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IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV No. 1 of 2013

M/s. Paradeep Paribahan Pvt. Ltd. .... ***Petitioner***

Mr. Jagabandhu Sahoo, Senior Advocate
Ms. Kajal Sahoo, Advocate

-versus-

State of Odisha, represented by the Commissioner of Commercial Taxes ... ***Opposite Party***

Mr. Sunil Mishra, Addl. Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIK

<u>ORDER</u>
13.07.2022

<u>Order No.</u>

<u>Dr. S. Muralidhar, CJ.</u>

05. 1. This revision petition by the Assessee arises out of an order dated 14th September, 2012 passed by the Orissa Sales Tax Tribunal, Cuttack (Tribunal) dismissing the Assessee's Appeal i.e. S.A. No.1103/2007-08. By the impugned order, the Tribunal affirmed the order of the Assistant Commissioner of Sales Tax (ACST), Cuttack II Range, Cuttack dismissing the Assessee's appeal i.e. Appeal Case No.AA 215 CUII-J/2006-07 by an order dated 8th May, 2007 and confirmed the assessment order dated 27th February, 2006 passed by the Sales Tax Officer (STO), Ward-A, Jagatsinghpur Circle, Paradip.

2. Admit. The following question of law is framed for consideration by this Court:

> "Whether the work executed as per the work order issued by MCL is taxable under Section 2(g) of the Orissa Sales Tax Act in absence of transfer of property in goods?"

3. The background facts are that the Petitioner was awarded a work order dated 1st April, 2003 by Mahanadi Coalfields Ltd. (MCL) under which MCL hired from the Petitioner a mechanical excavator for digging of overburden mechanically without blasting and removal of the tippers mechanically and transporting the over burden to a specific dump yard. For this the Assessee received a sum of Rs.1,31,16,345/- from MCL. Since the work did not involve any transfer of goods and was purely an activity of service the Petitioner did not pay sales tax thereon. The MCL deducted a sum of Rs.2,62,327.89 while making payment of the Petitioner. The Petitioner while producing the TDS certificate for the above sum, claimed refund of the said amount.

4. While completing the assessment for the period 2003-04 by the order dated 27th February, 2006 the STO allowed a sum of Rs.1,04,93,076/- being 80% of the amount towards labour and service charges by treating the balance to be taxable under the OST Act. The STO then held Rs.18,656.16 to be refundable to the Assessee when in fact it had claimed refund of Rs.2,62,327.89.

5. After the appeal filed against the above order was confirmed by the ACST by the order dated 8th May 2007, the Assessee went before the Tribunal with the aforementioned appeal which has been dismissed by the impugned order.

6. This Court has heard the submissions of Mr. Jagabandhu Sahoo, learned Senior Counsel appearing for the Petitioner-Assessee and Mr. Sunil Mishra, learned Additional Standing Counsel for the Opposite Party (Department).

7. Mr. Sahoo, learned Senior Counsel relies on the decision of this Court dated 4th December, 1991 in OJC No.576 of 1988 ***(Kandoi Transport v. Sales Tax Officer, Assessment Unit, Barbil),*** where the contract involved work of transportation, loading, unloading and stacking which the Petitioner in that case undertook for the MMTC. The Court there agreed with the Assessee that the work did not involve any transfer of property in goods. It is explained in paras 5 and 6 of the said judgment as under:

