,235.33 towards sale of tax exempted cement and sales tax collected determined the TTO at Rs.101,77,78,352.38. Accordingly, the total tax including surcharge and interest payable by the dealer-company was determined at Rs.13,42,45,905.00 and after deduction of the tax of Rs.12,94,32,907.00, the balance liability was determined at Rs.48,12,998.00.

4. The dealer-company being aggrieved with such demand raised by the assessing officer preferred first appeal before the learned first appellate authority on the ground that-

(a) Rejection of revised return without assigning any reason was illegal and arbitrary.

(b) The disallowance of set off of tax amounting to Rs.83,44,194.00 on purchase of HSD, lubricants, gas, electrical goods, wielding rods and coal is quite illegal and arbitrary which is integrally connected with the production of cement.

5 The first appellate authority on perusal of the record simply concurred with the finding of the assessing officer and confirmed the assessment order. The dealer-company being further aggrieved with the order of the first appellate authority confirming the order of assessing officer preferred this S.A. No.999 of 2006-07.

6. The dealer-company mainly challenged the order passed by both the forums below on two grounds-

(a) That the assessing officer was incorrect in its approach in rejecting the revised return on the ground of delay and arbitrarily imposed interest u/s.12(4-a) of the OST Act when the dealer did not produce incorrect account deliberately.

(b) The forums below also were incorrect in their approach in rejecting the claims of set off towards the tax paid on goods like HSD, lubricants, gas, electrical goods, wielding rods and coal utilised in manufacturing of cement.

7. It was vehemently urged by the learned Counsel for the dealer-company that the assessing officer has no jurisdiction to reject the revised return only because there is some delay in filing the same. Consequently also the imposition of interest u/s.12(4-a) of the OST Act is also illegal, arbitrary and against the sanction of law. When there is no malafide intention on the part of the dealer-company in submitting the revised return belatedly, imposition of interest is unwarranted. He relying on the

judgment of the Hon'ble Court in case of Associated Cement Companies Ltd. Vrs. State of Orissa in STREV No.28 and 29 of 2007 disposed of on 18.08.2021 vehemently urged that the HSD, lubricants, gas, electrical goods, welding rods and coal have been utilised in manufacturing of cement. Therefore, these are materials which directly go into the composition of finished product entitling the dealer-company to claim set off of tax paid on purchase of these materials. He further argued that for the purpose of granting set off it is not required that the goods must have gone directly into composition of finished products. When a good is directly or indirectly used in the process of manufacture of the cement the tax paid on such goods is to be set off while calculating the tax liability under the OST Act. In the manufacturing of goods normally encompass the entire process carried on by the dealer-company in converting the raw materials into finished products. The cement could not have been produced without the use of the goods like HSD, lubricants, gas, electrical goods, wielding rods and coal, therefore these goods are used either as raw materials or consumables in the process of manufacturing cement. So, the dealer-company is entitled to set off of tax paid on such goods. He thus submitted for allowing the appeal and setting aside the impugned judgments of both the fora below.

8. On the other hand, the learned Standing Counsel (CT) representing the State in terms of the cross objection filed by it vehemently urged that the dealer-company did not assign any reason for delayed filing of the revised return. Therefore, the learned assessing officer was correct in its approach in rejecting the revised return and imposing interest u/s.12(4-a) of the OST Act. The dealer-company purposefully did not include the turnover of Khariar unit in the return and when such escapement was detected he filed revised return belatedly, on account of such the assessing officer did not accept the revised return. So there is no legality in imposing interest as provided u/s.12(4-a) of the OST Act. So far as the claim of set off of tax paid on goods like HSD, lubricants, gas, electrical goods, wielding rods and coal the forums below have correctly disallowed such claim as these goods are neither raw materials nor consumables which directly goes into the composition of finished products. The dealer-company is only entitled to claim set off of tax in respect of the goods which directly goes into the composition of finished products. The goods in respect of which set off is claimed are not used in production of the cement for which the fora below did not commit any illegality in disallowing the claim of set off. He submits to dismiss the appeal and confirm the impugned judgment of both the forums below.

9. We have heard the rival submissions of the parties, gone through the grounds of appeal, impugned judgments of both the forums below vis-a-vis the materials on record. The crux of the dispute in the present appeal is (i) whether the forums below were correct in their approach in disallowing the claim of set off of tax amounting to Rs.53,44,194.00 paid on purchase of HSD, lubricants, gas, electrical goods, wielding rods and coal utilised in the manufacturing of cement ? On perusal of the impugned judgment of the assessment officer, we find that it has rejected the claim of set off on three grounds-

(i) No set off was claimed by the dealer-company in any of the return filed by him during the year in question.

(ii) No detailed account in respect of utilisation of the said materials could be produced during the assessment.

(iii) Coal and electricity have been used as fuel as revealed from the balance sheet submitted during the assessment and not as consumable or raw materials. Similarly gas, wielding materials, electrical goods, lubricants and HSD are neither raw materials nor consumables.

