

(2017) 04 OHC CK 0014
In the Orissa High Court
Case No : 24421 of 2012

SARADA MINES PVT LTD

APPELLANT

Vs

STATE OF ORISSA & OTHERS

RESPONDENT

Date of Decision : 20-04-2017

Acts Referred:

[Commissions of Inquiry Act, 1952](#), [Section 8C](#), [Section 8B](#) - Right of cross-examination and representation by legal practitioner - Persons likely to be prejudicially affected to be heard

Citation : (2017) 04 OHC CK 0014

Hon'ble Judges : Indrajit Mahanty, Biswajit Mohanty

Bench : DIVISION BENCH

Advocate : Gopal Jain, Satyajit Mohanty, S Patnaik, D K Mohanty

Final Decision : Allowed

Judgement

1. The petitioner, who happens to be a Private Limited Company, has filed the present writ application praying for quashing of notice dated 17.5.2012 issued by opposite party no.3 under Annexure-7 initiating the reassessment proceeding for the period 1.4.2008 to 31.3.2011 under Section - 43 of the Orissa Value Added Tax Act, 2004, for short "OVAT Act" and consequent reassessment order dated 26.11.2012 under Annexure-11 passed for the above noted period imposing tax to the tune of Rs.132,37,45,137/-and penalty to the tune of Rs.264,74,90,274/- as well as consequential Demand Notice dated 26.11.2012.

2. The case of the petitioner is that initially the Mining Lease Deed dated 14.8.2001 for operation of Thakurani Block-B, Iron Ore Mines comprising M.L. area over 947.046 hectares was executed in favour of Sunder Lal Sarda and Mohan Lal Sarda. Initially, the mining activities were undertaken by the lessee and the "Run of Mines" for short, "ROM", which is otherwise called as mother earth of Iron Ore consisting of raw unprocessed ores in its natural state obtained after blasting or digging was excavated and handed over to M/s. Jindal Steel &

Power Limited, for short, "JSPL". Thereafter, "JSPL", which has installed crusher plant inside the leasehold area used to crush and downsize the excavated ores/ROM consisting of large boulders, fragments and fines along with other contaminants/impurities. According to Mr. Gopal Jain, learned Senior Advocate for the petitioner after crushing of ROM in the crusher and sizing in the screen, Calibrated Lump Ore (CLO) is obtained. Size of CLO varies from 5 mm to 18 mm or 10 mm to 40 mm containing higher grade of iron. Another by-product of such crushing and screening is known as Fines containing granule materials like alumina, silica, dusts, spoils and other impurities. According to Mr. Jain, learned Senior Advocate, these Fines require further processing by way of washing and beneficiation so as to produce usable Fines and slime material. Earlier, excavated ores/ROM were crushed, sized and screened by "JSPL" and were given back to the lessee - Sunder Lal Sarda and Mohan Lal Sarda for sale to prospective buyers and "JSPL" was paid for job work charges for undertaking crushing, sizing and screening of ROM. While undertaking crushing, sizing, screening of the excavated ROM, huge quantity of residuary mixed with low grade Fines is generated, which are more than the quantity of CLO. It is the case of the petitioner that out of the excavated ore, after crushing and sizing on an average 25% to 30% CLO was produced and the rest 70% to 75% represented low grade fines. For such low grade fines, there was no market at all. This resulted in piling of huge stock of residuary mixed with low grade Fines covering the mining lease area. Since such business module described above was not viable/workable and not cost effective, as a prudent business decision, in the year 2004, the then the lessee decided to sell ROM on as is where is basis. "JSPL" which had installed the crusher unit inside the leasehold area of the lessee, agreed for lifting of entire excavated ROM on payment basis. In such background, the lessee vide letter dated 25.2.2004, requested the Deputy Director of Mines, Joda, Keonjhar to allow it to sell ROM from their Thakurani Iron Ore Mines to "JSPL" on ex-mines basis. On 4.3.2004, the Deputy Director of Mines, Joda vide letter No.11479 (Annexure-1/Annexure-A) wrote to the Director of Mines, Orissa inviting his attention to letter dated 25.2.2004 of the lessee for according approval for sale of ROM from their Thakurani Iron Mines. Pursuant to this, vide Letter No.MV(a)-39/2002 2853/DM. dated 27.3.2004, the Director of Mines, Orissa wrote back to the Deputy Director of Mines, Joda, Keonjhar intimating that Sunder Lal Sarda and Mohan Lal Sarda be allowed to supply ROM on ex-mines basis within leasehold area to "JSPL" in accordance with the provision of T.P. Regulations & O.M. (PTS & OUA) Act, 1989 & Rules 1990 subject to certain conditions. Accordingly, the Deputy Director of Mines, Joda, Keonjhar informed Sunder Lal Sarda and Mohan Lal Sarda vide Annexure-2 dated 5.4.2004 conveying approval of the Director of Mines for supply of ROM on ex-mines basis indicating five conditions therein. One such condition was that the lessee should pay highest rate of royalty prescribed for the lumpy iron ore containing 65% Fe and above for the entire quantity of ROM mineral supplied to "JSPL" for crushing and sizing. While such was the position, the mining lease granted in favour of Sunder Lal Sarda and Mohan Lal Sarda was transferred in the name of the petitioner Company vide proceeding No.8762/SM

dated 9.7.2006. According to Mr. Jain, learned Senior Advocate, the petitioner continued with the practice of mining ROM from the leasehold area and selling the entire quantity of ROM to "JSPL". In the year 2008, the petitioner entered into a long-term agreement with "JSPL" for supply of ROM for a period of 10 years. It was agreed between the parties to supply the ROM at agreed rate of Rs.400/- per Metric Ton initially with a stipulation that the rate and quantity of ROM, which was to be supplied would be reviewed from time to time, which would be mutually decided by both the parties to the agreement. Thus, the petitioner Company has been selling ROM excavated from the mines to "JSPL" on "as is where is basis" and paying highest rate of royalty prescribed for CLO containing 65 % Fe and above for the entire quantity of ROM so sold to "JSPL". It is the further case of the petitioner that prior to sell of ROM, the mining officials inspect the quality and quantity of the ores and only after that ROM is weighed and removed from the mines to the crusher plant of "JSPL" situated within the leasehold area. At the crusher plant of "JSPL", the ROM is crushed, sized and screened to CLO along with residue containing impurities and Fines. The petitioner showed the figures of ROM, CLO and Fines in its Return filed under the Mines and Minerals (Development and Regulation) Act, 1957. The petitioner has/had obtained Transit Passes and permits from the Mining Authorities for transporting ROM from mines to the crusher plant of "JSPL" under Annexure-12. The petitioner also filed various statutory Returns before the appropriate authorities under various statutes such as Central Sales Tax (Orissa) Rules, 1957, Orissa Entry Tax Act, 1999, Orissa State Tax on Profession, Trades, Callings and Employment Act, 2000, Orissa Minerals (Prevention of Theft, Smuggling & Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2005 and also under "OVAT Act". According to the petitioner, the excavation of ROM by the petitioner was/is controlled and regulated by the Indian Bureau of Mines and the Director of Mines, Government of Odisha. The movement of ROM is done with the prior approval/inspection and after issue of transit permit/passes by the jurisdictional Mining Officer. Production, consumption and stock of such minerals are reported monthly to the Jurisdictional Mining Authorities. During the period 2008-09, 2009-10 & 2010-11, the petitioner has regularly filed Annual Return in Form-H1 with the Controller General, Indian Bureau of Mines, Nagpur, the Controller of Mines, Nagpur Zone, the Regional Controller of Mines, Bhubaneswar Region and the Director of Mines, Bhubaneswar. In the Form-H1, the petitioner disclosed the quantum of ROM excavated and sold during the concerned period. All such Returns have been filed as Annexure-4 Series. During course of hearing, Mr. Jain, learned Senior Advocate appearing for the petitioner drew the attention of this Court to the table indicated in the writ application itself reflecting quantity of ROM sold during the year 2008-09, 2009-10 and 2010-11 with the rate of ROM and royalty paid. The table in Paragraph-16 of the writ application at Page-13 reflects quantum of VAT paid, royalty paid and Entry Tax paid. According to the petitioner, the petitioner had filed Returns under Section-33 of "OVAT Act" for the above mentioned three years and paid applicable VAT and the Entry Tax thereon. However, for the period 2008-09, audit

assessment under Section-42 of "OVAT Act" was completed accepting the books of account. Copy of that assessment order has been filed as Annexure-6 to the writ application. Similarly for the period 2009-10 and 2010-11, Returns were accepted under Section 39 of "OVAT Act" as self-assessed. In Annexure-6, the authorities accepted the business module of the petitioner regarding sale of ROM as it is and held that the petitioner is engaged in mining activity, i.e., extracting, digging out iron ore lumps/ROM and that extraction of such iron ore does not come under purview of manufacturing as no new different article having distinct name, character comes out. Thus, the petitioner cannot avail Input Tax credit on the same. Thus, according to Mr. Jain, learned Senior Advocate vide Annexure-6, the authorities accepted the business module of the petitioner Company regarding digging out of Iron Ore/ROM without engaging in any manufacturing activities.

