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

S.A. No. 2355 of 03-04

(Arising out of the order of the learned ACST, Cuttack-II Range, Cuttack in first appeal Case No. AA-607/KJB/1997-98 disposed of on 28.08.2003.)

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

M/s. SAIL, Raw Materials Division,
Bolani Ore Mines, Bolani.. ..... Appellant.

-Vrs.-

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

For the Appellant: : Mr. B.R. Panda, Advocate.
For the Respondent: : Mr. M.L. Agarwala, S.C.(C.T.)

Date of Hearing : 07.04.2022 *** **Date of Order :27.04.2022**

O R D E R

This present appeal has been filed by the dealer-assessee against the impugned order of learned Assistant Commissioner of Sales Tax, Cuttack-II Range, Cuttack (in short, ld. FAA) passed on 28.08.2003 in Appeal Case No. AA-607/KJB/1997-98 dismissing the appeal thereby confirming the order of the assessment of learned Sales Tax Officer, Assessment Unit, Barbil (in short, LAO) who raised a demand of Rs.5,70,480.00 U/s.12(4) of Odisha Sales Tax Act (in short, OST Act) relating to the year 1994-95.

2. Being aggrieved by the aforesaid order of the ld. FAA, the assessee has preferred second appeal before this Tribunal challenging the said order as unjust, illegal, improper and excessive liable to be quashed.

3. The brief fact of the case at hand is that the assessee is a part and parcel of multi-locational Public Sector Organization M/s. SAIL. It extracts iron ore from its lease hold mines located in Bolani area and supplies the same to different steel plants of SAIL on stock transfer basis. The assessee purchases goods by paying concessional rate of tax @4% on the strength of declaration form IV issued to its selling dealers. There are two reports submitted by the IST bearing No.19 dtd.27.07.1995 in which it is alleged that the assessee has purchased petrol to the tune of Rs.8,88,850.00 including concessional rate of tax of 4% against form IV which has been supplied to its employees as per quota fixed for their bikes. The petrol is also utilized by the General Manager of the Company in his car. This violates the terms and conditions of form IV for which differential tax may be collected from the assessee. It is further alleged that the assessee has mis-utilized form IV in purchase of HSD and lubricant. Moreover, it is alleged that the assessee has purchased cement worth of Rs.96,000.00 by paying concessional rate of tax of Rs.3,840.00 @4% by utilizing form IV which is equally a violation of the said form.

In another report of IST bearing No.51 dtd.23.12.1995, it is alleged that the assessee has purchased furniture, stationery,

sanitary fittings, medicines, insecticides and cement by mis-utilizing form IV. At assessment stage, the LAO, after verifying the books of account and hearing the averments of the assessee, observed that the assessee has not purchased office stationery, furniture, medicines and sanitary fittings etc. against form IV. However, he observed that since the assessee has supplied petrol to its employees for their own use, it violates the provision of the statute and accordingly the assessee is liable to pay the differential tax of 12% (16%-4%) on purchase value of petrol of Rs.8,54,663.46. Similarly, he observed that the assessee has purchased cement worth of Rs.96,000.00 (excluding concessional rate of tax of 4% i.e. Rs.3,840/-) and has issued to different contractors for construction job. Since, it is a violation of conditions of form IV, he levied balance 8% tax (12%-4%) on supply of cement of Rs.96,000.00 to different contractors used in civil construction jobs. Moreover, he observed that during the impugned year, the assessee has purchased HSD to the tune of Rs.1,02,22,686.00 and lubricants for Rs.58,64,987.00 against form IV including 4% tax at concessional rate against form IV. When asked about the utilization of HSD and lubricants so purchased on the strength of form IV, the assessee stated that it has got heavy machineries like excavators, dumpers, grades, pay-loaders and cranes etc which were engaged inside the mines and exclusively used “in mining” activities besides, light vehicles like jeep and heavy vehicles like trucks and water-sprinklers etc. Though the assessee put forth the argument that utilization of HSD & lubricants in

jeep and trucks were also forming part and parcel of "in mining" activities, the LAO was not inclined to accept the same by following a judgment of Hon'ble Apex Court. Their Lordships of the Apex Court in case of M/s. Indra Singh & Sons Pvt. Ltd. Vrs. STO reported in (1966) 17 STC 510 (SC) had streamlined the goods intended to be used "in mining" activities and the goods involved in "on mining" activities. Hence, he observed that the engagement of jeeps for carrying personnels, trucks for transportation of materials and water sprinklers were not taken to be part of "in mining" activities. Since, the major portion of HSD and lubricants were consumed in heavy vehicles engaged for "in mining" activities, he allowed 78% and 22% towards utilization of HSD and lubricants for "in mining" activities and "on mining" activities respectively. Accordingly, he assessed 22% of the value of purchase of HSD of Rs.98,29,475.04 and 22% of value of purchase of lubricants of Rs.56,39,410.55 at differential rate of tax of 12%. All these resulted in extra tax demand of Rs.5,70,480.00 which was challenged by the assessee before the ld. FAA in first appeal.

