

HIGH COURT OF ORISSA,CUTTACK

STREV Nos.101, 42, 80, 83, 84, 95, 98, 131 and 132 of 2011

And

STREV No.458 of 2008

And

STREV Nos.37, 38, 41, 42, 43 and 44 of 2010

And

STREV Nos.47, 49 and 50 of 2013

In the matter of applications under Section 24 of the Orissa Sales Tax Act, 1947 read with Rule 52A of the Orissa Sales Tax Rules, 1947.

State of Orissa

Represented by Commissioner of
Sales Tax, Orissa

... Petitioner
(In STREV Nos.101, 42, 80,
83, 84, 95, 98, 131 and 132 of
2011 and STREV Nos.47, 49
and 50 of 2013)

M/s.Sriram Minerals ... Petitioner (In STREV No.458/2008)

M/s.Hindustan Minerals ... Petitioner (In STREV No.37/2010)

M/s.Esskay Stone ... Petitioner (In STREV No.38/2010)

M/s.Sriram Minerals ... Petitioner
(In STREV Nos.41 & 42 of 2010)

M/s.Hindustan Minerals ... Petitioner (In STREV No.43/2010)

M/s.Esskay Stones ... Petitioner (In STREV No.44/2010)

VERSUS

M/s.D.K.Construction ... Opposite Party
(In STREV No.101 of 2011)

M/s.Mahashakti Granite Crusher
Private Limited ... Opposite Party
(In STREV No.42 of 2011)

M/s.Shiva Minerals ... Opposite Party
(In STREV Nos.80 & 83 of 2011)

M/s.Hindustan Minerals ... Opposite Party
(In STREV No.84 of 2011)

M/s.Sriram Minerals	...	Opposite Party (In STREV No.95 of 2011)
M/s.D.K.Construction	...	Opposite Party (In STREV No.98 of 2011)
M/s.C.C.Sahu & Sons (Construction) Private Limited	...	Opposite Party (In STREV Nos.131 & 132 of 2011)
M/s.Khushraj Enterprises	...	Opposite Party (In STREV No.47 of 2013)
M/s.Narayani Traders	...	Opposite Party (In STREV Nos.49 and 50 of 2013)
State of Orissa represented by the Commissioner of Sales Tax, Orissa	...	Opposite Party (In STREV No.458 of 2008 and STREV No.37, 38, 41, 42, 43 and 44 of 2010)
For Petitioner	: Mr.R.P.Kar, Standing Counsel (CT) Mr.M.S.Raman, Addl. Standing Counsel (CT) (In STREV Nos.101, 42, 80, 83, 84, 95, 98, 131 and 132 of 2011 and STREV Nos.47, 49 and 50 of 2013)	
	M/s.Damodar Pati, S.K.Mishra and P.Panigrahi (In STREV No.458/2008)	
	M/s. Damodar Pati, S.K.Mishra and S.N.Sharma (IN STREV No.37, 38, 41, 42, 43 and 44 of 2010)	
For Opp. Parties	:M/s.Damodar Pati, S.K.Mishra and S.N.Mishra. (For O.P. in STREV No.101/2011)	
	M/s.A.K.Roy and C.R.Das (For O.P. in STREV Nos.80 & 83 of 2011)	
	M/s.Damodar Pati, S.K.Mishra and S.C.Bairiganjan. (For O.P. in STREV No.98/2011)	
	M/s.Satyajit Nanda and G.R.Verma (For O.P. in STREV Nos.131 & 132 of 2011)	

PRESENT :

**THE HON'BLE MR. JUSTICE I.MAHANTY
AND
THE HON'BLE DR. JUSTICE D.P.CHOUDHURY**

Date of judgment:01.03.2017

Dr. D.P.Choudhury, J. Challenge has been made in all these revisions to the order of the Orissa Sales Tax Tribunal (hereinafter called "the Tribunal") for reversing the concurrent order passed by the First Appellate Authority and the Assessing Officer under the provision of Section 12(4) of the Orissa Sales Tax Act, 1947 (hereinafter called "the Act") read with Orissa Sales Tax Rules, 1947 (hereafter called "the Rules"). Since common question of law arose in all these revisions, they are being disposed of by this common judgment.

FACTS

2. The factual matrix leading to filing of STREV No.101 of 2011 is that the opposite party is the assessee and it has entered into an agreement with the South Eastern Railway for supply of machine crushed track ballast for laying the same on both the sides of railway track in different locations as per the tender call notice. The tender schedule specifies loading of ballast into any type of railway wagon/hopper with contractor's own arrangements including all lead lift crossing of railway line as per the direction of the Engineer-in-charge of the work.

3. During the assessment year 2001-2002, the Assessing Officer demanded under Section 12(4) of the Act for Rs.36,15,448/- on

31.3.2003. The Assessing Officer has treated the entire receipt by the opposite party to be sale of chattel qua chattel and made the same exigible to tax at the rate of 12% of the taxable list. Challenging the assessment order, the opposite party preferred First Appeal before the concerned Assistant Commissioner of Sales Tax on the ground that the supply of machine crushed track ballast would come within the fold of works contract and accordingly claimed 85% deduction towards labour and service charges and the rest was claimed to be taxed at the rate of 8% as tax under works contract. The First Appellate Authority disposed of the First Appeal keeping in view the order of this Court passed in P.K.Satapathy –V- State of Orissa, reported in (1999) 116 STC 494 (Ori) with the observation that the scope of contract, being supply of machine crushed ballasts, would be liable to be exigible to tax at the rate of 12%. So, the First Appellate Authority confirmed the order of the Assessing Officer.

