

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

S.A. No. 498 of 09-10

(Arising out of the order of the learned JCST, Jajpur Range, Jajpur in first appeal
Case No. AA-140CUIII-08-09, disposed of on 5.01.2010)

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

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

... Appellant.

-Vrs.-

M/s. Mahashakti Granite Crushing
Plant Pvt. Ltd., Badhua, Jajpur.

... Respondent.

For the Appellant:

:Mr.D. Behura, Standing Counsel (C.T.)

:Mr. S.K. Pradhan, ASC(C.T.)

For the Respondent:

:None

Date of Hearing : 19.04.2022

Date of Order :27.04.2022

ORDER

This second appeal has been filed by the State against the order dtd. 5.01.2010 passed by the learned Joint Commissioner of Sales Tax, Jajpur Range, Jajpur (in short, ld. FAA) in Sales Tax Appeal No. AA-140CUIII-08-09, allowing appeal in full that resulted in a refund of Rs.1,14,512.00 against the demand of Rs.5,27,377.00 raised by the Sales Tax Officer, Jajpur Circle, Jajpur (in short, LAO) in his assessment order passed under Section 12(4) of the Odisha Sales Tax Act (in short, OST Act) for the year 2004-05.

2. Being aggrieved by the aforesaid order of the ld. FAA, the State has preferred the second appeal before this Tribunal challenging the

said order as bereft of consideration of material facts to the provisions of law for which the said impugned order suffers from serious legal infirmities and liable to be modified. The main contentions in the grounds appended to the memorandum of appeal are as follows:

“a. That, the order of ld. JCST reducing demand on re-computation is arbitrary, illegal and bad in law.

b. That, the dealer has supplied ballast to S.E. Railway, khurda Road and as per Judgement of Hon’ble High Court of Orissa in case of M/s. P.K. Sathpathy Vrs. State of Orissa reported in 116 STC page 498 payment receipt upto stacking of metal/ballast on the railway site should be levied tax @12% as supply contract.

c. That, ld. JCST has erred in deducting transportation charges to arrive at the value of ballast supplied by the dealer.

d. That, the orders of Ld. JCST is liable to be modified to be extend payment receipt upto stacking of ballast is liable to be taxed as supply of ballast.”

3. The brief fact of the case at hand is that the assessee-respondent is having a Crusher Unit that crushes stones into chips, metals etc. The crusher Unit raises spalls from its own quarries taken on lease basis. At the time of assessment, the assessee submitted books of account together with sales statement and copy of TDS certificates. The LAO observe that the assessee has sold sized metals to S.E. Railway, khurda road and received a payment of Rs.47,29,387.00

during the impugned year that includes transporting charges, labour charges, stacking of materials, wagon loading and unloading , royalty charges and collection of sales tax. Besides the above sales disclosed, the LAO observed that the assessee has furnished two TDS Certificates issued by the Contractee against which TDS @4% i.e. Rs.54,080.00 has been deducted on its sales turnover for the impugned year but the assessee has not disclosed the gross turnover against the said tax of Rs.54,080.00 in his annual statement furnished which was deducted by the contractee from its bills for the Q.E. 30.09.2004. The sale value for above TDS comes to Rs.13,52,000.00 which was added to Rs.47,29,387.00 disclosed by the assessee and accordingly the LAO determined the GTO at Rs.60,81,387.00. However, he discarded the claim of deductions towards transportation charges, stacking of materials, labour charges, loading charges and royalty from the GTO taking into consideration the ratio of judgment pronounced by the Hon'ble Orissa High Court in case of M/s. P.K. Satpathy Vrs. State of Orissa reported in 116 STC 498. All these resulted in an extra demand of Rs.5,27,377.00 in the assessment order passed by the LAO relating to the impugned year which was challenged by the assessee before the ld. FAA.

At first appellate forum, the ld. FAA, after examining the books of account with the grounds taken by the assessee and relevant documents filed, reduced the demand raised in the assessment order

that resulted in a refund of Rs.1,14,512.00 with the following observations:

- i. He allowed deductions towards transportation, loading and unloading and stacking charges from the GTO as per Section 5(2)(a)(III) of OST Act.
- ii. He observed that though the dealer has received one work order from S.E. Railway , Khurda road, Bhubaneswar for supply, delivery, stacking and loading of ballast and laying the same into both sides of the tracks in different locations, the contract consist of two parts namely supply and delivery in stack of ballast and laying the same into both sides of the tracks in different locations. The rate includes cost of materials, loading, unloading, handling, transportation etc. The second part consist of loading of ballast supply into any type of railway wagons with the contractor's own loading arrangements. As such, he concluded that the dealer is required to do twin services of supply and of providing labour and services.