> "5. The enlarged definition of 'sale' pursuant to the amendment brought in by the Constitution (Forty-sixth Amendment) Act, 1982, to the Constitution of India, 1950, and consequent amendments in the Act includes transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration. In order to decide whether a transaction is of 'sale' the determinative factor is whether any transfer of right of user is involved. By way of illustration we may indicate that if 'A' allows his vehicle to be used by 'B' for a consideration, and the vehicle is placed at the control, custody and possession of 'B', it may be a case of transfer of the right to use the vehicle for any purpose. Where, however, the control, custody and possession over the vehicle remains with 'A', notwithstanding the fact that certain amounts were received as hire charges, no transfer of the right to use is involved. The

intention of the parties, the mode of use and several other surround and relevant aspects have to be considered. A positive finding has to be given that there was transfer of the right to use any goods. In the instant case, we find that no such finding has been recorded by the Assessing Officer. He has merely stated that the Petitioner No.1 received transportation charges vis-à-vis hire charges of the vehicles from MMTC. This, according to the Assessing Officer, brought the said petitioner within the definition of 'dealer', and the amount received were taxable.

6. As indicated above, in the absence of any finding that there was any transfer of the right to use any goods, the question of the petitioner No.1 being treated as a dealer does not arise.

'Transfer' is one of the widest terms that can be used (per James L.J., in *Gathercole Vrs. Smith 17 Ch.D. 1*. Transfer includes every transaction whether by a party divests himself or is divested of a portion of his interest, that portion subsequently vesting or being vested in another party. Transfer means passage of a right from one person to another. According to Murray's Oxford Dictionary, Volume II, page 257, it means 'to convey or make over title, right or process by deed or legal process.' The first meaning assigned to 'use' is to employ to any purpose. (See Johnson's Dictionary). A mere contract of hiring, without more, is a species of the contract of bailment. In *Commissioner of Income-tax, Bombay City I vrs. National Storage Pvt. Ltd. (1967) 66 ITR 596 (SC)*, the observations of Viscount Finlay in *Governors of the Rotunda Hospital, Dublin Vrs. Coman (1921) AC 1 (HL)* that 'the subject which is hired out is a complex one' were applied. 'Right' is a claim to a thing. It is the liberty of doing or possessing something consistently with law. A right is interest recognized and protected by law.

> Transfer of right implies that full liberty is vested on the transferee to have the right to use the goods at the exclusion of all others including the owner of the goods."

8. Mr. Mishra, learned Additional Standing Counsel for the Department on the other hand referred to a line in the order of the ACST that a sum of Rs.12,672/- had been collected as sales tax and therefore, there ought to have been some transfer of property in goods or sale of goods for which the sales tax was collected.

9. The Court finds that neither in the order of the STO nor in the order of the ACST, is it stated that there was actually any sale of goods or any transfer of property in goods during execution of the work by the Assessee. On the other hand, Mr. Sahoo, learned Senior Counsel has pointed out that in the order of the ACST, it has been noticed that the Petitioner had received Rs.1,05,000/- from local people towards hiring charges of machinery and it is possible that the sales tax collected pertained to that amount. In any event, merely because a sum of Rs.12,672/- has been shown having been collected as sales tax will not automatically imply that the use of the mechanical excavators for digging of overburden and removing it through tippers and transporting to a dump yard, involved any transfer of property in goods from the Petitioner to the MCL. In absence of any specific finding in that regard by the STO, it could not have been simply presumed that 20% of that work is attributable to 'sale' of goods thereby limiting the deduction only to 80%. In other words, the disallowance of 20% of

the hiring charges has to be based on some material which was available to the STO or to the ACST.

10. On the other hand, the facts of the present case appear to be closely aligned with the facts of ***Kandoi Transport*** *(supra)* As in the said case, here too there is nothing to show that the execution of the work order by the Petitioner involved any sale of goods or any transfer of property in goods from the Petitioner to MCL.

11. Consequently, the question framed is answered in the affirmative i.e. in favour of the Assessee and against the Department and it is held that the entire sum received by the Petitioner from MCL for performing the work order was not exigible to sales tax and the amount of TDS deducted by the MCL was refundable to the Petitioner. The impugned orders of the Tribunal, the ACST and the STO to the above extent are hereby set aside.

12. The revision petition is disposed of in the above terms. An urgent certified copy of this order be issued as per rules.

(Dr. S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

S.K. Jena/Secy.