4. Against the order passed by the First Appellate Authority, the opposite party carried Second Appeal before the Tribunal in the year 2005-2006. The State did not file any cross-objection before the Tribunal as the order of the Assessing Officer has been confirmed by the First Appellate Authority. The Tribunal, after hearing both the parties, allowed the Second Appeal preferred by the opposite party by holding that supply of ballast to the Railway in question is sale falling within the scope of Section 2(g) of the Act and “ballast” supplied to the Railway falls within the ambit of “mineral” for which it is exigible to tax at the

rate of 4% as per Entry 117 of the taxable list by not agreeing to make same exigible at the rate of 12% under Entry 189 of the taxable list. Challenging such order of the Tribunal, the State-petitioner has preferred revisions on various grounds.

5. Likewise in STREV Nos.41, 98, 131 and 132 of 2011 and STREV Nos.49 and 50 of 2013, opposite parties-assesseees in different years of assessment have supplied ballasts and delivered ballasts to S.E.Railway and accordingly, the Assessing Authority and First Appellate Authority made the sale of those materials of these assesseees exigible to tax at the rate of 12% whereas the Tribunal decided the same exigible to at the rate of 4% of taxable list.

6. Similarly, in STREV No.458 of 2008, STREV Nos.37, 38, 41, 42, 43 and 44 of 2010, STREV Nos.42, 80, 83, 84 and 95 of 2011 and STREV No.47 of 2013, the opposite parties-assesseees have purchased the ballast and after crushing the same, made boulders and chips and accordingly they are engaged in selling those products to different buyers. But the Assessing Authority demanded sales tax by taking such materials exigible to tax at the rate of 12% of taxable list and the First Appellate Authority also confirmed such order of the Assessing Authority. Again on the intervention in the Second Appeals, the Tribunal decided said material as "minor mineral", being exigible to tax at the rate of 4% in the taxable list.

7. SUBMISSIONS

Mr.R.P.Kar, learned Standing Counsel for the Revenue in all the revisions submitted that the Tribunal has committed gross irregularity by reversing the concurrent finding and conclusion arrived at by both First Appellate Authority as well as the Assessing Authority by erroneously deciding the question of law as borne out from the facts available on record. The Tribunal committed allowing deduction of amount received by the opposite parties in respect of loading of the supplied ballasts from the gross receipts because without analyzing the covenants of contracts, the Tribunal jumped to the conclusion on the basis of schedule of rates and fact that the loading charges of supplied ballasts into Railway wagons would be deducted from assessment under the Act as the same is purely labour work. The Tribunal ought to have considered all clauses of the contract. The Tribunal, being the final fact finding authority, should have taken into consideration the relevant statutory provisions along with the covenants of the contract in order to independently arrive at the conclusion whether the loading charges would form part of the consideration so that the sales tax could be levied on taxable turnover.

8. Mr.Kar, learned Standing Counsel for the Revenue further submitted that the Tribunal erred by considering the claim of the opposite parties that the ballast supplied by it to the Railway is "mineral" which is exigible to tax at the rate of 4% as per Entry 117 of the taxable list because the Tribunal has transgressed its jurisdiction and authority

by deciding the facts which has never before any of the authorities below raised. The Tribunal should not have considered such plea of the opposite parties as the Department was not given any chance to lead evidence in the forums. Thus, the Tribunal has violated the principles of natural justice by deciding such issue. According to him, when the intention of both the parties was to treat the goods in question as "ballast" qua "ballast" which being separate, distinctly identifiable commodity having marketability and not as "minerals", the opposite parties-assesseees cannot claim the same to be falling within the scope of Entry 117 of the taxable list, but it being not in any other list, could have been chargeable to tax at the rate of 12% of the taxable list as there was no contract between the parties to buy and sell the goods as minerals, but "ballast" simpliciter. The Tribunal has traversed its jurisdiction by holding that ballasts are minerals. He further submitted that the Tribunal went wrong to conclude that ballast obtained from spalls would be minerals inasmuch as the basis of such conclusion being the definitions contained in the Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter called as "the Act, 1957") and the Orissa Minor Mineral Concession Rules, 2004 (in short "the Rules, 2004"). The Tribunal erred in law by taking the aid of definition contained in another statute which has no nexus with the Act.

9. Mr.Kar, learned Standing Counsel for the Revenue submitted that since the ballast in no way is connected with the minerals but it is a specific material in the process as known to the commercial world, the

same has been wrongly interpreted by the Tribunal being exigible to tax at the rate of 4% of the taxable list. Further, the Tribunal has erred in law by admitting the Second Appeal which has been filed beyond the period of limitation contemplated under Section 23 of the Act. The Tribunal has also acted with material irregularity by coming to the wrong conclusion without proper independent application of mind for which the same should be quashed and the order passed by the First Appellate Authority and Assessing Officer should be restored.

10. Per contra, Mr.Damodar Pati, learned counsel for the opposite party submitted that the order of the Tribunal is legal and correct because the agreement between the parties is to supply and delivery in stacks of machine crushed track ballast and laying the same into both sides of track in different locations and the opposite party has received the gross bill, which has been treated as contract for sale as against works contract as per agreement for which the works contract tax has been deducted at source by the Railways. He further contended that the "ballast" being the material and the same having been deduced from the quarry which is made out of minerals, the ballast qua ballast is a mineral, the same has been specifically exigible under the Entry 117 of taxable list. As the ballast is deducible like boulder and other material from the quarry by using the dynamite and specifically processed through machine or by manual work, the same is rightly observed by the Tribunal to be classified as minerals being exigible to tax at the rate of 4% of taxable list.

11. Mr.Pati, learned counsel for the opposite parties submitted that the Tribunal, in its Full Bench, has considered that the opposite parties have supplied ballast made out of spall to the Railways and the ballast being the material used as to the bed of a road or a Railways with specific size, the same cannot be a stone as pointed out by the State. The Tribunal, after analyzing in detail under the Act, 1957, has rightly held that the ballast or boulder or chips are minerals and the Tribunal has also considered the dictionary meaning of such mineral which is a solid homogenous crystalline chemicals element or compound that results from inorganic process of nature and it has a characteristic crystal structure, chemicals composition and rational or composition.