4. The ld. FAA, after hearing of the case at first appeal, confirmed the order of assessment passed by the LAO by a reasoned order inasmuch as the appellant failed to produce any supporting evidence and document in rebuttal of his case.

5. Being further aggrieved, the appellant preferred second appeal before this Tribunal. He has mainly taken the following grounds as per his appeal memo:

a. “For that the forums below have completely failed to exercise the correct procedure of law but illegally had made the allegation that the goods purchased on the strength of the declaration Form IV were misused and utilized other than mining purposes such as cement, lubricants, furniture, stationary, diesel and petrol etc. and specific grounds of mis-utilization having been raised should have been proved on each items regarding mis-utilization as alleged and submissions made in the lower forums should not have been ignored whimsically without any positive findings detected and found if any and details available regarding the alleged violation should have been stated. Hence, the orders passed had to be vacated.

b. For that the appellant-company specifically purchased the cement and lubricant etc. for the purpose and use in the mining as per the R.C. had provided and permission given therein, hence, the forums below on the basis of alleged fraud reports and without proper confrontation on each items used should not have rushed to levy tax at enhanced rate. Hence, the levy of tax at enhanced rate is liable to be deleted.

c. For that the forums below should not have raised bold and false allegation that the items purchased were mis-utilized other than the mining purposes but mere presumption and surmises made in completing the assessment as well as the first appeal had to be quashed and vacated. The forums below should have given its findings in details and on item-wise and violation if made.”

6. During the course of hearing, the ld. Counsel for the appellant vehemently argued against the appeal order passed by the ld. FAA being unjust, illegal, improper, arbitrary and bad in law and accordingly argued to quash the said order with the averment that the goods purchased on the strength of form IV are covered under its R.C. and same has been utilized for the purpose of mining activities.

7. Per contra, the ld. Counsel for the Revenue argued in favour of the order of ld. FAA, being just and proper in the facts and circumstances of the case that doesn't warrant further interference by this Tribunal.

On going through the orders of lower forums together with materials available on record, it transpires the fact that the assertion of the appellant is misconceived. The goods such as cement has been supplied to contractors for construction job and not used "in mining". Further, the appellant has admitted that it has supplied petrol worth of Rs.8,88,850.00 at the concessional rate of tax of 4% against form IV to its employees as per quota fixed for their vehicles that doesn't come under the purview of "in mining" activities. Our aforesaid view is fortified by a judgment of Hon'ble Supreme Court in case of Indra singh and Sons (P) Ltd. Vrs. STO reported in 17 STC 510 (SC). It is held therein as under:

"8. …We cannot read the expression "in mining" in Rule 13 of the Central Rules to mean in the business of mining. The goods must be intended for use only in the actual activity of mining which would

include raising the coal and suoting it in heaps or in ware houses. But in our opinion the expression cannot be extended to include delivering the coal to a siding at the railway station. Therefore, the High Court was right in holding that these two items, namely spare parts of motor vehicles including tyres and tubes, and motor trucks cannot be included in the registration certificate of the Appellant.

9. As far as furniture and sanitary fittings are concerned, these are covered by the ratio of the decision of this Court in the Indian Copper Corporation 16 STC 259 case. In dealing with stationery, Shah, J. observed that "stationery also is not intended for use in the manufacture or processing of goods for sale or for mining operation. Use of stationery undoubtedly facilitates the carrying on of a business of manufacturing goods or of processing goods or even mining operations; but the expression "intended to be used" cannot be equated with "likely to facilitate" the conduct of the business of manufacturing or of processing goods or of mining". These observations apply to the items 'furniture' and 'sanitary fittings'. These two items are likely to facilitate the business of mining but it cannot be said that they are intended to be used in mining."

