IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV No. 28 of 2015

M/s Saraswati Stone Quarry ….. ***Petitioner***
Mr. R.P. Kar, Advocate

Vs.

State of Orissa ….. ***Opposite Parties***
Mr. S.K. Pradhan, ASC [CT & GST]

CORAM:
DR. JUSTICE B.R. SARANGI
MR. JUSTICE M.S. RAMAN

ORDER
05.04.2023

Order No.
05.

This matter is taken up through hybrid mode.

2. Heard Mr. R.P. Kar, learned counsel for the petitioner and Mr. S.K. Pradhan, learned Addl. Standing Counsel appearing for the CT & GST.

3. The petitioner, a registered dealer under the Odisha Sales Tax Act, 1947, having stone quarry, assailed common Order dated 11.01.2013 passed by the learned Odisha Sales Tax Tribunal, Cuttack in Appeal S.A. Nos.181, 1439 and 2936 of 2004-05 directed against Order dated 30.06.2004 of the Assistant Commissioner of Sales Tax, Koraput Range, Jeypore in Appeal No.AA (KO-II) 321/2003-04 in connection with Assessment framed under Section 12(4) of the aforesaid Act, 1947 by the Sales Tax Officer, Koraput-II Circle, Rayagada on 17.12.2003 pertaining to the year 2002-03.

4. With a prayer to set aside the Order of the learned Odisha Sales Tax Tribunal, the petitioner has raised the following questions of law for consideration:

> *" A. Whether on the facts and in the circumstances of the case, the order of the Tribunal is perverse and erroneous?*

B. Whether on the facts and in the circumstances of the case, the Tribunal was justified in not allowing labour and service charges involved in the works contract executed between thePetitioner and the Railways?

C. Whether on the facts and in the circumstances of the case, the transportation charges, which was separately charged, is liable to be taxed under the OST Act?

D. Whether onthe facts and in the circumstances of the case, the transportation charges which was shown separately is deductible from the GTO as per section 5(2)(A)(a)(ii) of the OST Act ?

E. Whether on the facts and circumstances of the case, the Chips and ballast are exigible to tax @4% being minor. minerals covered under the Mines Act, 1952 read with Mines and Mineral Development Act, 1957 as well as Odisha Minor Minerals Concession Rules, 2004?

F. Whether the ballast comes under Entry 117 of List C of the Rate Chart under the OST Act and exigible to tax @4% being minor minerals?

G. Whether the Tribunal was correct in overlooking its earlier decision passed in the case of the Petitioner where the issues were identical and same?"

5. As is revealed from the assessment order, the assessee owns a stone quarry and the petitioner effected sale of ballasts and chips. During the material period ballast was supplied to South Eastern Railway as per agreement. The order of supply contained "supply and delivery in stack of 50mm. gauge machine crushed hard stone ballast conforming to Railway specifications at Rayagada station depot including all costs of materials, loading, unloading handling, transportation, royalty, octroi, sales tax and other taxes imposed by Central Govt./State Govt. and other local bodies including all other incidental charges with all lead, lift, etc. complete and crossing of railway lines as per instructions of railway representative. Similar agreement is also executed for supply of ballast in respect of

Sambalpur Division of Railways. The assessing authority levied tax @ 12% treating supply of ballast to be goods not specified elsewhere in the schedule of taxable goods. However, he has allowed deduction towards loading charges ascertaining the same to be post-sale service rendered by the dealer.

6. Aggrieved by the demand so raised in the assessment, the petitioner approached the appellate authority under Section 23(1) of the Odisha Sales Tax Act, 1947 ("OST Act" for short). The first appellate authority confirmed the assessment with the following observation:

> *"*** The ratio of the judgment of the Hon'ble High Court of Orissa in an identical case P.K. Satpathy Vrs. State of Orissa, 116 STC, 495 clearly establishes the findings of the Learned Assessing Officer.in the said case their Lordship observed that whether the supply of materials would constitute a sale of goods or mere works contract would depend upon the determination of the true character of the transaction. If the quarries belong to another person having ownership in the chips and 'stones and if there is mere transportation without any 'passing of title, then it would constitute labour and the transaction would be a works contract not exigible to sales tax. On the other hand, if the right to the property vests in the assessee, then the supply of the material would certainly constitute sale. In the instant case, the appellant owns a Stone Quarry and received a composite price for the ballast and for handling and labour charges etc, Hence, the entire composite price becomes exigiblé to tax. The Learned Assessing Officer has analysed the terms of the contracts and came to a definite conclusion that the expenses incurred towards payment of 'royalty, transportation and stacking are pre-sale expenses which are payable by the purchaser to the appellant as consideration for the sale. Hence, those are part of the sale price."*