12. Mr.Pati, learned counsel for the opposite party further contended that since ballasts or boulder or chips are prepared from quarry and ballasts being crushed to prepare size ballast and then supplies to Railways, the same being "minor mineral" as defined in Section 2(jj) of the Mines Act, 1952 read with Section 3(a) of the Act, 1957, the Tribunal justified in charging the ballast or boulder or chips exigible to tax at the rate of 4% of the taxable list. He further submitted that the Tribunal, being the second appellate authority, has got powers to decide the facts and law for which there is no bar for the Department to adduce evidence when plea of the opposite party was raised before it that the material, i.e, ballast or boulder or chips is exigible to tax at the rate of 4% of the taxable list but not at the rate of 12% of tax list. According to him, the plea of the State that the arguments advanced by

the opposite party for the first time as to the plea that the ballast as mineral is a misnomer and there is no bar for the State to produce evidence contrary to the plea taken by the opposite parties. On the other hand, whether ballast or its different size is exigible to 12% tax or 4% being a question of law can be raised at any stage before any forum. Be that as it may, according to the learned counsel for the opposite parties that the contention of the learned counsel for the petitioner would not stand in the eye of law on this score. He further submitted that the appeal has been admitted by the Tribunal being filed within time and contention of learned Standing Counsel for the Revenue is untenable. So, he supported the impugned judgment of the Tribunal and prayed for a direction to implement the judgment by the State.

13. POINTS FOR DETERMINATION

After going through the contentions of both the parties, it appears that the question of law has not been formulated but the same is being formulated now for discussion as the revisions can be allowed on the question of law raised. So, in these revisions, the questions of law are formulated as under:

“(1) Whether the ballast or boulder or chips is exigible to tax at the rate of 4% or 12% of the taxable list?

(2) Whether such fresh plea can be raised in the second appeal without the same being raised in the forums below.”

**14. DISCUSSIONS
Point No.(1)**

It is not in dispute that the opposite party in STREV No.101 of 2011 is an assessee having undertaken the work of supplying,

delivering, stacking and loading of one lakh Cum of machine crushed track ballast to Railways. It is also not in dispute that there was an agreement between the opposite parties and the S.E.Railways for supply and delivery in stacks of machine crushed track ballast and laying the same into both side of track in different locations at Balangir Depot including all costs of materials, loading, unloading, handling, transportation including crossing of Railway lines, if required and royalty, octroi, sales taxes, cess charges and any taxes imposed by the Central/State Government and local bodies on one lakh Cum of loading of ballast supplied into any type of Railway wagons/hoppers with contractor's own loading arrangements including all lead lift cross of Railway lines. Similarly, it is not in dispute that the opposite party in other revisions have been dealing with ballast or boulder of chips by selling the same to Railway and other private parties.

15. On going through the assessment order, it appears that the Assessing Authority has gone through the deed of agreement executed between the parties and come to a conclusion that the payment received by the dealer is inclusive of charges like cost of materials, loading, unloading, handling, transportation charges, royalty, octroi, sale taxes, cess charges and any other taxes to be imposed by different authorities from time to time and the dealer has not been given any charge/responsibility of spreading machine-crushed track ballast in any place under the S.E.Railway. Accordingly, the Assessing Officer held that the delivery of ballast is purely a sale and not a works contract as

pleaded by the petitioner. The Assessing Officer has also found that there was no evidence adduced by the opposite parties to show that there was an express stipulation between the parties that freight and other charges were to be borne by the purchaser and since the opposite party has got received the gross payment which is inclusive of all cost of materials, loading, unloading and transporting including crossing of Railway line, he considered the same amount to be entire sale which is liable to be taxed at the rate of 12% of the taxable list. In other revision cases, the Assessing Authority has taken the rates by assessing of boulder, chips and ballasts and made them exigible to tax at the rate of 12% of the taxable list.

16. The First Appellate Authority in STREV No.101/2011, after hearing both parties, came to the conclusion that the contract between the parties should be interpreted whether it is a sale of good or for work or labour basically. According to him, to constitute sale, there must be an agreement express or implied relating to sale of goods and completion of the agreement by passing of title in the very goods contracted to be sold. He has referred to the tender schedule, which is reproduced as under:

"SOUTH EASTERN RAILWAY
TENDER SCHEDULE
SCHEDULE OF RATES AND QUANTITIES

30/SBP/97, (6) 35/SBP/97			
Sl. No	Description of work	Approximate Qnty.	Rate accepted both in Figures & in words
	Supply and delivery in stacks of machine crushed track ballast and laying the same into both side of track in different locations. (as per RDSO's specifications Jan-99) at Balangir Depot including all costs of materials loading, unloading, handling, transportation including crossing of Railway lines if required and royalty, actroi, sales taxes, cess charges and any other taxes imposed by Central/State Govt. and local bodies including all other incidental charges with all lead, lift, etc. complete as per the directions of the Engineer-in-charge of the work.	1,00,000 Cum	Rs567/- (Rupees five hundred & sixty seven only) per cum.
	Loading of ballast, supplied vide Srl. No.1 above into any type of Railway Wagons/hoppers with contractor/s own loading arrangements including all lead lift crossing of Railway lines etc. complete as per the directions of the Engineer-in-charge of the work.	1,00,000 cum	Rs.54/- (Rupees fifty four only) per cum.

Schedule of rates & conditions accepted for the work of "Supply, delivery, stacking and loading of 1,00,000 cum of machine crushed track ballast (as per RDSO's specifications-January-99) of BALANGIR DEPOT in Sambalpur Division".

NOTE.1. The entire work is to be completed within a period of 24 (twenty four months from the date of issue of acceptance letter as per the under mentioned programme.