While such was the position, vide notice dated 17.5.2012 (Annexure-7), the petitioner was noticed by opposite party no.3 to appear in person or through its authorised agent and to produce accounts and documents relating to its business in order to satisfy him that the Return for the tax periods, i.e., 2008-09, 2009-10 and 2010-11 were correct and complete since it appeared to him that the whole/part of the turnover of sales/purchase has (a) escaped assessment, (b) been under assessed. In other words, notice for re opening of the assessment was issued vide Annexure-7. Pursuant to such notice, the petitioner appeared before opposite party no.3 on 2.7.2012 with relevant documents and books of account and prayed for intimating/communicating the reasons for reopening of completed assessment for the above noted periods. On the said date, i.e., 2.7.2012, the statement of the authorised representative, namely, Raghunath Panda was recorded. Further, on the same date, opposite party no.3 informed the petitioner Company that based on the information contained in tax evasion report No.58 dated 29.2.2012 (Annexure- 9/Annexure-C) received from the Assistant Commissioner of Sales Tax, Enforcement Wing, Bhubaneswar alleging gross under invoicing of sale price of ROM sold by the petitioner, the completed assessment has been reopened. According to the petitioner, though the petitioner Company requested for supplying of copy of tax evasion report as well as documents relied thereon, however, the same were not provided to it. However, the authorised representative of the petitioner was permitted only to note down the contents/gist of the said report, without allowing to take note of the contents of the documents annexed thereto, which was voluminous in nature. The tax evasion report dated 29.2.2012 under Annexure-9/Annexure-C was supplied to the petitioner only on 1.12.2012 after the impugned reassessment order dated 26.11.2012 was passed vide Annexure-11/Annexure-D. Mr. Jain, learned Senior Advocate for the petitioner strenuously submitted that in the report under Annexure-9/Annexure-C, it has been admitted that the petitioner produces ROM and sells the same to "JSPL" and that the petitioner does not undertake further processing of ROM. Further processing of ROM is done by "JSPL". However, according to the Assistant Commissioner of Sales Tax, Enforcement Wing,

Bhubaneswar, selling of ROM instead of selling CLO after processing it, was unusual as the cost of processing ROM so as to convert it to CLO was not very high. Further, according to him, the entire production of ROM was sold at an abysmally low price. Basing on these two assumptions, an artificial formula was invented by him by which he came to a conclusion that the quantum of under invoicing to be about Rs.1961 Crores and accordingly the tax evasion report was prepared. Mr. Jain submitted that though a request was made for supply of a copy of the tax evasion report the same was not provided to the petitioner. On 16.8.2012, the petitioner submitted its written note of submission. Further, on 30.8.2012, another statement was recorded from Surendra Panda, who was the authorised representative of the petitioner Company. On 17.10.2012 and 22.11.2012, the petitioner submitted its further written notes of submission inter alia stating that in absence of fresh material in possession, the notice issued under Section 43(1) of "OVAT Act" alleging escaped reassessment/under assessment was without jurisdiction. The entire tax evasion report has been passed on the basis of presumption, conjecture and surmises. Though the said report accepted sale and sale price of ROM by the petitioner to "JSPL", reopening of assessment on the basis of such report was illegal as the same reflected non-application of mind. According to Mr. Jain, the petitioner also took a specific stand that comparison of sale price of ROM with CLO was not permissible as CLO is a totally different product vis-?-vis ROM. Further, there was nothing to show on records that the dealer/petitioner had received an amount in excess, shown and charged in the sale invoices of ROM. In such background, he contended that initiation of proceeding for reopening of assessment was liable to be quashed.

The dealer/petitioner also took the plea that neither under "OVAT Act" nor under the Rules made under the "OVAT Act", the authorities have any jurisdiction to suggest about the business module to a business man. He also submitted that while filing its written notes of submission on 17.10.2012 and 22.11.2012, the petitioner Company had asked for tax evasion report under Annexure-9/Annexure-C, which was never supplied to it and ultimately, the impugned order dated 26.11.2012 under Annexure-11/Annexure-D has been passed directing the petitioner to pay tax amounting to Rs.132,37,45,137/- and penalty amounting to Rs.264,74,90,274/-. Also, on the same date, notice of demand has been issued for making payment of the above amount. The notice of demand forms part of Annexure-11. Challenging the notice under Annexure-7 for reopening the assessment for the period 2008 - 2011 and reassessment order as well as the demand notice dated 26.11.2012 under Annexure-11, the present writ application has been filed.

3. A detailed counter-affidavit has been filed on behalf of the opposite parties. At the outset, they have taken a stand that the order of assessment under Annexure-11 can be challenged before the statutory appellate authority before whom the question of law and fact can be very well agitated. They have also submitted that the present writ application raises various questions of fact, which can be very well considered by the appellate authority not by a writ Court. Their

further stand is that the petitioner has been manipulating its accounts and affairs only with a view to defraud the State of the legitimate tax dues and was only paying a minimal tax by devising an ingenious method, which was unearthed by the Enforcement Wing of the Commercial Tax Department for which assessment was reopened. However, they admitted that the price of ROM is not statutorily decided by the Indian Bureau of mines. While defending, the impugned notice under Annexure-7 and the impugned reassessment order and Demand under Annexure-11, the stand of the opposite parties is that the petitioner was selling ROM at an abnormal price to its preferred buyer though paying royalty pertaining to the highest grade of CLO which indicated that it was not selling ROM, but was selling CLO. Further, according to them, the prevarication of the dealer-petitioner was caught red-handed when it was found that aggregates of CLO and Fines at the hand of "JSPL" equalled to the quantum of ROM transferred by the petitioner to "JSPL". Therefore, the claim of the dealer/petitioner that it was selling impure ROM only after paying royalty of the highest grade of CLO was found to be arithmetically impossible. Further, it is the stand of the opposite parties that the agreement under Annexure-3 is a post dated agreement of an ante dated activity regarding sale of CLO at the value of ROM, while paying royalty at the value of CLO but paying VAT at value of ROM, which is abysmally low. According to them, "OVAT Act" explicitly provides agreement or contract of such nature as void ab initio. In this context, the opposite parties have relied on Section 101-A of "OVAT Act". For all these reasons, on 29.8.2011 vide Annexure-B, the Sales Tax Officer, Investigation Unit, Barbil called upon the petitioner to produce purchase, production and dispatch of iron ore, sized iron ore and iron ore fines (grade wise and size wise), sale figure of iron ore, sized iron ore and iron ore Fines both in terms of quantity and value, copies of Returns filed for the period 1.4.2008 to 31.4.2011 under "OVAT Act", Orissa Entry Tax Act, Central Sales Act, and Audited Balance Sheet. Thereupon, the Assistant Commissioner of Sales Tax submitted the fraud case report under Annexure-C. On perusal of the said report, the Assessing Authority considered the same and by an order dated 17.5.2012 decided to reopen the assessment for the period from 1.4.2008 to 31.3.2011 by issuing notice to the petitioner under Annexure-7. In response to the notice, the petitioner took adjournment and appeared on 2.7.2012 on which date its authorised representative filed a petition with prayer to communicate the reasons of reopening of assessment. The Assessing Authority communicated the reasons for reopening of the assessment and the materials forming the basis of report were also explained to the representative, who took extract from the documents forming basis of the report. This fact was recorded in the order sheet dated 2.7.2012 signed by Raghunath Panda, authorised representative of the dealer/petitioner. Further, the petitioner filed written notes of submission on 16.8.2012, 17.10.2012 and 22.11.2012 and thereafter, the impugned assessment order under Annexure-11 was passed on 26.11.2012. In such background, the stand of the opposite parties is that all throughout principles of natural justice have been followed and there is no reason as to why a writ application should be entertained directly when the impugned order can very well be challenged before