Before examining the legality and propriety of such finding of the learned assessing officer it would be profitable to take note of the law laid down in some of the important judgments of our Hon'ble High Court as well as

Hon'ble Apex Court. In **Associate Cement Companies Ltd. Vrs. State of Orissa in STREV No.28/2007,** the Hon'ble Court by order dtd.18.08.2021 while answering the question whether coal is a raw material for manufacturing of cement and whether Full Bench of the Odisha Sales Tax Tribunal was correct to hold that coal cannot be treated as raw material which directly goes during the composition of finished products i.e. cement, in paragraph-10 of the judgment observed that the coal is used not merely as a fuel but when it gets burnt up in the process of preparation of clinker, it produces coal ash which gets absorbed by clinker. Clinker is a raw material goes into the composition of cement. The report of the Senior Manager (Technical) of the petitioner which was available with the ACST, explained the use of coal as a raw material in the manufacture of cement. It was pointed out that clinker cannot be produced without coal. This makes coal a vital and necessary raw material for manufacturing cement and in paragraph-14 & 15 of the judgment it was further observed that coal used in the process of manufacturing of cement is indeed an input within the meaning of Section 2(25) of the OET Act and therefore qualifies for input tax credit as claimed by the petitioner. Question A is accordingly answered in favour of the petitioner and against the Department by holding that the Tribunal erred in holding that the coal is not a raw material for manufacturing cement. Question B is

answered by holding that the Tribunal erred in coming to the conclusion that coal could not be treated as a raw material vis-a-vis the finished product i.e. cement. Such conclusion was contrary to the decision of the Supreme Court in Ballarpur Industries Ltd.

10. The Hon'ble Court while holding the coal as raw material for manufacturing of cement took note of the decision in case of **National Aluminium Company Limited vs. Deputy Commissioner of Commercial Taxes, Bhubaneswar III Circle, Khurda reported in (2012) 56 VST 68 (Orissa),** where the question was whether coal, alum, caustic soda and other consumables used as inputs for manufacturing of aluminium ingots and sheets could enrol the petitioner to approach input tax credit on such inputs. It was held in that case that huge quantity of electrical energy is required during **electro license process** to produce aluminium which is a commercial product. Thus, the electrical energy generated in the captive power plant of the petitioner is not the final product which is sold in the market. Electrical energy which is generated with the use of coal and other materials is the only intermediate product which is used in the process of manufacturing of final product i.e. aluminium, aluminium ingots and sheets etc.

11. The Hon'ble court also took note of the decision of the Supreme Court in the case of **J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. Sales Tax Officer, Kanpur**

and others reported in (1965) 16 STC 563 (SC), where it was held that the expression in the manufacturing of goods normally encompass the entire process carried on by the dealer in converting the raw materials into finished products. It was further observed where any particular process is so integrally connected with the ultimate production of goods but for that purpose, manufacturing or processing of goods should be commercially inexpedient, goods required in that process would fall within the expression "in the manufacture of goods". Undisputedly, in the present case the generation of electrical energy in the captive power plant is integrally connected with the ultimate production of finished goods. Therefore, goods required in the process of generation of electrical energy would fall within the expression "in the process of manufacturing".

12. In the case of **Reliance Industries Ltd. v. Asst. Commissioner of Sales Tax and others reported in (2008) 15 VST 228 (Orissa)** the Hon'ble Court while considering the question whether furnace oil was a consumable within the meaning of Sec.2(25) of the OVAT Act observed as under:

> "the contention of the opposite parties that furnace oil used by the dealer is to produce flame and therefore it is fuel and not consumable which is directly used in processing or manufacturing of finished product is totally misconceived and not sustainable in the law. On the other hand, it boils down to an

> irresistible conclusion that furnace oil is one of the primary and essential commodities which has a direct relation in the manufacturing process and 'direct relation' means without which the manufacturing of end-product is not possible at all. In that view of the matter, we are of the considered view that furnace oil used by the petitioner in the process of manufacture without which production of PSF is not feasible is nothing but consumable."

13. Similarly, in case of **Commercial Taxation Officer v. Rajasthan Taxchem Ltd. Reported in (2007) 3 SCC 124.** the Hon'ble Apex Court while considering te question whether diesel is a raw material for the purpose of manufacturing yarn, in paragraph-19 of the judgment observed that diesel is being used for the purpose of running the generator set for the production of the ultimate product which is also required for the purpose of manufacturing the end product the diesel can only be termed as raw material and not otherwise.