2. The contractor will be required to strictly adhered to "QUARTERLY SCHEDULE OF SUPPLY" failing which the penalty as per clause-09 of

“Special condition for supply and loading of ballast Annexure-IV” shall be recovered. The “QUARTERLY SCHEDULE OF SUPPLY” is indicated below:-

1 st Quarter	10,000 cum	5 th quarter	15,000 cum
2 nd Quarter	10,000 cum	6 th quarter	15,000 cum
3 rd Quarter	15,000 cum	7 th quarter	15,000 cum
4 th Quarter	15,000 cum	8 th quarter	05,000 cum

Total = 1,00,000 cum

Sd/-
K.C. Agrawal
Manager
Notary, Balangir

Sd/-
Additional Divl. Railway
S.E. Railways, Sambalpur”

17. After going through the agreement and discussing various judgments of the Hon’ble Supreme Court and High Courts including of this Court, the First Appellate Authority reached at a conclusion that the rates stipulated in the agreement were inclusive of all charges incurred by the opposite party and were paid after the supply and delivery of the stacks. He found that the contract is for supply of ballast and amount received is to be taxed at rate of 12% but not to be treated as works contract for which he entirely agreed with the finding of the learned Assessing Officer. In other revision cases, the First Appellate Authority has confirmed the order of the Assessing Officer as ballast, boulder and chips are exigible to the tax at the rate of 12% of the taxable list.

18. On perusal of the order of the Second Appeal, it appears that the Full Bench of the Tribunal has considered the argument of both parties. After going through the contract executed between the parties, Tribunal found that the present opposite party has received Rs.54/- per Cum towards loading charges of the supplied ballast into any type of

Railway wagons as per his own loading arrangement, which is purely a labour work and hence directed to deduct the loading of supplied ballast from the total amount of computation of sales tax liability of the opposite party. Moreover, the Tribunal went on discussion whether the ballast is a mineral exigible to sales tax at the rate of 4% of the taxable list. The Tribunal has discussed about the dictionary meaning of mineral and has also considered the definition of minor mineral under the Act, 1957 and Rules made thereunder. According to Section 2(jj) of the Mines Act, 1952, mineral means all substance which can be obtained from earth by mining, digging, drilling, dredging, laying, draulicing, quarrying or by any other operation and includes mineral oil which in term included defines minerals include all minerals except mineral oils which in term included natural gas and petroleum. But, as per the Act, 1957, the mineral is defined under Section 3(a) which includes all minerals except mineral oil. Similarly, Section 3(e) of the said Act, 1957 defines minor minerals means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purpose and any other mineral which the Central Government, may by notification, declare the same to be a minor mineral.

19. The Tribunal has opined that according to Orissa Minor Minerals Concession Rules, 2004 (in short "the Rules, 2004") which provides for granting quarry lease by the Government for extraction, collection or removal of minor minerals. The learned Assessing Officer in his order categorically has mentioned that appellant took quarry located

at Basupali on lease from the Tahasildar, Balangir on payment of royalty and extracted spalls from that quarry and crushed those spalls into ballasts and supplied the same to S.E.Railways. These facts led to the Tribunal to come to a conclusion that the ballast is nothing but a mineral. The Tribunal opined that since the ballasts are obtained by quarrying from the earth and its minerals according to the Act, 1957, which found the same to be exigible to tax as per Entry No.117 of the taxable list and accordingly exigible to tax at the rate of 4% of the taxable list. Thus, the Tribunal allowed the appeal in part by directing the learned Assessing Officer to reassess the sales tax liability accordingly after deducting the amount received by the opposite parties towards loading charges from the payment received by it and to refund rest of the amount according to the provisions of law.

20. In other revisions, the Tribunal has simply arrayed the boulder, ballast, stone chips as minor mineral under the Act, 1957 and Rules made thereunder.

21. In the case of ***Union of India –V- The Central Indian Machinery Manufacturing Co. Limited and others; 40 STC 246***, the Hon'ble Supreme Court has observed in the following manner:

“The question, whether a contract is one for sale of goods or for executing works or rendering services is largely one of the fact, depending upon the terms of the contract, including the nature of the obligations to be discharged thereunder and the surrounding circumstances.”

22. The Hon'ble Supreme Court, in the case of ***Patnaik & Company –V- State of Orissa; 16 STC 364***, has observed as follows:

"The primary difference between a contract for work or service and a contract for sale of goods is that in the former there is in the person performing work or rendering service no property in the thing produced as a whole notwithstanding that a part or even the whole of the materials used by him may have been his property. In the case of a contract for sale, there is in the first instance a chattel which belongs exclusively to a party and under the contract property therein passes for money consideration."

23. Further, the Hon'ble Supreme Court, in the case of ***Sentinel Rolling Shutters and Engineering Company Pvt. Ltd -V- the Commissioner of Sales Tax; 42 STC 409***, has observed as follows:

"To distinguish between a contract for sale and contract for work and labour there is no rigid or inflexible rule applicable alike to all transactions. They do not give any magic formula by the application of which one can say in every case whether a contract is a contract for sale or a contract for work and labour. They merely focus on one or the other aspect of the transaction and afford some guidance in determining the question."

24. From a perusal of the aforesaid decisions with due regard, it appears that whether a contract is one for the sale of goods or for executing works or rendering services are all questions of fact which depend on the terms of the contract including the nature of work discharging. Moreover, in case of contract for works or services, the person performing work or rendering services has no property produced whereas for contract of sale in the first instance a chattel which belongs exclusively to a party and under the agreement, it passes for money consideration. The sole idea to distinguish between the contract for sale and contract for work or labour is to find out the same from the transactions to determine the questions. Keeping in mind these

principles, the present case is to be scrutinized with reference to the agreement made between the parties.