the 1st appellate authority. From the documents submitted along with the fraud report and figures submitted along with the fraud report and further from the figures in Form-H1, it was seen that while ROM was billed @ Rs.400/- per M.T., the processing charge for processing of ROM into CLO was around Rs.203 per M.T. and the price of lump ore was around Rs.2000/- to Rs.4000/-. Thus, the Assessing Authority recorded the finding that there was huge under invoicing and resulting in escapement of turnover. In the counteraffidavit, their further stand is that as indicated earlier the agreement under Annexure-3 was/is in contravention of provisions of Mines & Minerals (Development & Regulation) Act, 1957, Sale of Goods Act, Odisha, Entry Tax Act and "OVAT Act". Further, the opposite parties have asserted that the owner of mining lessee does not acquire any title i.e. any saleable right on the minerals upon mere raising from the ground. The lessee does not acquire a saleable right in its raw form or in its processed form until removed from the mining area upon payment of royalty. So, the claim of the petitioner that it was selling ROM to "JSPL" is contrary to the conditions of the lease and various statutory provisions.

Further, the opposite parties have asserted that by virtue of the agreement under Annexure-3, there has been an illegal shifting of point of sale from ex-leasehold area to ex-mine point. On this account, also the agreement under Annexure-3 is ab initio, null and void. They have also stated that the Pollution Control Authorities have permitted the petitioner to beneficiate ROM by way of installation of primary iron ore crusher of the capacity of 300 TPH, secondary iron ore crusher of 400 TPH (3 nos.), tertiary iron ore crusher of the capacity 350 TPH (3 nos.) to produce sized iron ores, i.e., CLO. Therefore, the claim that ROM has been sold by the petitioner is factually incorrect. Further, the stand of the opposite parties is that since administrative charges are being borne by the petitioner, thus, the petitioner is vitally and legally interested in goods/ROM even after alleged ex-mine sale. Therefore, according to the opposite parties, no sale had taken place in terms of Sale of Goods Act read with "OVAT Act" on ex-mine basis. They have also relied on various clauses of lease deed dated 14.8.2001 to show that the petitioner has violated many such conditions. One further stand of the opposite parties is that the lease agreement between the lesser and lessee does not permit sub-leasing/assignment of the leased property. The petitioner by introducing "JSPL" has been sub-leasing and assigning the property in reality. Thereby, it has violated the lease conditions.

The opposite parties term the agreement under Annexure-3 to be a puzzling agreement between the petitioner and "JSPL" contravening the provisions of "OVAT Act", Orissa Entry Tax Act, Mines and Minerals (Development and Regulation) Act, 1957 and Sale of Goods Act, 1930 in order to deny the State its due. Therefore, according to them, this Court may lift the corporate veil to expose the wrong doing by the party.

4. The petitioner has filed a rejoinder to the counter-affidavit filed by the opposite parties. According to the petitioner, sale of ROM is not a thing prohibited

under law. Rather removal of ROM has been duly recognised by Rule 64-B of the Mineral Concession Rules, 1960. Annexure-2 records approval of the Director of Mines for supply of ROM on ex-mine basis within the leasehold area to "JSPL" and the petitioner has duly complied the terms and conditions of the permission granted under Annexure-2. Though the present fact situation is covered under Rule-64B(1) of the Mineral Concession Rules, 1960 and though the royalty is chargeable only on the processed minerals, however in obedience to the approval order under Annexure-2, all along, the petitioner has paid royalty at the highest rate applicable to the highest grade of ore. Further, the petitioner reiterated that the entire demand under Annexure-11 is based on erroneous comparison of prices of altogether two different commodities, namely, price of ROM sold by the petitioner to "JSPL" with that of CLO. Further, it is the case of the petitioner that since the impugned orders are ex-facie perverse, arbitrary and wholly illegal and unsustainable being without jurisdiction, therefore, existence of alternative remedy is no bar to maintainability of the writ application. With regard to attack on the agreement, the stand of the petitioner is that much after permission was granted under Annexure-2 for supply of ROM, such agreement under Annexure-3 was entered into. Therefore, no mala fide can be read into the same. With regard to establishment of processing plants by the petitioner as alleged by the opposite parties in Paragraphs-9 and 33(d) of the counter-affidavit, the stand of the petitioner is that they have not established any such processing plant within the leasehold area. The said plant has been established by the "JSPL" in terms of permission granted by the competent authority of the State Government. Further, the arrangement to supply of ROM has been approved by the Director of Mines under Annexure-2. Further, the stand of the petitioner is that there exists no case for reassessment and the same has been done merely on the basis of change of opinion. In such background, opposite party no.3 by issuing the impugned notice under Annexure-7 and impugned orders under Annexure-11 has acted without jurisdiction. The petitioner specifically denies that it is selling CLO instead of ROM. It also reiterates that there has been violation of principles of natural justice because the documents which form the basis of opinion for reopening the petitioner's case, copies of the report and annexures, etc. were not provided to the petitioner. With regard to the averment made in Paragraph-22 to the counter affidavit, the case of the petitioner is that no new fact has been collected by the reporting officer and it specifically denies that the Judicial Commission set up by the Hon'ble Supreme Court of India has given any particular finding against the petitioner regarding allegation of under invoicing and assuming that any such finding has been recorded by any commission without giving notice and opportunity of hearing to the petitioner, all such findings by such commission are wholly arbitrary, illegal and void ab-initio being directly contrary to the provisions of Sections 8B and 8C of the Commissioner of Inquiry Act, 1952. Further, it has denied that the agreement under Annexure-3 is contrary to any provisions of MMDR Act or Sale of Goods Act or "OVAT Act" or Odisha Entry Tax Act or any other provision of law. It reiterates that the sale of ROM on ex-mines basis has been duly approved by the competent authorities of

the State and accordingly the petitioner sold ROM. It denies the allegation relating to legal manipulation and takes a stand that in any case, mining authorities have never disputed the factum of transaction/sale of ROM between the petitioner and "JSPL".

5. The above noted Paragraphs delineate the respective case of the petitioner and opposite parties. In such background, Mr. Jain, learned Senior Advocate for the petitioner submitted that under the facts and circumstances, there was no occasion for issuing the notice under Annexure-7. He submitted that since the notice under Annexure-7 has been issued merely on account of change of opinion, such notice is totally without jurisdiction and liable to be set aside. Additionally, he submitted that the notice under Annexure-7 is legally vulnerable as it contained no reason. He submitted that though pursuant to notice under Annexure-7, the petitioner has participated in the proceeding however in its written submission dated 17.10.2012, the petitioner has made it clear that it reserved its right to challenge the notice. Secondly, he submitted that since there has been infraction of principles of natural justice as copy of the report under Annexure-9 was not supplied to the petitioner despite repeated requests, the impugned order under Annexure-11 is legally vulnerable and the same is liable to be set aside. He also submitted that the Annexures to the said report, which are copies of various documents which run up to 180 pages having not been supplied to the petitioner, there has been gross violation of principles of natural justice. Merely, permitting the authorised representative of the petitioner to take note of the gist of the report was wholly inadequate so as to enable the petitioner to comprehend the allegations made in the report particularly, when the report ran to more than 180 pages. Further, the information/data/ records obtained by opposite party no.3 from their Orissa Mining Corporation and Indian Bureau of Mines in respect of price of iron ore prevailing from time to time were never disclosed to the petitioner, thus it was not afforded with any opportunity to rebut them. Mr. Jain, learned Senior Advocate further submitted that foundation of the tax evasion report/fraud report under Annexure-9 was also not supplied to the petitioner thereby occasioning gross violation of principles of natural justice. In such background, he prayed that the impugned order under Annexure-11 ought to be quashed. Thirdly, he reiterated that both the notice under Annexure-7 initiating the reassessment proceeding and the impugned order under Annexure-11 are legally vulnerable as the decision to open of the assessment was done on account of mere change of opinion. Thus, the initiation of the entire proceeding is without jurisdiction. According to Mr. Jain, learned Senior Advocate for the petitioner, the re-assessment proceeding is without jurisdiction because there exists no information/material which can give rise to the opinion as required for exercise of power under Section-43 of "OVAT Act". According to him, the jurisdictional facts required for initiation of reassessment proceedings are completely absent in the present case and from the facts, it is clear that such initiation of reassessment proceeding was/is based on mere change of opinion. In fact, no new facts/no new materials existed/exists for initiation of such

