ORISSA HIGH COURT: CUTTACK

AFR

STREV No. 43 of 2018

In the matter of an application under Section 9(2) of the Central Sales Tax Act, 1956 read with Section 80 of Odisha Value Added Tax Act, 2004.

M/s. Krsna Minerals ..... Petitioner

-Versus-

State of Odisha ..... Opp. Party

For petitioner : M/s. B. Panda, Bijay Panda, B.B. Sahu and K.K. Bal Advocates.

For opp. party : Mr. Diganta Das, Addl. Standing Counsel (Revenue)

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MR JUSTICE MURAHARI SRI RAMAN

Date of Hearing: 29.08.2023:: Date of Judgment: 31.08.2023

DR. B.R. SARANGI, J. M/s. Krsna Minerals, a proprietorship firm, has filed this Sales Tax Revision under Section 9(2) of the Central Sales Tax Act, 1956 read with Section 80 of Odisha Value Added Tax Act, 2004 to consider the following questions of law arising out of order dated 01.02.2018

passed in S.A. No.65(C) of 2016-17 by the Odisha Sales Tax Tribunal:-

I) *Whether the Ld. Tribunal was legally justified to hold that the order of First appeal passed was correct in law even if passed after lapse two years from the date of hearing?*

II) *Whether the Ld. Tribunal had legally proceeded and correctly held without any specific reasons to disallow the transaction claimed U/s. 5(3) of the CST Act made through valid statutory form "H" and not disputed in the tax evasion report of the Vigilance Wing ?*

III) *Whether the sale for ultimate export can be disallowed when the said transactions were fully supported with documents, evidence and form "H" will it be legally correct and statutorily valid to disallow them violating principles of law already settled?*

IV) *Whether in the facts and circumstance of the case the order of assessment passed U/r. 12 (4)(C) of the CST(O) Rules and affirmed the same by the appellate authorities to justify the GTO and TTO determined at Rs.21,24,026/- ?*

V) *Whether the Ld. Tribunal had legally proceeded and correctly held that the levy of tax, interest and penalty on the transactions made at Rs.19,04,110/- vide invoice No.003/10 dtd. 22.02.2010, which was not disputed in tax evasion report?*

VI) *Whether in the facts and circumstance of the case the order or assessment passed U/r 12 (4) (C) of the CST (O) Rules and affirmed the same by the appellate authorities to justify the penalty imposed At Rs.1,69,992/- U/r. 12(4)(c) of the CST (O) Rules without recording the satisfaction of escapements involved ?*

2. The facts leading to filing of this revision, succinctly put, are as follows:-

2.1 The petitioner, as a dealer registered under the OVAT, the CST and the OET Acts under the jurisdiction of the Dy. Commissioner of Sales Tax, Bhubaneswar-II Circle, Bhubaneswar, having TIN-2121118681, is indulged and engaged in the business of trading of iron ore and iron ore fines. The petitioner-dealer had filed returns under the OVAT Act for the period from 01.03.2010 to 31.03.2010 disclosing sales in course of export at Rs.20,14,068/- made through two invoices of Rs.19,04,110/- dated 22.02.2010 and of Rs.1,09,958/- dated 24.03.2010, but the Asst. Commissioner of Sales Tax, Vigilance Flying Squad, Cuttack submitted a tax evasion report to the Assessing Officer disputing the Invoice No. KM/Gimpex Ltd-001/11 dated 24.03.2010 amounting to Rs 1,09,958/- regarding claim of penultimate sale u/s. 5(3) CST Act on the ground that shipment was made on 13.03.2010. The Assessing Officer made the assessment u/r. 12(4)(c) of the CST (O) Rules for the period from 01.03.2010 to 31.03.2010, vide

order dated 11.09.2013, on the basis of tax evasion report bearing case no.14/Flying Squad Vigilance, vide letter no. 7585/VTX dated 12.06.2013, that the contract no. 2252 was dated 15.09.2009 and shipment was made on 13.03.2010, but the invoice was dated 24.03.2010 in respect of sale of 36.410 MT of iron ore fines (Fe content 62.60%) at Rs.1,09,958/- relating to the order no. PO/TS-23/09-10 to M/s. Gimpex Ltd, Bhubaneswar. But rejection of entire penultimate sales at Rs.20,14,068/- made due to non-submission of certificate of export in Form "H".