25. In the aforesaid paragraphs, the tender schedule clearly shows that for supply and delivery of stacks of machine crushed track ballast and laying the same into both side of track in different locations at Balangir Depot including all costs of materials, loading, unloading, handling transportation including crossing of Railway lines if required and royalty, octroi, sales taxes, cess charges and any other taxes imposed by Central/State Government and local bodies including all other incidental charges with all lead, lift or complete as per the direction of the Engineer-in-charge for one lakh Cum of ballasts at the rate of Rs.567 per Cum. Similarly, for loading of the said quantity of ballasts into any type of Railway wagons/hoppers with contractor's own loading arrangements including all lead lift cross of Railway lines etc. complete as per the direction of the Engineer-in-chief, the rate will be Rs.54 per Cum of ballasts. Thus, the agreement is very defensible as to all charges as per Serial No.1, i.e, Rs.567/- per Cum for supply and delivery and for loading and unloading of ballasts has different charges and the same is not included with the rate as specified in Serial No.1 although the ballasts supplied at Serial No.1 are also required to be loaded to the Railway wagons. It is needless to opine that the loading of ballasts supplied is a labour charge and the same cannot be termed as a sale after going through the contents of the deed of contract. On the other hand, the supply and delivery of stacks including all other nature

of works as agreed to between the parties as per Serial No.1 is a sale. The order of the Tribunal is correct for deducting the loading charges while computing the sales tax.

26. Next question comes in all revisions as to whether the sale of ballasts or boulders or chips including all incidental charges as per Serial No.1 of the tender schedule stated above "mineral" or not. Under the Act, OST schedule as amended vide Finance Department Notification dated 31.3.2001 is as follows:

"Under the Orissa Sales Tax (OST) Act, 1947

OST Schedule (Ad amended vide Finance Department Notification dated 31.3.2001)

Sl. No.	Description of Goods	Rate of tax
1	2	3
117	Ores and minerals	4%
189	All other goods	12%"

27. It appears from the aforesaid table that ores and minerals as per Entry No.117 is exigible to 4% tax whereas all other goods which are not mentioned in the schedule is exigible to 12% of tax. Now, both learned Assessing Officer and First Appellate Authority have placed the ballasts as exigible to 12% of tax but the Tribunal after taking the cue from the fact that the ballasts being prepared from the spalls which are stones being quarried from the mines Basupali in the district of Balangir is a mineral liable to 4% sales tax. Similarly, the Tribunal in other cases came to a conclusion that boulder, chips prepared from spalls which are quarried from mines also mineral by making the same exigible to tax at the rate of 4% of taxable list.

28. In the Assessment Order, the learned Assessing Officer admitted that the present opposite party in STREV No.101 of 2011 has taken a quarry located at Basupali on lease from the Tahasildar, Balangir on payment of royalty and extracted the spalls from the quarry and then crushed same into ballasts as per the specification and then supplied to the Railways. Of course, the learned Assessing Officer has mentioned that except payment of royalty, the ballasts supplied have not suffered any tax under the provisions of the Act. Even if it had not suffered from any tax, the fact remains that the ballasts have been extracted from the quarry if it had not suffered any tax, definitely it would be chargeable but question arises as to what is the rate of tax? So, the conclusion of the learned Assessing Officer that since it had not suffered from payment of sales tax, it should be treated as entire sale exigible to 12% of tax is not correct.

29. Similarly in other cases, boulder, chips having not suffered from payment of sales tax must be at the rate of 12% of taxable list under the Act as observed by Assessing Officer is not correct because they are made extracted from quarry even if purchased from M/s.OCL.

30. The First Appellate Authority, without going to the facts but by only relying upon the decisions of the Courts, agreed with the view of the learned Assessing Officer that same are to be taxed at the rate of 12% under the Act. Thus, the concurrent finding of the fact by the learned Assessing Officer as well as by the First Appellate Authority that the ballasts supplied to S.E.Railway or chips, boulders supplied to

Railway or private parties are nothing but extracted from the quarry which was leased out to the opposite party and in other cases to their vendors. Of course, the Tribunal has taken aid of the Act, 1957 because of the fact that the ballasts or boulders or chips supplied spalls being cut to size and spalls have been extracted from quarry. It is a fact that the ballasts, boulders and chips are to be interpreted under the Act but by not taking aid of any other Act. The ballasts, boulders and chips have not been defined under the Act. The question of taking aid of other Act will only arise if there is no use of the same on common parlance.

31. It is reported in the case of ***Banarasi Dass Chadha and others -V- L.T. Governor, Delhi Administration and others; AIR 1978 SC 1587*** where Their Lordships at paragraphs 4 to 7, have observed as follows:

"4. We agree with the learned Counsel that a substance must first be a mineral before it can be notified as a minor mineral pursuant to the power vested in the Central Government under Section 3(e) of the Act. The question, therefore, is whether brick-earth is a mineral. The expression "Minor Mineral" as defined in Section 3(e) includes 'ordinary clay' and 'ordinary sand'. If the expression "minor mineral" as defined in Section 3(e) of the Act includes 'ordinary clay' and 'ordinary sand', there is no reason why earth used for the purpose of making bricks should not be comprehended within the meaning of the word "any other mineral" which may be declared as a "minor mineral" by the Government. The word "mineral" is not a term of art. It is a word of common parlance, capable of a multiplicity of meaning depending upon the context. For example the word is occasionally used in a very wide sense to denote any substance that is neither animal nor vegetable. Sometimes it is used in a narrow sense to mean no more than precious metals like gold and silver. Again, the word "minerals" is often used to indicate substances obtained from underneath the surface of

the earth by digging or quarrying. But this is not always so as pointed out by Chandrachud, J (as he then was) in **Bhagwan Dass v. State of Uttar Pradesh, AIR 1976 SC 1393** where the learned judge said (at p.1397):