We also refer to the judgment of Hon'ble Apex Court in case of Indian Copper Corporation Vrs. CST reported in 16 STC 259 (SC) in which it is held as under:

"The expression "goods intended for use in the manufacturing or processing of goods for sale" may ordinarily include such vehicles as are

intended to be used for removal of processed goods from the factory to the place of storage. But it cannot on that account be said that the goods purchased for the hospital such as equipment, furnishings and fittings are intended for use in the manufacture or processing of goods for sale or in the mining operations. The mere fact that there is a statutory obligation imposed upon the owner of the factory or the mine to maintain hospital facilities would not supply a connection between the goods and the manufacturing or processing of goods or the mining operations so as to make them goods intended for use in these operations. For the Corporation contended that the expression "equipment" used in rule 13 is wide enough to include hospital equipment, furnishings and fittings and maintenance of such equipment being made obligatory by statute, it fell within rule 13. But rule 13 requires that the goods including equipment should be intended for use by the owner as equipment in the manufacture or processing of goods for sale or mining operations. If the equipment is not so intended to be used, rule 13 will not be attracted. For reasons already mentioned, we are unable to hold that hospital equipment, furnishings and fittings fall within the description of equipment intended for use in the manufacture or processing of goods for sale or in mining operations. The High Court was therefore right in declining to specify hospital equipment, furnishings and fittings. The same considerations would apply to medical supplies. In respect of household furnishings and fittings, there is not even a statutory obligation to which our attention

has been invited which requires the Corporation to provide them… "Stationery" also is not intended for use in the manufacture or processing of goods for sale or for mining operations. Use of stationery undoubtedly facilitates the carrying on of a business of manufacturing goods or of processing goods or even mining operations; **but the expression "intended to be used" cannot be equated with "likely to facilitate" the conduct of the business of manufacturing or of processing goods or of mining."**

It is well settled principle of law that the concession has to be strictly construed. The legislature has granted concession to utilize the goods in mining and not to facilitate mining. In J.K. Spinning & Weaving Mills V. STO (1965)16 STC 563 (SC), the Hon'ble Apex Court held that the expression "in the manufacture" encompasses the entire process carried out for converting raw material into finished product. However, office equipments such as fan, coolers, AC would not be eligible for concessional rate of tax. It was been further held that goods like tiles, other commodities, building materials including lime and cement are not required in the manufacture of textile for which they are not eligible for concessional rate of tax.

Further, the Hon'ble Odisha High Court in Hira Cements Vrs. State of Orissa reported in (1998) 108 STC 619 (ORI.) upholding the contravention under fifth proviso of section 5 (1) of OST Act has held that cement used in construction of building is not eligible for concession and liable to full rate of tax.

However, on purchase of HSD and lubricants on the strength of form IV by the appellant, it is observed from the assessment order that the assessee has utilized the same in heavy machineries like excavators, dumpers, graders, pay-loaders and cranes etc. which are exclusively used “in mining” activities besides used in light vehicles like jeep and heavy vehicles like trucks and water sprinklers etc. In separating “in mining” and “on mining” activities as per Apex Court judgment in case of M/s. Indra Singh & Sons (P) Ltd. vrs. STO noted supra, the LAO observed that HSD and lubricants used in jeeps for carrying personnels, trucks for transportation of materials and water sprinklers are not to be taken to be a part of “in mining” activities. However, since the major portion of HSD and lubricants are consumed in heavy vehicles engaged for “in mining” activities, he judiciously made a ratio of 78% towards heavy vehicles and 22% towards light vehicles and trucks in determining “in mining” and “on mining” activities respectively and taxed 22% of the value of purchased HSD and lubricants towards tax. Before this Tribunal, the ld. Counsel for the assessee failed to submit details of HSD and lubricants consumed in heavy vehicles and light vehicles including water sprinklers. As such, we don’t find any infirmity caused by the forums below in determining the ratio of consumption in their orders. We further observed that the imposition of differential amount of tax by the LAO is in consonance with fifth proviso to Section-5(1) of the OST Act inasmuch as goods purchased has not

been utilized directly “in mining” activities and thus, the appellant mis-utilized the declaration form IV.

8. In the result, the appeal filed by the dealer-assessee is rejected being devoid of any merit and the order passed by the ld. FAA for the impugned period is confirmed.

The case is disposed of accordingly.

Dictated and corrected by me.

Sd/-
(Srichandan Mishra)
Accounts Member-II

Sd/-
(Srichandan Mishra)
Accounts Member-II

I agree,

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(S. K. Rout)
2nd Judicial Member