3. The Assessing Officer, in completing the assessment for the period from 01.03.2010 to 31.03.2010 (one month), determined the GTO and TTO at Rs.21,24,026/- over and above the transactions made at Rs.20,14,068/- (Rs.19,04.110/- + 1,09,958/-) and levied tax @ 4 % at Rs.84,961/- . Apart from that, interest u/r. 8 of the CST (O) Rules at Rs.34,976/- was charged and penalty at Rs. 1,69,922/- u/r 12(4)(c) of the CST (O) Rules was imposed.

4. Rule 12(4)(c) of the CST (O) Rules prescribes that if the Assessing Officer is satisfied that the escapement was without reasonable cause, then he may direct for payment of penalty twice of the tax determined. In the present case, the transaction made at Rs.19,04,110/- was disallowed for non-submission of certificate of export in Form "H", which, according to the petitioner, cannot be held that such transaction was escaped. Further, the balance transaction at Rs.1,09,958/- was also rejected on the basis of the report of the Flying Squad. Therefore, the Assessing Officer disallowed the documents due to alleged date of invoice as 24.03.2010 and the shipment was on 11.03.2010. Therefore, imposition of penalty of Rs.1,69,922/- could not have been directed to be paid by the dealer.

5. Aggrieved by the order of assessment dated 11.09.2013, the petitioner preferred first appeal by submitting that the Assessing Officer had simply relied on the evasion report without verifying the details furnished, such as, Form "H", buyer's contract, purchase order, bill of lading and copy of invoices etc. Therefore, determination of

GTO and TTO at Rs.21,24,026/- etc. could not have been raised. The addition of Rs.1,09,958/- over and above the transaction made at Rs.20,14,068/-(Rs.19,04,110/- + Rs. 1,09,958/-) amounts to double addition.

6. The Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur passed the order of First appeal on 30.08.2016 considering the facts of the case and documents/ evidence produced for claim of exemption u/s 5 (3) of the CST Act by confirming the order passed by the Assessing Officer and holding that the petitioner did not submit the copies of invoice and challans at the time of assessment to substantiate the claim of export u/s 5(3) of the CST Act.

7. Aggrieved by the order passed by the First Appellate Authority, the petitioner-dealer moved the Odisha Sales Tax Tribunal stating inter alia that the orders of forums bellow were illegal and the transactions made at Rs.20,14,068/- claimed to be exempted u/s. 5(3) of the CST Act being supported with statutory Form "H" issued as well as other reasons and further the addition of Rs.1,09,958/-

made twice. Therefore, the same was illegal in the facts of the case and the evasion report had disputed only on the invoice dated 24.03.2010 amounting to Rs.1,09,958/- and had not made any objection on the invoice dated 22.02.2010 amounting to Rs.19,04,110/-. Thereafter, determination of the GTO and TTO at Rs.1,24,026/- caused excessive and unjust without proper reasons and the order of First Appellate Authority, passed after two years from the date of hearing, cannot be held as the reasoned order passed. On such allegation of the petitioner-dealer the Sales Tax Tribunal disposed of the 2nd appeal confirming the order passed by Assessing Officer as well as Firtst Appellate Authority.

8. The present revision has been filed formulating the above questions of law to be adjudicated by this Court. But, since there are concurrent findings of fact, this Court cannot disturb such findings of the three forums on the question of facts.

9. In ***Hay v. Gordon***, (1872) LR 4 PC 337, it was held that it is general rule of practice on appeals in the

Privy Council not to reverse the concurrent findings of two Courts on a question of fact.

10. Taking into consideration the principle enunciated under Section 100 of Civil Procedure Code, in case of second appeal, the finding of fact shall not be disturbed unless such finding stands vitiated on wrong test on the basis of assumptions and conjectures resulting in perversity. The issue of perversity will also come within the ambit of substantial question of law as held in ***Kulwant v. Gurdial*** (2001) 4 SCC 262 : AIR 2001 SC 1273.