reassessment proceeding. Elaborating the argument, he further submitted that as per settled principles of law, material information for formation of opinion must come from outside the departmental sources not from inside the departmental sources as has been done in the present case. Otherwise it would be possible for the authorities to reopen an assessment on the basis of change of opinion in which case finality of complete assessment would lose all sanctity. Here, the entire initiation of reassessment proceeding is based on the tax evasion report prepared by the Assistant Commissioner, Sales Tax, Enforcement Range, Bhubaneswar. Further, according to Mr. Jain, learned Senior Advocate a proceeding under Section - 43 of "OVAT Act" can be initiated only when materials/informations are available with the Assessing Authority on the basis of which he can form an opinion that whole/any part of the turnover of a dealer in respect of a particular tax period has escaped assessment or has been under assessed. In other words only if these conditions are satisfied then the assessing authority gets jurisdiction to reopen the assessment. According to him, here the tax evasion reports refers to quantum production, dispatch and sale value of ROM as disclosed by the petitioner in its Returns for the period April, 2008 to March, 2011. Therefore, apparently there was no fresh materials/fresh information in order to come to the conclusion regarding under invoicing/escaped assessment or under assessment. According to him, it is well settled that with regard to reopening of assessment, the information means (1) the information must be authentic and capable of giving rise to inference regarding escapement, (2) the information should be definite and there must be necessity of live link between the material and believe (3) there should be new information dehors the assessment record thereby giving rise to evasion of tax and (4) the materials should be relevant and should not be a matter of guess work. Here, since no new information was there in the hands of opposite party no.3, the impugned reassessment order is a clear case of change of opinion and therefore, is liable to be set aside. According to Mr. Jain, learned Senior Advocate, reassessment has been done on the basis of change of opinion as the authority has assumed without any legal evidence that the petitioner has sold high priced CLO instead of ROM as selling of ROM at low price is an unusual business practice. In other words, the reassessment order has been passed presuming existence of a better business module and doubting rationale of petitioner selling ROM instead of CLO. In this context, he submitted that the Authorities under OVAT Act has no jurisdiction to suggest business module. The impugned order under Annexure-11 like that of Annexure-9 has also been influenced by an assumed low sale price of ROM without bringing on record any evidence relating to high prevailing market price of ROM. Further, though the tax evasion report under Annexure-9 admits sale of ROM, but the impugned order under Annexure-11 has gone one step further as while relying on the tax evasion report under Annexure-9, it has come to a finding that the dealer/petitioner had sold CLO in the guise of ROM by under invoicing the price as the quantum of ROM fed into processing plant equals quantum of CLO and fines after processing. Since the output is equal to input, the opposite party No.3 has reached a conclusion that the material fed into

processing plant was not ROM but CLO. In this context, Mr. Jain, learned Senior Advocate strenuously submitted that there exists no iota of evidence on record to show that the petitioner has sold CLO in the guise of ROM and merely because the output quantum of CLO and fines equalled the input quantum of ROM, it could not be said that the petitioner had sold CLO. Such presumption of opposite party No.3 is not backed by any scientific study. Further, the mining authorities have never raised a finger on this. Thus, the opposite party No.3 has passed reassessment order based on conjectures, surmises assuming that output quantum cannot be same as input quantum, when such assumption is not backed by any scientific study, though there existed no dispute as to quantum of sale and no evidence that while selling such quantum, the petitioner had received anything more. In this context, he also submitted that the VAT authorities failed to appreciate that Fines contained huge quantity of waste and impurities and for making the same usable further washing and beneficiation is required. Further, he submitted that even a bare look at the tables given in Annexure-11 relating to details of quantity of ROM sold and quantum of CLO transferred by "JSPL" does not show that quantity of ROM is equal to quantity of CLO. Moreover all these figures have never been disputed by the mining authorities. Rather, the Mining Authorities have granted transit permits some of which have been filed under Annexure-12 accepting selling of ROM by the petitioner to "JSPL". Once mining authorities are not disputing the nature of minerals sold and price of minerals, Revenue authorities cannot go into those matter to come to a conclusion that since the quantity of CLO and Fines equals the quantity of ROM so it must be taken that the petitioner has sold CLO not ROM. According to him the Revenue Authorities are not the experts under the law to arrive at such a conclusion. Thus by coming to such a conclusion, the opposite party no.3 under Annexure-11 has also acted without jurisdiction. In such background, he submitted that erroneously the reassessment has been done though no factual basis exists for treating that the petitioner sold CLO instead of ROM. Even otherwise as per the decision of this Court in W.P.(C) No.12119 of 2014, it is not disputed that the petitioner sells ROM to "JSPL", who processes the same for producing CLO and Fines. Thus, it is a strange case while the Mining Department allows sale of ROM, the Finance Department is saying that the petitioner is selling CLO not ROM. Such stand is also impermissible in law. He reiterated that since there has been violation of principles of natural justice in course of proceeding and since reassessment proceeding has been undertaken merely on change of opinion thus being without jurisdiction, the writ application is maintainable as per settled principles of law. He also submitted that there is no allegation to the effect that the petitioner suppressed the quantum of sale or has received any undisclosed amount or any other consideration in lieu of alleged under invoice sale. Thus, the finding relating to under invoicing is on account of change of opinion and nothing else, which is not permissible in law. 6. In the written submission, the petitioner relied on following decisions. On the point of maintainability of the writ application, the petitioner relied on the following decisions: State of H.P. and others - vrs- Gujarat Ambuja

Cement Ltd., [(2005) 6 SCC 499], Whirlpool Corporation -vrs- Registrar of Trade Marks, Mumbai and others, (AIR 1999 SC 22) , The State of Uttar Pradesh -vrs- Mohammad Nooh, (AIR 1958 SC 86). For our purpose, it would be enough to refer to law laid down by Hon''ble Supreme Court in Whirlpool Corporation (supra). There the Hon''ble Supreme Court has made it clear that the alternative remedy would not operate as bar in exercising writ jurisdiction, where the writ petition has been filed for enforcement of Fundamental Rights or where there has been violation of principles of natural justice or where the order or proceedings are wholly without jurisdiction or where vires of an act is challenged. Here according to Mr. Jain, since there has been violation of principles of natural justice as indicated earlier and since the reassessment proceeding was undertaken merely on change of opinion thus being without jurisdiction, present writ application is maintainable.

On the point of reopening of assessment not being permissible on mere change of opinion, the petitioner relied on the following decisions: Binani Industries Ltd., Kerala -vrs- Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore and others [(2007) 15 SCC 435], Commissioner of Income Tax, Delhi - vrs- Kelvinator of India Limited [(2010) 2 SCC 723], Indian and Eastern Newspaper Society, New Delhi -vrs- Commissioner of Income Tax, New Delhi [(1979) 4 SCC 248], Naba Bharat Ferro Alloys Ltd., and another -vrs- State of Orissa and others [(2010) 31 VST 319 (Orissa)]. In Binani Industries Ltd., (supra) the Hon''ble Supreme Court has made it clear that re-opening the assessment by mere change of opinion is entirely impermissible. Merely because the assessing authority changes his view or opinion, it cannot review its earlier decision. In Kelvinator of India Limited (supra), the Hon''ble Supreme Court has made it clear that change of opinion cannot be a reason to reopen the assessment as that would amount to review. In case of M/s. Indian and Eastern Newspaper Society, New Delhi (supra), it has been laid down that an error discovered by assessing authority on a reconsideration of same material does not justify reassessment. Here Mr. Jain, learned Sr. Advocate submitted that no fresh material/fact was/is there in the present case. Here on selfsame facts, some new, artificial and presumptive parameters have been used without backing of any evidence/scientific data for re-opening assessment. Thus, such reassessment is on account of change of opinion, which makes the entire proceeding without jurisdiction and thus liable to be quashed. In Naba Bharat Ferro Alloys Ltd., and another (supra), this Court has reiterated that reassessment is impermissible on mere change of opinion particularly when no fresh material is there with the Assessing Officer to go ahead with the reassessment. According to Mr. Jain, learned Sr. Advocate, in the present case there is nothing to show that the petitioner has concealed some materials from the Assessing Officer relating to turnover of sales. What the Assessing Officer has done is that he has gone for review by changing his opinion relying on certain artificial parameters which are not backed by factual/scientific evidence. Since the Assessing Officer has acted without jurisdiction the impugned notice under Annexure-7 and reassessment order under Annexure-11 are liable

