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IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV Nos. 156 & 157 of 2007

M/s. SHIVAKASI STONE WORKS .... ***Petitioner***
Mr. R.P.Kar, Advocate

-versus-

State of Orissa represented by Commissioner of Sales Tax, Orissa .... ***Opposite Parties***
Mr. S.S. Padhi, S.C.

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIK

ORDER
21.03.2022

Order No.

Dr. S. Muralidhar, CJ.

01. 1. The challenge in the present petition is to an order dated 25th June, 2007 passed by the Full Bench of the Orissa Sales Tax Tribunal, Cuttack (Tribunal) in S.A. No. 553-554 of 2000-01 for the years 1992-93 and 1993-94 respectively.

2. By the impugned order, the Tribunal set aside the two separate orders dated 16th May, 2000 passed by the Assistant Commissioner of Sales Tax, (ACST) Sambalpur Range, Sambalpur allowing the Assessee's Appeal Case Nos. AA.150 & 151(SA.I) of 98-99 for the said two years. It must be noted here that the ACST, i.e. the first Appellate Authority, had reversed the two assessment orders dated 13th May,1998 passed by the Sales Tax Officer, Sambalpur-1 Circle, Sambalpur (STO) under Section 12 (8) of the Orissa Sales Tax Act, 1947 (OST Act).

3. In the effect, the STO reopened the earlier assessment made under Section 12 (4) of the OST Act in respect of the each of the years by acting on the report of the Circle Inspector Sales Tax, (Circle IST) as well as the report of the AG Audit which had objected to the fact that the supply of ballasts to the Railways by the Petitioner pursuant to a works contract had been taxed at 4% whereas it should have been considered to be a sale of ballasts and taxed at 12 %.

4. While admitting each of the revision petitions, this Court framed the following questions which were common to both the petitions:

> "A. WHETHER on the facts and in the circumstances of the case, the Tribunal is justified in holding that it has little scope to examine the assessment record particularly when the question of jurisdiction as regards initiation of proceeding under Section 12(8) of the Orissa Sales Tax Act, 1947, has been raised by the Petitioner?
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> B. WHETHER on the facts and in the circumstances of the case, the Tribunal is correct in including transport charges, which is separately charged by the Petitioner, while determining sale price of the ballasts?
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> C. WHETHER on the facts and in the circumstances of the case, the Tribunal is correct in not considering the certificate issued by the Railway authorities which has got probative value and was available on record?
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> D. WHETHER on the facts and in the circumstances of the case, the Orissa Sales Tax Tribunal committed error of law and fact in substituting its reasons with that of the ACST and/or the STO when the order of the ACST is supported by cogent reasons set out founded on materials available on record?

E. WHETHER on the facts and in the circumstances of the case, the Tribunal is justified in law while allowing the second appeal preferred by the opposite party by quashing the order passed in first appeal without referring to the materials/documents/ evidence available on assessment record as well as the first appeal record basing on which the first appellate authority has applied the independent quasi judicial mind?

F. WHETHER on the facts and in the circumstances of the case, the order of the Tribunal suffers from arbitrary exercise of power in reversing the finding recorded by the first appellate authority supported by cogent reason and based on evidence available on respective records, without referring to and/or enforcing production of such records of for a below in the second appeal filed by the opposite party?

G. WHETHER on the facts and in the circumstances of the case, the Tribunal has exercised jurisdiction illegally and with material irregularity, while reversing the finding recorded in the order passed in first appeal as also the question of law raised, by declining to examine the records of authorities below?"

5. By separate interim orders this Court also granted a conditional stay against coercive action against the Petitioner subject to the Petitioner depositing Rs.40,000/- in STREV No. 157 of 2007 and Rs. 1,50,000/- in STREV No. 156 of 2007.

6. As regards, the reopening of the assessment under Section 12 (8) of the OST Act, it is submitted by Mr. Kar, learned counsel for the Petitioner, that the reopening was based on a mere change of opinion by the STO which was not permissible in law.