11. In ***Hero Vinoth v Seshammal***, (2006) 5 SCC 545, the apex Court held that the general rule is that the High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are; (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision

based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

12. In ***Chacko v Mahadevan***, (2007) 7 SCC 363, the apex Court held that in a second appeal filed the Court cannot interfere with the findings of fact of the first appellate court, and is confined only to questions of law.

13. As a general principle, the Supreme Court of India in the case of ***Chandrabhan V. Saraswati***, *2022 SCC OnLine SC 1273* laid down as follows:-

> *"33. The principles relating to Section 100 of the CPC relevant for this case may be summarised thus:*
>
> > *(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.*
> > *(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a*

question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents and involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that the High Court will not interfere with findings of facts arrived at by the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

14. This Court in ***Laxmi Jewellers V. State of Odisha***, (2017) 100 VST 220 (Ori), held that in exercise of power conferred under Section 80 of the Odisha Value Added Tax Act, 2004, may interfere with the finding of the

statutory appellate authority if there is any error apparent on the face of the record or miscarriage of justice, but cannot assume the power of appellate Court for reversing the fact-finding by re-appreciating the evidence or the materials produced before the appellate forum.

15. The case of ***State of Odisha V. Ranital Rice Mill,*** (1994) 93 STC 362 (Ori), was referred to in ***Kalanauria Trading Co. V. State of Odisha,*** (2015) 85 VST 342 (Ori) to say that where the conclusion has been arrived at by the Tribunal after making elaborate analysis of fact-situation, what would be the quantum of enhancement does not in all cases involve a question of law. It has been held that where there is absolutely no material to support the conclusion, a question of law arises. But where the Tribunal, after dealing with relevant aspects, fixes up the enhancement at a particular figure, it is a conclusion of facts, giving rise to no question of law.

16. It may be noteworthy to refer to ***Commissioner of Sales Tax, U.P. V. Kumaon Tractors & Motors,*** (2002)

9 SCC 379, wherein it has been stated that the Trade Tax Act confers limited jurisdiction to interfere with the order of the Tribunal, *i.e.,* only on "question of law", that too, the said question of law is required to be precisely stated and formulated. Instead of doing so, the High Court could not simpliciter re-appreciate the evidence.

17. In the case at hand, undisputed fact on record, which is not disputed by Sri Bijay Panda, learned counsel appearing for the petitioner-dealer during the course of hearing, that "the dealer has not filed CST return for the said period (01.03.2010 to 31.03.2010) and accordingly such transactions of sale in course of export are not declared in the CST returns for the period 01.03.2010 to 31.03.2010 and for that matter from 01.04.2009 to 31.03.2010". Whereas the due date for filing return for the said period was 21.04.2010, the assessment was made on 11.09.2013. The first appellate authority has recorded that "the learned Advocate appearing on behalf of the appellant-company could not furnish the supporting copies of challans and copies of invoices as urged at the time of

assessment to substantiate the claims of export under Section 5(3) of the CST Act". The learned Tribunal has referred to ratio of the Judgment of the Supreme Court of India in the case of ***Commissioner of Sales Tax Vrs. Mohan Brickfield,*** (2006) 148 STC 638 (SC), wherein it has been held that It is incumbent upon the assessee to offer plausible explanation as to why the relevant material was not produced before the authority and the burden is on him to show as to why no adverse inference should be drawn.

18. As it appears from the order of the Odisha Sales Tax Tribunal, the final fact finding authority held that the petitioner-dealer failed to prove that "the goods have movement pursuant to a contract or the self-same goods which were invoiced were exported". Further fact noticed by said Tribunal is that the dealer "has failed to furnish returns and failed to make payment of tax without any reasonable cause". It is beneficial to refer to Section 5 of the CST Act, which speaks of sale or purchase of goods in course of import or export. Sub-section (3) of Section 5 provides for grant of exemption in respect of penultimate

sale in course of export and sub-section (4) provides that such exemption shall be allowed subject to the condition of furnishing a declaration in the prescribed form. The CST (Registration and Turnover) Rules, 1957 prescribes such declaration form as Form-H, *i.e.*, Certificate of Export.