to be quashed. On the point that the Revenue Authorities/Taxing Authorities not having the power to dictate as to what would be the appropriate business module/method to be adopted, he relied on the following decisions: Hemraj Udyog -vrs- Commissioner of Trade Tax U.P. Lucknow. (1997 SCC Online (All) 1383), Commissioner of Income Tax -vrs- Oberoi Hotels (P) Ltd., [(2011) 334 ITR 293 (Cal.)] and Commissioner, Sales Tax -vrs- Saurashtra Chemicals, [1995 SCC Online (All) 1169]. For our purpose it would be enough to refer to the decision of Allahabad High Court in Hemraj Udyog (supra), Saurashtra Chemicals (supra). These decisions lay down that it is not the business of a taxing officer to guide the businessman about the manner in which later should conduct his business. A businessman is not expected to earn more so as to be able to pay higher tax nor can the Assessing Officer force a dealer to sale his goods at a particular price. It is essentially for the assessee to manage his business affairs according to his wisdom. The taxing authority cannot dictate as to how a dealer/ assessee would conduct his business. Accordingly, Mr. Jain, learned Sr. Advocate submitted that the authorities have gone wrong in initiating reassessment proceeding thinking that business module adopted by the petitioner of selling ROM at a particular price was unusual particularly when there is nothing to show that such a business practice was prohibited by law. Accordingly, he contended that opposite party No.3 exceeded his jurisdiction in issuing notice of reassessment under Annexure-7 and in passing the impugned order under Annexure-11/Annexure-D.

7. With regard to definition of ROM as unprocessed/uncrushed raw material as obtained after digging and blasting, the petitioner relied on the decisions of National Mineral Development Corporation Ltd., -vrs- State of M.P. and another [(2004) 6 SCC 281]. There it has been made clear that in Iron Ore production the run of mine (ROM) is in a very crude form and its existence has been recognised in Rule-64B of the Mining Concession Rules, 1960. On the question of onus of proof lying on the Revenue Authority to prove that the assessee has received an undisclosed sum from sale, the petitioner relied on the following decisions in the cases of Girdhari Lal Nannelal -vrs- The Sales Tax Commissioner M.P. [(1976) 3 SCC 701] and K.P. Varghese -vrs- Income Tax Officer, Ernakulam and another, [(1981) 4 SCC 173].

In both the above cases, the Hon"ble Supreme Court has made it clear that burden of proving understatement or concealment is on Revenue. This burden can be discharged by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee had not correctly declared/ disclosed the consideration received by him. According to Mr. Jain, learned Sr. Advocate in the present case, no such thing has been proved by the petitioner or that the petitioner has concealed the turnover of sales. Thus, the Revenue has not discharged its burden. In such background, merely by introducing new and artificial parameters based on conjectures and surmises to reconsider the same set of facts, the Assessing Officer has acted merely on the basis of change of opinion and thus beyond jurisdiction.

8. The petitioner has relied on the decisions in the cases of Vinod Trading Company -vrs- State of Assam and others [(2006) 144 STC 573] (Gauhati), Delux Wines -vrs- State of Andhra Pradesh [(1990) 77 STC 373 (A.P.)] to drive home the point that even where the assessment has been sought to be re-opened on the ground of variation between prices charged by the assessee/dealer and the alleged prevailing market price, the same has not been allowed by the Courts. Here according to Mr. G. Jain, learned Sr. Advocate the facts of the present case are still better as in the instant case except saying that the petitioner has sold ROM at an abysmally low price, there exists no evidence to show high prevailing market price of ROM in order to come to a conclusion for re-opening assessment.

9. Learned Standing Counsel appearing for the Revenue at the outset, pointed out that the impugned order being an appealable order and when statutory remedy of appeal is available, the writ application should not be entertained by this Court. He defended the notice under Annexure-7 and the impugned orders under Annexure-11 saying that those have been issued and passed in accordance with law particularly when the Returns filed before the Indian Bureau of Mines showed that the weight of ROM sold by the petitioner is equal to the weight of the CLO and Fines, which came out after processing of ROM. Thus, according to him the goods sold did not contain any waste material. Further, since the authorities have permitted the petitioner to beneficiate ROM by installing primary, secondary and tertiary iron crusher units, i.e., processing units, the claim of the petitioner that it has sold ROM cannot be accepted to be factually correct. He also attacked the agreement under Annexure-3 saying that the same is void because of violation of the terms of mining lease and provisions of Mines and Minerals (Development and Regulation) Act 1957 and Sale of Goods Act. He also submitted that in the present case, there has been no change of opinion. According to him, the allegations contained in tax evasion report under Annexure-9 were never considered or dealt by the Assessing Authority either in the assessment proceeding under Section - 42 of "OVAT Act" or while accepting Returns under Section 39 of "OVAT Act". Therefore, the initiation of proceeding under Section-43 of "OVAT Act" cannot be said to be on the basis of change of opinion. With regard to proceeding under Section-43 of "OVAT Act" being without jurisdiction, he submitted that the notice for assessment under Section- 43 of "OVAT Act" was issued on the basis of information in possession of the Assessing Authority after receipt of the tax evasion report under Annexure-9/Annexure-C. On the basis of said tax evasion report, the Assessing Authority formed his opinion about escapement assessment/under assessment. Therefore, it cannot be said that the Assessing Authority was acted without jurisdiction warranting interference by the writ Court. With regard to violation of principles of natural justice, he submitted that the assessment record would indicate that during course of proceeding, the Revenue has furnished the reasons for assessment. He further submitted that during course of assessment proceeding, the Assessing Officer afforded sufficient and reasonable opportunity to produce documents and

evidence to support the figures disclosed in the books of account. The petitioner was confronted with the allegation contained in the tax evasion report and was granted adequate and sufficient opportunity to place its evidence. A perusal of the case records would show that on 2.7.2012, Raghunath Panda, the authorized representative of the petitioner, was explained the reasons for reopening of assessment based on information contained in tax evasion report under Annexure-9. The contents of the said report were explained to him in detail. He was allowed to take extracts of the materials. He was shown the sale prices of different rates of CLO and iron fines of Orissa Mining Corporation Ltd., during the years 2008-2009, 2009-2010 and 2010-2011, which were utilized for arriving at a conclusion of under invoicing. He was allowed to go through the calculation sheet prepared by the authorities. Further, Sri Panda was allowed to take extract of calculation sheet, OMC rate, agreement No.13 between OMC Limited and J & S Minerals and Construction Company Ltd., Nellore. He also went through Annexure-9 and accordingly, the petitioner filed its written notes of submission on 16.8.2012, 17.10.2012 and 22.11.2012 under Annexure-10 series. Learned Standing Counsel submitted that the written note of submission filed on 17.10.2012 was an exhaustive one running up to 28 pages. Along with the written submission, a number of documents were filed as Annexures. The said written notes of submission also referred to a number of judicial pronouncements. Thus, according to him, a perusal of the same would show that adequate opportunity was given to the petitioner in the matter. Therefore, the petitioner cannot say that the principles of natural justice have been violated. With regard to contention of the petitioner relating to absence of fresh material/new material to reopen an assessment proceeding, he submitted that the same is not a sine qua non for initiation of proceeding for reassessment of the proceeding under Section-43 of "OVAT Act". According to him, Section-43 of "OVAT Act" covers both the case of escaped assessment and under assessment and there is a distinction between the two. In case of under assessment, there is no scope for estimate because turn over would remain the same, while a low rate has been applied on the earlier occasion, the appropriate rate is only to be applied. But case of escaped assessment stands on a different basis. Though, he had filed two written notes of submission dated 25.8.2016 and 1.11.2016, however, in view of the order passed on 1.11.2016, we will only take into account the last written note of submission filed by the opposite parties on 1.11.2016. It may be noted here that while in Index portion of written submission dated 25.8.2016, the Revenue relied on 10 judgments; in written submission dated 1.11.2016 as per the Index portion, they have relied on only 6 judgments. In the written notes of submission dated 1.11.2016, learned Standing Counsel relied on the judgment of this Court rendered in W.P.(C) No.12119 of 2014 in M/s. Jindal Steel and Power Limited and another -vrs- State of Orissa and on Mideast Integrated Steel Ltd., -vrs- State of Odisha, [2016 (I) ILR-CUT 208], Bhusan Power and Steel Ltd., -vrs- State of Odisha, [2012 (I) ILR-CUT 421], Bharat Petroleum Corporation Ltd., -vrs- Sales Tax Officer, [2012 (II) ILR-CUT 218], Commissioner of Income-tax -vrs- Chhabil Dass Agarwal, [(2014)

1 SCC 603] and State of Odisha -vrs- Durgadutt Moda, [(1973) 32 STC 98 (Ori)]. He also filed a note of submission to the queries raised by this Court on hearing held on 7.2.2017.