7. The Court finds that the reopening of the assessment was based on the reports of the Circle IST and the AG Audit. Both objected to taxing of the works contract @ 4% whereas the contract involved supply of ballast. According to both reports, the said supply had to be treated as sale of ballast. Therefore, without entering at this stage into the question whether such opinion formed by the Circle IST and the AG Audit was right, the Court finds that the reopening of the assessment by the STO was not on a mere change of opinion but on the basis of the above materials made available to the STO. Further, the Assessee was confronted with the said materials during the re-assessment proceedings and it is only thereafter that the impugned reassessment order was framed. Consequently, as far as Question A is concerned, the Court is of the view that reopening the assessment cannot be said to be without jurisdiction. Question A is therefore answered in favour of the Department and against the Assessee.

8. As regards the certificate issued by the Railways showing separately the cost of ballast and the cost of transportation, Shri Kar learned counsel for the Petitioner Assessee refers to Section 5 (2) (A) (iii) of the OST Act which states that "The cost of outward freight or of delivery or the cost of installation for the purpose of sale or supply of goods by the dealer when such cost is separately charged." He accordingly submits that the said transportation charge is required to be excluded from the taxable turnover. He submits that in terms of the certificate of the Railways for the year 1992-93, Rs. 14,97,990/- and for 1993-94, Rs. 4,00,544/- being the respective costs of transportation, loading, unloading and stacking had to be excluded from the taxable turnover.

9. The Court finds that even in the order of the ACST which was in favour of the Assessee, it was noted that the bills raised by the Assessee was for the composite sum for supply and stacking of ballast. The transportation cost was not separately shown. In other words, there was one composite charge for supply and stacking which included transportation costs. In fact, in the operative portion of the order of the First Appellate Authority, all that was said was that the contract had to be treated as one composite works contract without separating out the elements of supply of ballast and transportation for stacking. It is on this basis, that it was held that the STO was not justified in taxing the said contract as one for supply of ballast thereby reopening the assessment under Section 12 (8) of OST Act.

10. Learned counsel for the Department pointed out that Section 5 (2) (A) (iii) of the OST Act would get attracted only if the costs of outward freight or of delivery 'is separately charged'. In the present case, admittedly, it was not separately charged. Therefore, he submitted that the Assessee cannot take advantage of the said provision to exclude the transportation costs from the taxable turnover.

11. The above submissions have been considered. In order to examine whether the contract in question envisages supply of ballast and the transportation thereof as separate components, its wording has to be understood. It is seen that the First Appellate Authority examined in some detail the contract in question and found that it was one composite works contract which did not separately indicate the costs

of supply of ballast and the transportation or delivery charges. This order by the First Appellate Authority was in favour of the Assessee in so far as it maintained that the entire works contract had to be charged at 4% and not at 12%. The said order was not challenged by the Assessee but by the Department before the Tribunal. In other words, the finding of the First Appellate Authority that the works contract was one composite contract with the costs of supply of ballast and transportation not being shown separately and therefore, not amenable to be separately treated, has attained finality as far as the Assessee is concerned.

12. Even otherwise, the Court finds that if the payment was a composite one which included the elements of supply of ballast and the cost of transportation till the site of stacking then, the Assessee cannot possibly seek to avoid including the transportation cost by relying on Section 5 (2) (A) (iii) of the OST Act. Consequently, as far as the questions, 'B' & 'C' are concerned, they are answered in favour of the Department and against the Assessee and it is held that the Tribunal was right in including the transport charges as part of the taxable turnover.

13. Turning now to the questions D to G, the Court finds that as a logical corollary of treating the contract as one composite contract where the elements of supply of ballast and its transportation are not separately treated, is that the Department could not have proceeded to reopen the assessment on the basis that the contract must be treated as only for supply of ballast, which should be construed as a 'sale' and nothing else. In other words, the entire consideration for the

performance of the contract cannot be treated as a consideration for sale of ballast by the Assessee. Thus, the Tribunal erred in treating the entire sum received by the Assessee for the performance of the works contract to be sale consideration which would attract tax at 12%. Therefore, on merits, the Court finds that there is no justification in reopening of the assessment. In effect, this Court affirms the order of the ACST while setting aside the orders of the STO and the Tribunal. Questions D to G are answered accordingly.

14. Both the revision petitions are disposed of in the above terms. The amount of tax already paid by the assesses will be adjusted while raising the final demand or refund of the excess amount as the case may be in accordance with the applicable rules.

15. An urgent certified copy be issued as per Rules.

(Dr. S. Muralidhar)
Chief Justice

(R.K.Pattanaik)
Judge

Kabita/Tudu