"It was urged that the sand and gravel are deposited on the surface of the land and not under the surface of the soil and therefore they cannot be called minerals and equally so, any operation by which they are collected or gathered cannot properly be called a mining operation. It is in the first place wrong to assume that mines and minerals must always be sub-soil and that there can be no minerals on the surface of the earth. Such an assumption is contrary to informed experience. In any case, the definition of mining operations and minor minerals in section 3(d) and (e) of the Act of 1957 and Rule 2(5) and (7) of the Rules of 1963 shows that minerals need not be subterranean and that mining operations cover every operation undertaken for the purpose of "Winning" any minor mineral. "Winning" does not imply a hazardous or perilous activity. The word simply means extracting a mineral" and is used generally to indicate any activity by which a mineral is secured. "Extracting" in turn means drawing out or obtaining. A tooth is 'extracted' as much as the fruit juice and as much as a mineral. Only that the effort varies from tooth to tooth, from fruit to fruit and from mineral to mineral".

5. We may also refer to **Northern Pacific Railway Company v. John A. Sedrbarg; (1902) 47 Law Ed 575** where the Supreme Court of United States observed as follows (at page 581):

"The word 'mineral' is used in so many senses, dependant upon the context, that the ordinary definitions of the dictionary throw but little light upon its significance in a given case. Thus, the scientific division of all matter into the animal, vegetable, or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore, could not be

excepted from the grant without being destructive of it. Upon the other hand, a definition which would confine it to the precious metals-gold and silver-would so limit its application as to destroy at once half the value of the exception. Equally subversive of the grant would be the definition of minerals found in the Century Dictionary: as "any constituent of the earth's crust" ; and that of Beinbridge on Mines: "All the Sub- stances that now form, or which once formed, a part of the solid body of the earth". Nor do we approximate much more closely to the meaning of the word by treating minerals as substances which are "'mined'" as distinguished from those are "quarried", since many valuable deposits of gold, copper, iron, and coal lie upon or near the surface of the earth, and some of the most valuable building stone, such for instance, as the Caen stone in France, is excavated from mines running far beneath the surface. This distinction between under ground mines and open workings was expressly repudiated in **Midland C. v. Haunchwood Brick & Tile Co. ((1882) 20 Ch Div 552)** and in **Hext v. Gill ((1872) 7 Ch 699)"**

6.The Supreme Court of United States also referred to several English cases where stone for road making or paving was held to be 'minerals' as also granite, sandstone, flint stone, gravel, marble, fire clay, brick clay, and the like. It is clear that the word 'mineral' has no fixed but a contextual connotation.

7.xxx xxx xxx

That is why we say the word mineral has no definite meaning but has a variety of meanings, depending on the context of its use. In the context of the Mines and Minerals (Regulation & Development) Act, we have no doubt that the word 'mineral' is of sufficient amplitude to include 'brick-earth'. As already observed by us, if the expression 'minor mineral' as defined in the Act includes 'ordinary clay' and 'ordinary sand', there is no earthly reason why 'brick-earth' should not be held to be 'any other mineral' which may be declared as 'minor mineral'. We do not think it necessary to pursue the matter further except to say that this was the view

taken in **Laddu Mal v. State of Bihar; AIR 1965 PAT 491, Amar Singh Modilal v. State of Haryana; AIR 1972 PUNJ & HAR 356 (FB) and Sharma & Co. v. State of U.P.; AIR 1975 ALL 386.**

Xxx xxx xxx xxx"

32. With due regard to the aforesaid decision, it appears that the mineral not necessary to be viewed with reference to the provisions of the Act but it depends on the use of the same on different context. Although the minerals under the Act, 1957 is discussed in the aforesaid judgment, but Their Lordships took "brick earth" to be any other mineral. The aforesaid decision has also been followed in the decision rendered in the case of **Stonecraft Enterprises –V- Commissioner of Income Tax; (1999) 237 ITR 131 SC** where Their Lordships have observed as follows:

"It is necessary immediately to note that the Mines and Minerals (Regulation and Development) Act covers granite as a minor mineral. This Court in the **State of Mysore vs. Swamy Satyanand Saraswati; AIR 1971 SC 1569** has held that granite is a mineral. The Court quoted Habbury Laws of England, thus (page 1575):

"The test of what is a mineral is what, at the date of instrument in question, the word meant in the vernacular of the mining world, the commercial world, and among land owners, and in case of conflict this meaning must prevail over the purely scientific meaning."

No material was laid by the assessee before the Tribunal to suggest that in the export world granite was treated as anything but a mineral.

Reference was made to the judgment of this Court in **Banarsi Dass Chadha & Bros. –V- Lt. Governor. Delhi Administration AIR 1978 1587; (1979) 1**

SCR 271. It was there held that the word 'mineral' is a word of common parlance, capable of a multiplicity of meanings depending upon the context. For example, the word is occasionally used in a very wide sense to denote any substance that is neither animal or vegetable. Sometimes it is used in a narrow sense to mean no more than precious metals like gold and silver. Again, the word 'minerals' is often used to indicate substances obtained from underneath the surface of the earth by digging or quarrying.

It is at this stage appropriate to refer to the argument of learned counsel for the assessee based upon the doctrine of *noscitur a sociis* which as he submitted, has been explained by this Court in *Pardeep Aggarbatti -V- State of Punjab & Ors.* (1997) 107 STC 567' (1997) 8 SCC 511 (pages 565 of 107 STC):

"Entries in the Schedules of sales tax and excise statutes list some articles separately and some articles are grouped together. When they are grouped together, each word in the entry draws colour from the other words therein. This is the principle of *noscitur a sociis*."