4. However, when the matter was called on for hearing, none appeared on behalf of the dealer-respondent in spite of valid service of notice. Moreover, since, the instant appeal relates to the period 2004-05, which is more than 17 years, it was taken up for ex-parte hearing in the presence of learned Standing counsel (C.T.) representing the State.

5. During the course of hearing the Id. SC (C.T.) vehemently argued against the appeal order passed by the Id. FAA claiming it as unjust and not in accordance with the provisions of the Statute referring to the Judgment of Hon'ble Orissa High Court in case of M/s. P.K. Satpathy noted supra. He further argued that since, the agreement is not of works contract rather supply contract, no deductions should have been allowed by the Id. FAA in determining the TTO.

6. We, now, felt necessitated to address the main grounds taken by the appellant-State as appended in appeal memorandum while filing before the Tribunal taking into consideration the information available in this record including first appeal record.

The materials available in the appeal record reveal the fact that the assessee has entered into an agreement with East Coast Railway, Khurda Road bearing No.105 dtd.09.11.2014 with an agreement value of Rs.2,94,00,000/- for supply and delivery in stacks of 50MM size 50,000 cum of hard stone machines crushed ballast approved quality at HDS depot of Khurda Road Division and loading the same into any type of Railway Wagon @Rs.588/- per cum that includes all cost of materials transportation with all lead, lift and also loading of ballast into any type of Railway wagons with contractor's own mechanized loading arrangements including crossing of railway lines etc. complete. As such, we observe that the

said agreement doesn't fall under the category of works contract rather supply of goods as per specification given in the schedule of rates of the contractee i.e. S.E. Railway. In order to fortify our observation we refer to the case law of Hon'ble Orissa High Court in case of M/s. P.K. Satpathy noted supra in which it is held as under:-

"The transactions of supply of hard broken stone ballasts by the assessee to the Railways at the specified rate were by way of sale as the assessee had undertaken to supply the ballasts and to stack the materials at the approved site. The contract with Railways for supply of hard broken ballasts and stacking the same at specified depots involves payment of royalty to the quarry owners. The price agreed to between the Railways and the petitioner was a composite price for the ballasts and for handling and labour charges; and the property was passed to Railways from the contractor-assessee. Hence, the assessee is taxable on the composite price paid. The title of the property rested with the assessee till final transfer of goods to the Railways is effected and hence, as there is transfer of property of goods to Railways and as the predominant object of the contract was supply of chattel as chattel, transactions does not involve works contract and constitute a sale to attract levy of tax."

We, further observe from the assessment order that TDS of Rs.54,080.00 has been deducted by the contractee which has not been disclosed in the annual statement furnished by the assessee

that involves supply of goods of Rs.13,52,000.00. The ld. FAA has grossly erred in not discussing on the above issue resulting in a reduction of GTO for the impugned year which appears unjust and improper. We are, thus, inclined to determine the GTO at Rs.60,81,387.00 which has otherwise been determined by the LAO in his assessment order.

7. Since, it is a fact of sale/supply of ballasts by the assessee, we find that both the forums below have grossly erred in determining the rate of tax @12% in case of supply of ballast/stone chips. The Hon'ble Orissa High Court in case of state of Orissa Vrs. M/s. D.K. Construction and in other similar cases in STREV Nos. 101, 42, 80, 83, 84, 95, 98, 131 and 132 of 2011 and STREV No. 458 of 2008; STREV Nos. 37, 38, 41, 42, 43 and 44 of 2010 and STREV Nos. 47, 49 and 50 of 2013 vide their judgment on 01.03.2017 held that ballasts or boulders or chips being mineral as per Entry 117 of the taxable list are exigible to tax @4% of OST Rate Chart.

Accordingly, the assessee should have been taxed @4% on sale of ballasts to S.E. Railways as per agreement and not @12% as determined by the forums below.

8. Accordingly, it is ordered.

The order passed by the ld. FAA for the impugned period is set-aside and the matter is remitted back to the LAO for re-

computation of tax in the light of our above observations after giving the assessee a reasonable opportunity of being heard.

The cross objection filed by the dealer-assessee-respondent is disposed of accordingly.

Dictated & 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