Perused the case records. The undisputed facts of this case are as follows:-

10. The State Government executed a mining lease granting lease of iron ore in favour of Sunder Lal Sarda and Mohan Lal Sarda for operation of Thakurani Iron Mines. On 25.2.2004, the lessee filed application before Deputy Director, Mines, Joda in the district of Keonjhar requesting him to accord approval for sale of Lumpy Ore (ROM) to "JSPL", which they would process in their crusher for their own use. This letter dated 25.2.2004 was filed as Annexure-1 to the note of submission by the petitioner to the queries raised by this Court on its hearing dated 7.2.2017. On 4.3.2004, the Deputy Director, Mines, Joda vide Annexure-1 enclosed to the writ application wrote to the Director of Mines intimating the request made by Sunder Lal Sarda and Mohan Lal Sarda in their letter dated 25.2.2004 for according approval for sale of (lumpy ore) ROM to "JSPL". In the self-same letter, it was made clear that "JSPL" has installed iron ore crushing unit within the mining lease area and they requested Sunder Lal Sarda and Mohan Lal Sarda for supply of iron ore (ROM) from their aforesaid mines for processing in their crusher for consumption in their own steel plants and sell of Fines. He also indicated therein that presently "JSPL" received iron ore from the lessee and crushed those to different sizes at there steel plant on job work basis. On 27.3.2004, the Director, Mines wrote back to Deputy Director, Mines, Joda with reference to his letter under Annexure-1 indicating therein that Sunder Lal Sarda and Mohan Lal Sarda be allowed to supply ROM mineral (iron ore) on ex-mines basis within leasehold area to "JSPL" in accordance with the provision of T.P. Regulations and O.M.(P.T.S.) OUA Act, 1989 & 1990 Rules thereunder subject to certain conditions. This letter dated 27.3.2004 was filed by the petitioner on 1.3.2017, along with a memo with copy served on opposite parties after the matter was reserved for judgment on 27.2.2017 after further hearing. In tune with letter dated 27.3.2004, on 5.4.2004 vide Annexure-2 the Deputy Director, Mines, Joda, Keonjhar intimated the lessees about such approval of Director of Mines for supply of ROM (iron ore) on ex-mines basis within the leasehold area to "JSPL" with a number of conditions. One such condition was the lessees have to pay the highest rate of royalty prescribed for lumpy iron ores containing 65% Fe and above for the entire quantity of ROM supplied to "JSPL" for crushing and sizing. On 22.6.2006, Sunder Lal Sarda and Mohan Lal Sarda transferred the mines in favour of the petitioner after the State Government granted permission for such transfer. "JSPL" continued to purchase ROM from the petitioner. On 31.3.2008, the petitioner entered into an agreement with "JSPL" for sale of ROM under Annexure-3. Though, the learned Standing Counsel appearing for the Revenue relying on counter attacked such agreement as ab initio, void, however, we will ignore such argument as no appropriate form has declared the same to be void and further, the impugned order does not say anything about its legality. Here, we should not forget that the Hon'ble Supreme Court in Commissioner of

Police, Bombay -vrs- Gordhandas Bhanji, (AIR 1952 S.C. 16), has made it clear that where a statutory functionary makes an order based on certain ground, its validity must be judged by the reasons mentioned in the order and the same cannot be supplemented by fresh reasons incorporated in the affidavit filed in the Court. The Hon"ble Supreme Court made it clear that "public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanation subsequently given by the officer making the order of what he meant, or of what was in his mind or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself". The same principle was reiterated by the Hon"ble Supreme Court in the case of Mohinder Singh Gill and another -vrs- The Chief Election Commissioner, New Delhi & others (AIR 1978 S.C. 851). Further, in Union of India -vrs- G.T.C. Industries Limited, (AIR 2003 S.C. 1383), it was made clear that it is well settled that a quasi judicial order has to be judged on this basis of reasoning contained therein and not on the basis of pleas put forward by the person seeking to sustain the order in its counter-affidavit or oral argument before the Court. Therefore, we refuse to take cognizance of the arguments of learned Standing Counsel for the Revenue on the illegality of Anneure-3, which has not been discussed by opposite party no.3 in the impugned order under Annexure-11. Further, in tune with the above noted decisions, we will confine our examination to the language of impugned orders under Annexures-7 and 11 and reasoning given therein only and we will not take into account the new points raised by Revenue in its counter or in the written submission. Further, it is not disputed that for the year 2008-09, audit assessment was conducted under Section-42 of "OVAT Act" and the order passed in the same proceeding has been filed as Annexure-6 to the writ application. In Annexure-6 the authorities have accepted that the petitioner is engaged in digging and extraction of iron ore lumps and ROM and such process does not involve any manufacturing activity. With regard to years 2009-2010, 2010-2011, the self assessments made by the petitioner under Section-39 of "OVAT Act" were accepted by the authorities. For the years 2008-2009, 2009-2010 & 2010-2011, the petitioner had filed annual returns in Form-H1 before the authorities of Indian Bureau of Mines disclosing the quantity of ROM excavated and sold during the concerned periods. These documents have been filed as Annexure-4 Series. While such was the position on 29.8.2011 (Annexure-B), the Sales Tax Officer, Investigation Unit, Barbil issued notice to the petitioner for producing several documents for the tax period 1.4.2008 to 31.4.2011. Vide self-same notice, the petitioner was asked to produce documents/registers relating to purchase, production and dispatch of iron ore, sized iron ore and iron ore Fines so also the sale figures of iron ore, sized iron ore and iron ore Fines both in term of quantity and value grade-wise and size-wise. The petitioner was also asked to submit copies of Returns filed for the above mentioned period under "OVAT Act", Orissa Entry Tax Act and Central Sales Tax Act and the audited balance sheets. Though, the averment relating to

Annexure- B has been made at Paragraph-18 of the counter-affidavit filed by the opposite parties, however, in Paragraph-20 of the rejoinder, the petitioner has denied issuance of receipt of the same by it. However, a perusal of LCR shows that Raghunath Panda, Authorized Signatory, on 7.9.2011, produced the document as required under Annexure-B without prejudice. Ultimately, the tax evasion report under Annexure-9 was prepared by Sales Tax Officer, Investigation Unit, Barbil alleging that the petitioner has sold ROM at low price. In coming to such a conclusion the Sales Tax Officer relied on a formula invented by him taking into account actual sale price of ROM, cost involved in converting ROM into CLO and market rate of CLO as he thought that selling of ROM at a low price was an unusual business practice. It may be noted here that in the report under Annexure-9, there exists no reference to any prevailing market price of ROM. However, one thing is clear from the report that it admits sale of ROM though under priced. It is extremely important to note here that in the counter affidavit, the opposite parties at Paragraph-13 have admitted that the price of ROM is not decided by the Indian Bureau of Mines. On the basis of the said report under Annexure-9/Annexure-C, on 17.5.2012, the impugned notice under Annexure-7 was issued under Form VAT 307 for the assessment period 1.4.2008 to 31.3.2011 for reopening the assessment on the ground of escaped assessment and under assessment. On receipt of notice as would be appear from the L.C.R. the petitioner took time on 28.5.2012, 18.6.2012 and on 2.7.2012, the authorized representative of the petitioner filed his Hazira and prayed to inform/communicate the reasons for reopening the completed assessment so as to enable the petitioner to participate in assessment proceeding. On the said date, L.C.R. shows authorized representative was communicated with the reasons for reopening the assessment based on information contained in the tax evasion report under Annexure-9/Annexure-C received from the Assistant Commissioner, Sales Tax, Enforcement Range, Bhubaneswar. The materials sought to be utilized in the assessment was shown to Sri Panda, the authorised representative, who took extract therefrom. Further, a statement was recorded from Sri Panda. The said statement finds place at Page-209 of the L.C.R. and the same is quoted hereunder:

"In response to notice no.2913 dt.17/05/2012 and no.2914 dt.17/05/2012, I, being authorized by M/s Sarda Mines P. Ltd appeared today i.e. 02/07/12 before the Deputy Commissioner of Sales Tax, Barbil Circle, Barbil and filed Hazira. M/s. Sarda Mines Pvt. Ltd. is the lessee of Thakurani Iron Ore Mines, Block B spread over an area of 947.046 hectares. M/s. Sarda Mines Pvt. Ltd sells the entire production of ROM (Rum of Mines) to M/s. Jindal Steel & Power Ltd. It does not sell outside the State nor export iron ore fines.