33. With due regard to the said decision, it appears that the word "mineral" is a word of common parlance used in various way but cannot be used in narrow sense. Similarly, it appears from the aforesaid decision that entries in the schedules of sales tax and excise statutes draws colour from the other words therein because of the principle of *noscitur a sociis*. Thus depending on the aforesaid doctrine in the present context, we have to see whether the ballast is a mineral even if it is not to be defined as mineral under the Act, 1957 or Rules made thereunder. Since the facts are clear in this case to show that the ballast has been prepared from the spalls which are extracted from the quarry taken by the opposite parties on payment of royalty and it has not been

defined separately in the tax list, it is to be understood with common parlance.

34. It is reported in the case of ***Porritts & Spencer (Asia) Ltd -V- State of Haryana; AIR 1979 SC 300*** where Their Lordships have decided as to whether "Dryer felts" are "textiles" within the meaning of that expression in Item 30 of Schedule 'B' to the Punjab General Sales Tax, 1948. In that judgment, Their Lordships have considered the meaning of "Common parlance" in the following manner:

"1. 'Dryer felts' are 'textiles' within the meaning of that expression in Item 30 of Schedule 'B' to the Punjab General Sales Tax Act, 1948.

2. In a taxing statute words of everyday use must be construed not in their scientific or technical sense but as understood in common parlance, meaning "that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it."

Ramavtar Bhudhaiprasad etc. V Assistant Sales Tax Officer, Akola and another; AIR 1961 SC 1325, M/s.Motipur Zamindary Co. (Pvt) Ltd and another V Superintendent of Taxes, Muzafarpur and another; AIR 1962 SC 660, State of West Bengal and others V Washi Ahmed etc. (1977) 3 SCR 149 and Madhya Pradesh Pan Merchant's Association, Santara Market, Nagpur V State of Madhya Pradesh (Sales Tax Department) and others, 7 STC 99 at 102 referred (1 to E Gretfell V IR.C. (1876) I Ex. D. 242 at 248, Planters Nut and Choco Co. Ltd V. The Kind (1951) 1 DLH 385 and 200 Chest of Tec (1824) 9 Wheaton (U.S.) 430 at 438; quoted with approval.

Where a word has a scientific or technical meaning and also an ordinary meaning according to common parlance, it is in the latter sense that in a taxing statute the word must be held to have been used, unless contrary intention is clearly expressed by the Legislature. The reason is that the Legislature does not

suppose our merchants to be 'naturalists, or geologists, or botanists'. In the instant case the word 'textiles' is not sought by the assessee to be given a parlance.

3. The concept of 'textiles' is not a static concept. It has, having regard to newly developing materials, methods techniques and processes, a continually expanding content and new kinds of fabric may be invented which may legitimately, without doing any violence to the language be regarded as textiles.

The word 'textiles' is derived from Latin 'texere' which means 'to weave' and it means woven fabric. When yarn, whether cotton, silk, woollen rayon, nylon or of any other description or made out of any other material is woven into a fabric, what comes into being is a 'textile' and is known as such. Whatever be the mode of weaving employed, woven fabric would be 'textile'. What is necessary is no more than meaning of yarn and weaving would mean binding or putting together by some process so as to form a fabric. A textile need not be of any particular size or strength or weight. The use to which it may be put is also immaterial and does not bear on its character as a textile. The fact that the 'dryer felts' are used only as absorbents of moisture in the process of manufacture in a paper manufacturing unit, cannot militate against 'dryer felts' falling within category of textiles, if otherwise they satisfy the description of textiles. The Customs, Tariff Act, 1975 refers to textile fabrics in this sense."

35. With due respect to the aforesaid decision, it is clearly observed that whether the word has a scientific and technical meaning and also it is in the later sense that in a taxing statute, the word must be held to have been used unless contrary intention is expressed by the legislature. Similarly, it is reported in the case of ***Commissioner of Central Excise, New Delhi –V- Connaught Plaza Restaurant (P) Ltd; 2012 (286) E.L.T. 321 (S.C.)*** where a similar question arose and Their Lordships, at paragraphs 18, 19 and 31, have observed as under:

"18. Time and again, the principle of common parlance as the standard for interpreting terms in the taxing statutes, albeit subject to certain exceptions, where the statutory context runs to the contrary, has been reiterated. The application of the common parlance test is an extension of the general principle of interpretation of statutes for deciphering the mind of the law maker; "it is an attempt to discover the intention of the legislature from the language used by it, keeping always in mind, that the language is at best an imperfect instrument for the expression of actual human thoughts."

19. A classic example on the concept of common parlance is the decision of the Exchequer Court of Canada in **The King Vs. Planter Nut and Chocolate Company Ltd; (1951) CLR (Ex. Court) 122**. The question involved in the said decision was whether salted peanuts and cashew nuts could be considered to be "fruit" or "vegetable" within the meaning of the Excise Tax Act. Cameron J., delivering the judgment, posed the question as follows:

"...would a householder when asked to bring home fruit or vegetables for the evening meal bring home salted peanuts, cashew or nuts of any sort? The answer is obviously 'no'." Applying the test, the Court held that the words "fruit" and "vegetable" are not defined in the Act or any of the Acts in pari materia. They are ordinary words in every-day use and are therefore, to be construed according to their popular sense.

Xx xx xx xx

31. Therefore, what flows from a reading of the aforementioned decisions is that in the absence of a statutory definition in precise terms; words, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding, or according to their popular meaning. In other words they have to be constructed in the sense that the people conversant with the subject-matter of the statute, would attribute to it. Resort to rigid interpretation in terms of scientific and technical meanings should be avoided in such circumstances. This, however, is by no means an absolute rule. When the legislature has expressed a contrary intention, such as by providing a statutory definition of the particular entry, word or item in specific, scientific or technical terms, then,

interpretation ought to be in accordance with the scientific and technical meaning and not according to common parlance understanding.”