7. Being unsuccessful in the appeal, the petitioner carried the matter before the Sales Tax Tribunal under Section 23(3) of the OST

Act, questioning the factual error in the observation of the first appellate authority and cited legal infirmity in such conclusion arrived in the appeal. The learned Tribunal framed the following question:

> *"5. The only point for consideration in these appeals is that:*
>
> *'whether the findings arrived at by the learned ACST, Koraput Range, Jeypore in enhancing the demand by not allowing the deduction claimed towards transportation charges, etc. and levying 12% tax on the supply of chips and boulders in justified in the eye of law?'*

8. In answer to said question, the learned Tribunal observed that the goods, *viz.* ballasts and chips in question fall within the scope of Entry 189 of scheduled goods declared taxable under the OST Act and the transportation of such goods being pre-sale event falling within the ambit of Section 5(2)(iii) read with Section 2(h), the charges relating thereto would form part of taxable turnover. Accordingly it held as follows:

> *"6. *** Regarding the rate of tax both the parties argued at length and the point to be decided as to whether the chips and boulders are minor minerals or they are unspecified item under the O.S.T. Rate chart. The learned Authorized Representative of the dealer mainly relied on the Full Bench decision passed by this Tribunal in S.A.No.283 of 2005-06, S.A.No.1137 of 2005/06 and S.A.No,1341 of 2005-06. In all these Full Bench decisions, this Tribunal has arrived at a conclusion by discussing at length that the stone chips and ballasts is nothing but minor minerals which has been clearly defined in Section 2(jj) of the Mines Act, 1952 read with provisions of Section 3(e) of the Mines and Mineral Development Act, 1957 and the provisions under the Orissa Minor Minerals Concession Rules, 2004. When the matter has been put to rest by this very Tribunal the said supply of chips and ballast is only*

> *exigible to 4% tax and not 12% as determined by both the fora below."*

9. Mr. Rudra Prasad Kar, learned counsel appearing for the petitioner submitted that the commodities, ballast and chips, fall within the meaning of Entry 117— "Ores and Minerals"— of the schedule of goods subject to sales tax @4% and the transportation charges including the incidental charges was to be deducted from the taxable turnover as they are separately charged. He contended that such charges being post sale event, would not form part of "sale price" as defined under Section 2(h) and thereby eligible for deduction in terms of Section 5(2)(A)(a)(iii) of the OST Act.

10. In support of his contention, Mr. Rudra Prasad Kar placed reliance on the decision of this Court rendered in the case of *State of Odisha Vrs. D.K. Construction, 2017 SCC OnLine Ori 157 = (2017) 100 VST 24 (Ori),* and submitted that both the issues relating to treatment of supply of ballast and chips as "minerals" falling within ambit of Entry 117 of the taxable list subject to tax @ 4% and deduction of incidental charges incurred from gross turnover have been decided in favour of petitioner in the said reported Judgment of this Court. Mr. Kar submitted that the first appellate authority in settling the facts committed error, which could have been dealt with by the Tribunal.

11. Mr. Susanta Kumar Pradhan, learned Additional Standing Counsel (Commercial Taxes) has conceded to the position of law as laid down by this Court in *D.K. Construction (supra).* However, he argued that the authorities have correctly decided the issues, which do not require indulgence of this Court.

12. This Court passed the following Order on 07.12.2022:

> *"1. Issue notice. Mr. Susanta Kumar Pradhan,*

> *learned Additional Standing Counsel accepts notice on behalf of the Opposite Party. Since he accepts notice, let a copy of the review petition be served on him within three working days. Replies be filed within eight weeks and rejoinder thereto, if any, be filed before the next date.*
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> *2. List on 5th April, 2023. In the meanwhile, defects be removed."*

Since no written replies are forthcoming from the side of the Revenue, and the matter is of the year 2015, this Court proceeded to hear the matter on merits on the basis of available material and arguments advanced by respective counsel for the parties.

13. This Court, on perusal of record, finds that the factual position obtained in *D.K. Construction (supra)* is identical to the present case and similar questions of law as posed in the present revision petition are decided in favour of the petitioner-assessee and against the revenue.

14. In such view of the matter, the revision petition succeeds and, therefore, the order(s) are hereby set aside. Accordingly, the Assessing Authority is directed to re-compute the tax liability as per observation made above and taking into consideration the Judgment of this Court in the case of *State of Odisha Vrs. D.K. Construction, 2017 SCC OnLine Ori 157 = (2017) 100 VST 24 (Ori)*. In the circumstances, there is no order as to costs.

(DR. B.R. SARANGI)
JUDGE

(M.S. RAMAN)
JUDGE

Ashok/MRS