On my appearance, I sought to know the reasons of reopening of assessment for the period 01/04/2008 to 31/03/2011. The Assessing Authority (Deputy Commissioner of Sales Tax, Barbil Circle, Barbil) explained me the reasons of reopening of assessment based on information contained in a tax evasion report no.58 dt.29/02/2012 submitted by the Asst. Commissioner of Sales Tax,

Enforcement Range, Bhubaneswar. The contents of the report were explained to me in detail. The allegations relate to under invoicing of sale price of ROM during the period 01/04/2008 to 31/03/2011. The basis of the allegation of under invoicing was explained to me. It is alleged in the report that selling of ROM by a mine owner is unusual and any mines owner instead of selling ROM will sale calibrated lump ore (CLO) and the resultant of iron ore fines after processing of ROM so as to achieve the real market value of the ore mined. It is also alleged that the entire production of ROM has been sold at abysmally low price to one single customer. To prove under invoicing the reporting authority has taken resort to the figures submitted by us in Form "H1" (Annual Return) to IBM for the year 2008-09, 09-10 & 10-11, the normal processing charges i.e. Rs.203/- per MT to process ROM and sale price of similar products sold by M/s Orissa Mining Corporation Ltd. The basis on which the processing charges of Rs.203/- has been arrived was also explained to me. I was shown the sale prices of different grades of CLO and iron ore fines of Orissa Mining Corporation Ltd. during the year 2008-09, 09-10 & 10-11 of Barbil sector which has been utilized for arriving at under invoicing. I was allowed to go through the calculation sheets prepared by the reporting authority showing the amount of under invoicing during 2008-09, 09-10 & 10-11. During the year 2008-09, 09-10 & 10-11, the amount of under invoicing has been calculated at Rs.9,74,46,81,384/-, Rs.5,53,78,10,838/- & Rs.4,33,20,45,178/- respectively. I was also allowed to take extract of the documents i.e. calculation sheet, OMC rate, agreement no.13 between OMC Ltd and J & S Minerals & Construction Co. Ltd., Nelore sought to be utilized in the assessment. I also went through the report submitted by the Asst. Commissioner of Sales Tax, Enforcement Range, Bhubaneswar. On the basis of the above information contained in the tax evasion report, I am told that the assessing authority has formed an opinion that the turnover of the dealer M/s Sarda Mines Pvt. Ltd for the period -1/04/2008 to 31/03/2011 has been under assessed for which notice in Form VAT-307 has been served. I was also communicated that the assessment for the year 2008-09 has been completed under Section 42 of the OVAT Act and assessment for the period 01/04/2009 to 31/03/2010 and 01/04/2010 to 31/03/2011 has been completed under Section 39 of the OVAT Act. To rebut the allegations of under invoicing, I may be allowed twenty days time. I shall submit a written note of submission. Considering my prayer, the assessing authority fixed the next date of hearing to dt. 20/07/2012 at 11 A.M.

Recorded to my dictation, Raghunath Panda Read over, explained and 02/07/2012 Admitted to be true and (Authorised Representative) correct. M/s. Sarda Mines (P) Ltd.

Sd/2.7.2012

Deputy Commissioner of Sales Tax,

Barbil Circle, Barbil."

11. The above noted statement shows that the contents of the report under Annexure-9/Annexure-C were explained to the authorized representative of the petitioner in detail. The basis of allegation of under invoicing was also explained to him. The basis on the processing charge of Rs.230/- has been arrived at was also explained to him. He was shown the sale prices of different grades of CLO and iron Fines of Orissa Mining Corporation Ltd. for the years, 2008-2009, 2009-2010, 2010- 2011 of Barbil Sector, which was utilized for arriving at the conclusion of under invoicing. Shri Panda was allowed to go through the calculation sheets prepared by the reporting authority showing the amount under invoicing. Further, he was allowed to take extract of the documents, calculation sheet, OMC rate agreement No.13 between OMC Limited and J & S Mineral Construction Company, Nellore. He also went through Annexure-9/Annexure-C. A perusal of LCR reveals that on 2.7.2012, the authorised representative never asked for copy of Tax Evasion Report and other materials. On 16.8.2012, the authorized representative on behalf of the petitioner filed a memo of appearance along with documents and made certain submissions as would be clear from Annexure-10 series. On that day, the statement of Surendra Panda, the Authorized Officer of the petitioner was recorded. On that day also there was no prayer from the side of the petitioner for supply of Tax Evasion Report. Thereafter, the matter was adjourned to 30.8.2012. On 30.8.2012, the matter was adjourned to 18.9.2012 and again the matter was adjourned on 18.9.2012 to 29.9.2012. On 29.9.2012 the matter was adjourned to 17.10.2012 when the petitioner filed exhaustive and detailed written notes of submission with a number of Annexures. However, in the said written note of submission, the petitioner has made it clear it reserved its right to challenge the notice under Annexure-7 at appropriate time before the appropriate forum. The submission filed on 17.10.2012 also contained reference to various judgments covering various points raised by the petitioner and to the tax evasion report. However, in the said written submission in a round about way the petitioner indicated that in absence of full fledged "text of tax evasion report", the submission made are subject to alteration, modification on being provided with copy of the "tax evasion report". It is important to note here that the "text of tax evasion report" under Annexure-9 consisted of only 5 pages and as indicated earlier, Raghunath Panda, the Authorised Representative has gone through the same on 2.7.2012. On 22.11.2012, the petitioner filed its submission with regard to certain queries under Annexure-10 Series and requested to provide "sketchy tax evasion report" confronted to dealer. In such background, without supplying the sketchy tax evasion report, the impugned order under Annexure-11 was passed on 26.11.2012.

12. Since the opposite parties have raised issue of maintainability of the writ application on the ground of availability of the provision of this appeal, we will address the said issue first. As per well settled principles of law relating to maintainability of writ application in the face of availability of alternative remedy as has been made clear in Whirlpool Corporation -vrs- Registrar of Trade Marks,

Mumbai and others, (supra), The State of H.P. and others v. Gujarat Ambuja Cement Ltd. (supra) and The State of Uttar Pradesh -vrs- Mohammad Nooh, (supra), a writ application is maintainable when the impugned order(s) has/have been passed without jurisdiction or in violation of principles of natural justice. Therefore, we have to examine whether in the present case there has been any violation of principles of natural justice or whether the impugned orders have been passed without jurisdiction. First, we will examine the contentions relation to violation of principles of natural justice. The tax evasion report under Annexure-9/Annexure-C runs only to 5 pages. The authorised representative of the petitioner, Mr. Raghunath Panda went through the same on 2.7.2012 and the contents of the report were also explained to him in detail as per his own statement quoted earlier. The basis of allegation of under invoicing was explained to him. In his statement he has stated that allegation in the report pertained to unusual practice of selling of ROM at abysmally low price. On that day, he never asked for copy of Tax Evasion Report. Even on 16.8.2012, the petitioner never asked for a copy of Tax Evasion Report. The petitioner only asked for tax evasion report on 17.10.2012 in a round about way while filing an exhaustive and detailed response. There the petitioner has admitted that it has been permitted to note down the contents (gist) of the report. It may once again be indicated that the Tax Evasion Report runs only to 5 pages and the written submission dated 17.10.2012 contains several attacks on the Tax Evasion Report and how the said report has been issued without jurisdiction. Only on 22.11.2012 the petitioner asked for the "sketchy" tax evasion report after filing exhaustive report on 17.10.2012. In such background, we cannot come to a finding that there has been violation of principles of natural justice. In such background, merely for non-supply of tax evasion report, the petitioner cannot be said to have suffered any prejudice. For all these reasons, we refuse to accept the submission of Mr. Gopal Jain, learned Sr. Advocate that there has occurred violation of principles of natural justice in the present case.