36. In the aforesaid decision, Their Lordships have also relied on the decisions in the case of **Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Alok (1962) 1 SCR 279, Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh; (1967) 2 SCR 720, Dunlop India Ltd. Vs. Union of India & Ors; (1976) 2 SCC 241, Shri Bharuch Coconut Trading Co. and Ors. Vs. Municipal Corporation of the City of Ahmedabad & Ors; 1992 Suppl. (1) SCC 298, Indian Aluminium Cables Ltd. Vs. Union of India & Ors; (1985) 3 SCC 284, Collector of Central Excise, Kanpur Vs. Krishna Carbon Paper Co; (1989) 1 SCC 150, Reliance Cellulose Products Ltd., Hyderabad Vs. Collector of Central Excise, Hyderabad-I Division, Hyderabad; (1997) 6 SCC 464, Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur, (1969) 9 SCC 402, Naturalle Health Products (P) Ltd. Vs. Collector of Central Excise, Hyderabad; (2004) 9 SCC 136 and B.P.L. Pharmaceuticals Ltd. Vs. Collector of Central Excise, Vadodara; (1995) Suppl. (3) SCC 1.**

37. After analyzing all the above decisions, Their Lordships have made it clear as to what is “Common Parlance Test”. Thus, in the absence of a statutory definition in precise terms; words, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding, or according to their popular meaning. In other

words they have to be constructed in the sense that the people conversant with the subject-matter of the statute, would attribute to it.

38. Now adverting to the present cases, the ballasts are deduced from the spalls which are extracted from quarry. The ballasts may be different size to make it boulder or chips. Neither ballasts nor chips or boulders are found in the taxable list but in ordinary sense, one can understand that it is nothing but the mineral as in the aforesaid paragraphs, the meaning of mineral has been well decided in the case of ***Banarasi Dass Chadha and others -V- L.T. Governor, Delhi Administration and others (Supra)***. When the ballasts, boulders and chips have got "common parlance" with the minerals as available in Entry 117 even without taking the aid of the Act, 1957 or Rules made thereunder, the facts remain that the quarry leased out to opposite party in STREV No.101 of 2011 or the chips or boulders purchased by other opposite parties from the M/s.OCL who have also got the same from quarry by taking the mining of the same on "common parlance" is nothing but "mineral". It is, therefore, the opinion of the Tribunal in this regard in all the revisions that they are all mineral cannot be said to be incorrect. Of course, the finding of the Tribunal is based on the definition of mineral in the Act, 1957 or Rules made thereunder. Even if taking the "common parlance test" without going to the reasons by the Tribunal, the result is same to the effect that the ballasts, boulders or chips are nothing but "mineral" under Sales Tax Act exigible to tax at the rate of

4% as per Entry 117 of the taxable list. The Point No.(1) is answered accordingly.

39. POINT No.(2)

Section 23(3) of the Act states as follows:

"23.(3)(a) Any dealer or as the case may be, the State Government dissatisfied with an appellate order made under sub-section (2) may within sixty days from the date of receipt of such order prefer an appeal in the prescribed manner to the Tribunal against such order. Provided that an appeal under this clause may be admitted after the aforesaid period of limitation if the Tribunal is satisfied that the appellant had sufficient cause for not preferring the appeal within such period.

(b)The dealer or the State Government as the case may be on receipt of notice that an appeal has been preferred under clause (a) may notwithstanding that the said dealer or the State Government may not have appealed against such order or any part thereof, within sixty days of the service of the notice file a memorandum of cross objections and such memorandum shall be disposed of by the Tribunal as if it were an appeal presented within time under clause (a)

(c) While disposing of an appeal under this sub-section the Tribunal shall have the same powers subject to the same conditions as are enumerated in sub-section (2) and any order passed under this sub-section shall, except as otherwise provided in section 24 be final."

40. Section 23 of the Act speaks about appeal and revision and there is no bar for the party to file cross-objection. In the revision petitions, the State-petitioner admitted that they have not filed any revision as there are concurrent finding in their favour. So, question of giving opportunity to the State-petitioner to file cross-objection by the Tribunal as argued by the petitioner is of no substance.

41. The contention of the learned Standing Counsel for the State-petitioner that the opposite parties raised for the first time about the exigibility of the ballast or boulder or chips under Entry 117 of the tax list has no substance because the Tribunal is a Court of fact and law as per Section 23 of the Act. When such fact is pleaded, there is no bar for the State to rebut the facts by filing cross-objection. Moreover, it appears from the orders of the learned Assessing Officer and First Appellate Authority that the argument as has already been advanced before the forums below that it is a work contract but not a contract for sale and it should be chargeable to 8%.

42. It is further clear from the assessment order and the First Appellate Authority's order that sales tax has been demanded for dealing in ballasts or boulders or chips by the respective opposite parties. So, the question is whether they are to be exigible to tax at the rate of 4% or 12% of taxable list in the schedule attached to the Act is a question of law as per the interpretation made by the parties. It is trite in law that the question of law can be raised at any stage. Moreover, the contention of the State that such plea of exigibility to tax at the rate of 4% of the taxable list before the Tribunal is barred by limitation is not acceptable as the said being question of law can be raised at any stage, as discussed above. Point No.(2) is answered accordingly.

43. CONCLUSION

From the foregoing discussions, we are of the view that ballasts or boulders or chips being mineral as per Entry 117 of the taxable

list are exigible to tax at the rate of 4% of taxable list. Moreover, the appeal has been purportedly filed before the Tribunal with proper perspective and there is no defect in raising any such plea before it. It has already been observed that rightly the Tribunal has excluded the loading charges from the computation of the sales tax in STREV No.101 of 2011. Thus, the findings of the Tribunal in all the second appeals are correct and legal and we confirm the said orders of the Tribunal.

In the result, these Revisions, being devoid of any merits, stand dismissed.

I.Mahanty,J.

I agree.

.....
Dr.D.P.Choudhury,J.

.....
I.Mahanty,J

Orissa High Court, Cuttack
Dated the 1st Day of March, 2017/B.Nayak