19. A perusal of the prescribed Form-H under Rule 12(10) of the CST (Registration and Turnover) Rules reveals that Sl. No.5 of Part-B dealing with details regarding export and the same runs as under:-

> *"(5) Number and date of air consignment note/bill of lading/railway receipt or goods vehicle record or postal receipt or any other document in proof of export of goods across the customs frontier of India* ***(Certified copy of such air consignment note/bill of lading/railway receipt/goods vehicle record/postal receipt/other document to be enclosed)****"*

Sub-section (4) of Section 5 of the CST Act lays down that "the provisions of sub-section (3) shall not apply to any sale or purchase of goods unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner a declaration duly filled and signed by the exporter to whom the goods are sold in a prescribed from obtained from the prescribed authority. Sub-section (4) of Section 5

of the CST Act which is couched in the negative, meaning thereby that it is mandatory requirement to claim exemption under sub-section (3) of Section 5 that such Certificate of Export is to be furnished in the manner prescribed. Under Rule 7A of the CST (Odisha) Rules, 1957, it is specified that "every registered dealer while filing return under Rule 7, for the month/quarter ending on 30th June, 30th September, 31st December and 31st of March every year, shall furnish to the Assessing Authority, the declaration and/or certificates as referred to in sub-rule (7) of Rule 12 of the CST (Registration and Turnover) Rules, received from the purchasing dealers/transferees for the transactions made in the quarter preceding to the quarter for which the return is filed as above showing particulars of transactions in the statement of Form C, E-I/E-II, F, H, I and J as applicable". When it is a fact on record, as asserted by all the fact-finding authorities including the Tribunal, that the dealer has failed to file return for the period in question under the CST Act, there was no scope

for the authority to consider such documents claimed to have been furnished by the petitioner-dealer.

20. It may be fruitful to refer to interpretation as set out by the Supreme Court of India in the case of ***Saraf Trading Corporation V. State of Kerala***, *(2011) 1 SCR 371*:-

> *"16. In the case of State of Karnataka Vs. Azad Coach Builders Pvt. Ltd. & Anr., reported in 2010 (9) SCALE 364, the Constitution Bench of this Court took note of the aforesaid sub-section (3) and after noticing the said provision laid down the principles which emerged therefrom as follows:-*
>
> > *23. When we analyze all these decisions in the light of the Statement of Objects and Reasons of the Amending Act 103 of 1976 and on the interpretation placed on Section 5(3) of the CST Act, the following principles emerge:*
> > *- To constitute a sale in the course of export there must be an intention on the part of both the buyer and the seller to export;*
> > *- There must be obligation to export, and there must be an actual export.*
> > *- The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export.*
> > *- To occasion export there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it, without which a transaction sale cannot be called a sale in the course of export of goods out of the territory of India.*
> > *24. The phrase 'sale in the course of export' comprises in itself three essentials:*
> > *(i) that there must be a sale:*

(ii) that goods must actually be exported and
(iii) that the sale must be a part and parcel of the export. The word 'occasion' is used as a verb and means 'to cause' or 'to be the immediate cause of'.
Therefore, the words 'occasioning the export' mean the factors, which were immediate course of export. The words 'to comply with the agreement or order' mean all transactions which are inextricably linked with the agreement or order occasioning that export. The expression 'in relation to' are words of comprehensiveness, which might both have a direct significance as well as an indirect significance, depending on the context in which it is used and they are not words of restrictive content and ought not be so construed.

17. It was held by the Constitution Bench that there has to be an inextricable link between local sales or purchase and if it is clear that the local sales or purchase between the parties is inextricably linked with the export of goods, then only a claim under Section 5(3) for exemption under the Sales Tax Act would be justified. The principle which was laid down in the said decision is required to be applied to the facts of the present case in view of the submissions made by the counsel appearing for the respondent State and refuted by the counsel appearing for the appellant."