Thus, in view of the above judgments, it is abundantly clear that the goods which are primary and essential commodities which has direct relation in the manufacturing process and without which the manufacturing of the end product is not possible are all inputs within the meaning of Sec.2(25) of the OVAT Act which provides that any goods purchased by the dealer in course of his business for resale 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 goods such as HSD, lubricants, gas, electrical goods, wielding rods and coal are intermediate products which are used in the process of manufacturing of final products i.e. cement. It is undisputed fact that cement cannot be produced without the use of HSD, lubricants, gas, electrical goods, wielding rods and coal. It is well settled in case of J.K. Cotton Spinning & Weaving Mills Co. Ltd. that the expression in the manufacture of goods would normally encompass the entire process carried on by the dealer in converting the raw materials into finished products. So in the present case also the HSD, lubricants, gas, electrical goods, wielding rods and coal are so integrally connected with the ultimate production of goods, without which the production of cement is not feasible. Therefore, these goods being the raw materials and consumables used in the process of manufacturing of cement, tax paid on such good is to be set off. The fora below without taking note of the law laid down in the above mentioned judicial pronouncement, disallowed the claim of set off of tax paid on goods like HSD, lubricants, gas, electrical goods, wielding rods and coal for which the impugned orders passed by both the forums below are not sustainable in the eye of law. When the dealer-company is entitled to any deduction or exemption in law the taxing authorities are bound under

law to grant such exemption or concession even if not claimed. The rejection of claim of dealer-company for set off on the ground that it has not made such claim in any of the return filed by it is legally unsustainable as such claim of the dealer-company is genuine and legally permissible. The dealer-company having paid tax of Rs.53,44,194.00 on purchase of HSD, lubricants, gas, electrical goods, wielding rods and coal which were utilised in the manufacturing of cement, it is entitled to set off of such amount. The impugned order passed by the forums below disallowing claim of set off of tax amounting to Rs.53,44,194.00 on unreasonable grounds is bad in law.

14. The next issue that was raised in challenging the impugned orders of the forums below about imposition of interest @ 10% per annum for a period of ninety days u/s.12(4-a) of the OST Act. There is no dispute in the present case that revised return was not filed within three months from the due date. Section 11(2) of the OST Act provides “if a registered dealer having furnished a return under sub-section (1) discovers any omission or wrong statement therein he may furnish a revised return in the prescribed manner within three months from the due date prescribed for furnishing of returns under sub-sec(1). In the present case the dealer-company filed return without including the turnover of Khariar unit and subsequently filed revised return after expiry of three months from the

due date. The assessing officer because of delay in filing the revised return did not accept the same and impose interest u/s.12(4-a) of the OST Act which provides that "If the Commissioner, while making an assessment under sub-sec.(2), (3) or (4), he satisfies that the dealer had intentionally produced incorrect accounts, documents, registers or has without sufficient cause furnished incorrect return or information affecting or intended to affect the quantum of tax payable by him or his liability to pay tax for the period in which such assessment is made he may direct that dealers in addition to the tax assessed under the said sub-section pay interest @ 10% per annum on the tax payable in respect taxable turnover not incorporated in the return for a period of ninety days or for the period beginning from the date on which the return was due and ending on the assessment whichever is less". In the present case the dealer-company furnished incorrect return without including the turnover of Khariar unit and filed the revised return three months after the due date without assigning sufficient cause for furnishing such incorrect return. So, under this circumstance the assessing officer cannot be faulted with for imposing interest for delayed filing of the revised return. It is the dealer-company who is to show sufficient cause as to how he furnished incorrect return without including the turnover of Khariar unit. When there was no plausible explanation from the side of the dealer-company, the

assessing officer was correct in its approach in imposing interest @ 10% per annum on the tax payable in respect of taxable turnover. Therefore, the assessing officer has correctly calculated the interest at Rs.33,356.00 for a period of ninety days. There is no illegality or impropriety in such finding of the learned assessing officer as well as the first appellate authority.

So far as S.A. No.199(ET) of 2006-07 is concerned, the learned assessing officer disallowed claim of set off of Rs.5,08,418.00 u/r.19(5) of the Orissa Entry Tax Rules, 1999 representing the entry tax paid on coal which has been used in manufacturing or sale of cement inside the State of Odisha during the period 2002-03. On perusal of the impugned order of the assessing officer we find that he disallowed the claim of set off on the ground that coal is not a raw material which directly goes into the composition of finished products. This finding of the Sales Tax Officer which was subsequently confirmed by the first appellate authority is not legally sustainable in view of law laid down by the Hon'ble High Court in case of Associate Cement Companies Ltd. (supra). The Hon'ble Court has categorically held in paragraph-10 of the judgment that clinker cannot be produced without coal and the cement cannot be produced without clinker and this makes coal a vital and necessary raw material for manufacturing cement. In view of the settled position of law, we are of the considered opinion that coal is raw material which goes

directly into the composition of finished product thereby entitling the dealer-company to claim set off u/r.19(5) of the OET Rules. The impugned orders passed by the forums below disallowing the claim of set off of Rs.5,80,418.00 on the entry tax paid on coal which has been used in the manufacturing of cement is not sustainable in the eye of law, accordingly the same needs to be set aside.

15. In view of the foregoing reasons, both the appeals filed by the dealer-company is allowed. The impugned orders passed by both the forums below are hereby set aside to the extent indicated above and the matter is remitted back to the assessing officer to recomputed the tax liability of the dealer-company afresh keeping in view of the observations made hereinabove within a period of three months from the date of receipt of the copy of the order. Accordingly, the cross objection filed by the State-respondent is disposed of.

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/-
(M. Harichandan)
Accounts Member-I