21. The Supreme Court of India in ***Ramnath & Co. V. The Commissioner of Income Tax***, (2020) 6 SCR 719, referring to Constitution Bench decisions set forth as follows:-

"17.2. The Constitution Bench decision in Hari Chand Shri Gopal, (2011) 1 SCC 236 was also taken note of, inter alia, in the following:-

"50. We will now consider another Constitution Bench decision in CCE v. Hari

Chand Shri Gopal (hereinafter referred as "Hari Chand case", for brevity). We need not refer to the facts of the case which gave rise to the questions for consideration before the Constitutional Bench. K.S. Radhakrishnan, J., who wrote the unanimous opinion for the Constitution Bench, framed the question viz. whether manufacturer of a specified final product falling under the Schedule to the Central Excise Tariff Act, 1985 is eligible to get the benefit of exemption of remission of excise duty on specified intermediate goods as per the Central Government Notification dated 11-8-1994, if captively consumed for the manufacture of final product on the ground that the records kept by it at the recipient end would indicate its "intended use" and "substantial compliance" with procedure set out in Chapter 10 of the Central Excise Rules, 1994, for consideration? The Constitution Bench answering the said question concluded that a manufacturer qualified to seek exemption was required to comply with the preconditions for claiming exemption and therefore is not exempt or absolved from following the statutory requirements as contained in the Rules. The Constitution Bench then considered and reiterated the settled principles qua the test of construction of exemption clause, the mandatory requirements to be complied with and the distinction between the eligibility criteria with reference to the conditions which need to be strictly complied with and the conditions which need to be substantially complied with. The Constitution Bench followed the ratio in Hansraj Gordhandas case, to reiterate the law on the aspect of interpretation of exemption clause in para 29 as follows: (Hari Chand case, SCC p. 247)

> *"29. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception,*

*as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption. *** *** ***"*

17.3. In view of above and with reference to several other decisions, in Dilip Kumar & Co., (2018) 9 SCC 1, the Constitution Bench summed up the principles as follows:-

"66. To sum up, we answer the reference holding as under:

66.1.Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

66.2.When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue.

66.3. The ratio in Sun Export case is not correct and all the decisions which took similar view as in Sun Export case, (1997) 6 SCC 564 stand overruled.""

22. Applying the legal position to the fact of the present case, the petitioner-dealer having not filed return

claimed exemption from payment of tax under Section 5(3) of the CST Act which is contrary to the mandate of law. Thus, this Court is not inclined to adjudicate the questions of law posed by the dealer which are essentially question(s) of fact, which has been dealt with by all the fact-finding authorities including the Odisha Sales Tax Tribunal.

23. Taking into consideration the above principle of law and applying the same to the present case, so far as interference on the factual aspect of the case is concerned, the scope of this Court is very limited, but the question of law which has been framed to be adjudicated based on pure question of fact and, as such, there was no return submitted for the period in dispute. More so, in absence of any return submitted by the petitioner for the period in question, the assessing authority was well justified in passing the order impugned, which has been confirmed by the First Appellate Authority and also by the Second Appellate Authority.

24. There is no dispute that sales in course of export at Rs.20,14,068/- were made through two invoices of Rs.19,04,110/- dated 22.02.2010 and Rs.1.09,958/- dated 24.03.2010, but the Asst. Commissioner of Sales Tax, Vigilance Flying Squad, Cuttack submitted tax evasion report disputing the Invoice No. KM/Gimpex Ltd. dated 24.03.2010 amounting to Rs.1,09,958/- regarding claim of penultimate sale u/s. 5(3) CST Act on the ground that shipment was made on 13.03.2010. Therefore, there was every justifiable reason that the GTO and TTO determined at Rs.21,24,026/-. It is also made clear that there is no intrinsic link between sale/ movement of goods and its export. The penultimate seller failed to prove that the same goods which were exported by the ultimate exporter had been purchased by the ultimate exporter from the penultimate seller for compliance of the export order. Therefore, the transaction cannot be classified as sale in course of export falling within the purview of Section 5(3) of the CST Act and accordingly, the said stand was rightly rejected. As a consequence thereof, the transaction of

penultimate sale amounting to Rs.1,09,958/- was rightly found to be completely suppressed by the petitioner-dealer.

25. In view of such position, the questions of law formulated by the petitioner in para-7.10 of the revision petition, as quoted above, cannot be answered in favour of the petitioner-dealer. Thus, this Court does not find any merit in this STREV, which is accordingly dismissed.

(DR. B.R. SARANGI)
JUDGE

M.S. RAMAN, J. I agree.

(M.S. RAMAN)
JUDGE

Orissa High Court, Cuttack
The 31st August, 2023, Arun