13. With regard to the next submission of Mr. Gopal Jain, learned Senior Advocate to the effect that since in the present case the entire reassessment proceeding has been initiated on account of mere change of opinion and thus the same is clearly without jurisdiction; we are inclined to accept the same in the facts and circumstances of the case. As has been laid down in Binani Industries Ltd., Kerala (supra), Kelvinator of India Limited (supra), Indian and Eastern Society, New Delhi (supra) and Naba Bharat Ferro Alloys Ltd., (supra), reopening of assessment by mere change of opinion is entirely impermissible. Further, an error discovered by the Assessing Authority on a reconsideration of same material does not justify reassessment in absence of new material/information.

14. In the present case, it is not disputed that the notice under Annexure-7 was issued on the basis of information contained in tax evasion report under Annexure-9. The said tax evasion report does not dispute sale of ROM to "JSPL". It also does not say that the petitioner has/had suppressed the quantum of sale/turnover or has received any undisclosed amount. It has simply proceeded on

the basis of an assumption that business module of selling ROM at a low price instead of selling CLO is an unusual thing as ordinarily mine owner sells CLO after processing of ROM spending a miniscule amount in order to achieve real market value. In this context, law is well settled that the Taxing Authorities do not have the power to dictate as to what business module or method should be adopted by a businessman. It is upto him to manage his business affair according to his wisdom as has been rightly held by Allahabad High Court in Hemraj Udyog (supra) and Saurashtra Chemicals (supra). Secondly, the Assistant Commissioner, Sales Tax, Enforcement Wing, Bhubaneswar while preparing the tax evasion report has been swayed by assumed low price of sale of ROM without indicating anywhere in the tax evasion report as to how the said price is low. It also does not refer to prevalent market price of the relevant period. In this context, it is important to note here that the opposite parties in their counter affidavit at Paragraph-13 have admitted that the price of ROM is not decided by the Indian Bureau of Mines. In such background, the assumption that ROM is being sold at abysmally low price has no legs to stand. Moreover, there is nothing to show that there is any legal bar for selling of ROM. In such background, the tax evasion report, which is based on conjectures, surmises and on certain artificial and presumptive parameters by taking into account a newly invented artificial formula, while the factual background remains the same, cannot constitute new/fresh information under Section-43(1) of "OVAT Act" for initiating a proceeding for reassessment by taking into account the price of an altogether different commercial commodity i.e. CLO. In this context, we refuse to accept the contention of Revenue that no new/fresh material is required to initiate a reassessment proceeding under Section-43 of the "OVAT Act". If such a contention is accepted then there would be no finality to assessment proceeding and every assessment order may remain at an unsettled stage and assessee will remain at the mercy of tax authorities, who may abuse such power at any time they like. It may further be noted here that the sale of ROM has been made in tune with the permission granted under Annexure-2 by the Director of Mines at the highest rate of royalty. The Assistant Commissioner Sales Tax, Enforcement Range, Bhubaneswar nowhere says/disputes quantum of turnover for the period 2008 to 2011. Only on the basis of his opinion that the sale of ROM is being done at abysmally low price without any evidence to back such claim and such sale of ROM instead of selling of CLO after converting the ROM being an unusual business practice and taking into account the price of CLO, he has invented an artificial formula to arrive at the conclusion of under invoicing under Annexure-9. Since the Annexure-9 is a product of change of opinion vis-?-vis the same factual background, the proceeding initiated under Annexure-7 on the said basis becomes without jurisdiction. However, with regard to the contention of Mr. Jain, that the entire proceeding is vitiated as notice under Annexure-7 gives no reason for initiation of reassessment proceeding we will say that it is well settled that reasons for reassessment is not required to be given in the notice. In this context, we rely on a decision of this Court in Suburban Industries Kalinga Pvt. Ltd., and another -vrs- Sales Tax Officer, Bhubaneswar and another (1993) 90

STC (Orissa) 280). Though the petitioner has participated in the proceeding pursuant to Annexure-7, however while filing its voluminous written submission on 17.10.2012 it has made it clear that it is participating without prejudice to its right to challenge the notice. In such background, we have no hesitation in holding that the notice under Annexure-7 was itself issued without jurisdiction and is liable to be quashed.

15. Though quashing of Annexure-7 would result in automatic quashing of the entire proceeding pursuant to such notice, however for the sake of completeness, we will discuss how the end result under Annexure-11 is even otherwise illegal. We make it clear that we will scan the reassessment order under Annexure-11 keeping in mind the law laid down by the Hon'ble Supreme Court in the decision of Gobardhan Das Bhanji (*supra*). In passing the impugned reassessment order under Annexure-11 while accepting the reasoning given in the tax evasion report under Annexure-9/Annexure-C based upon so-called unusual business practice of sale of ROM at low price, the opposite party No.3 has travelled beyond the same by coming to a conclusion that the petitioner is selling CLO and not ROM as the output of CLO and fines after processing equals that of ROM, for a given quantity. Thus, though the material facts remain same, the opposite party No.3 is of the opinion that as input and output ratio is 100%, the petitioner is selling CLO. Such a conclusion runs contrary to Tax Evasion Report under Annexure- 9 which does not dispute sale of ROM but at a lesser price resulting in under invoicing. In any case, merely because the input quantum of ROM equals the output quantum of CLO and Fines, it cannot be said that the dealer has been selling CLO not ROM. Had that been the case than after processing, there would not have been any Fines. The very presence of Fines containing impurities show JSPL has only processed ROM. Further, such opinion of opposite party No.3 is not backed by any scientific study that after processing of a given quantity of ROM it cannot produce same quantity of CLO and Fines. The opposite party No.3 is not an expert to give opinion on this. Thus, in absence of authentic scientific study that input and output cannot be same, the opinion of opposite party no.3 was that what was fed during processing was CLO not ROM has no legs to stand. In fact opposite party no.3 is no expert in these matters. Either he should have relied on some expert's opinion on the subject or on any Notification of Indian Bureau of Mines. In absence of this, to assume that since output and input is same, the material fed in the processing plant was CLO and not ROM is fallacious. Further, the fallacy of such an opinion can also be clear from the fact that the total quantity of ROM does not correspond to total quantity of CLO produced, which is much less. Rather, this shows ROM was really processed by "JSPL". Further, under Annexure-6, the Revenue authorities themselves were satisfied that the petitioner is only engaged in digging/extracting ROM and not in any manufacturing activity. In any case neither the Mining Authorities of the State Government nor the Authorities of Indian Bureau of Mines have ever objected to such figures. Therefore, such assumption by opposite party no.3 is also arbitrary and without jurisdiction. It again clearly reflects a change of opinion on the basis

of certain presumptions, which are not backed by scientific study. Like the report under Annexure-9/Annexure-C, there does not exist any dispute relating to quantum of turnover/quantity of sell of ROM. The opposite party No.3 has also referred to the conduct, which is required of a prudent business man. As indicated earlier the Taxing Authorities lack jurisdiction to suggest business module. He also refers to abysmally low price paid by the petitioner while selling ROM without indicating how such a conclusion has been arrived at. The opposite party No.3 also refers to attempt by Assistant Commissioner, Sales Tax, Enforcement Range, Bhubaneswar under Annexure-9 to find "factual anomaly". However a perusal of Annexure-9 nowhere reflects the same. Even there exists no discussion on factual anomalies in the impugned order under Annexure-11. Neither in the Tax Evasion Report nor under Annexure-11 there exists any allegation anywhere about suppressing of figures of turnover of sales of ROM. Rather, relying on certain presumptive parameters and an artificial formula which takes in to account price of another commodity i.e. CLO, the reassessment proceeding has been initiated and concluded. Thus, such a reassessment proceeding is clearly based on change of opinion. Further, though opposite party No.3 treats the report under Annexure-9 as a new material containing a new formula, however as discussed earlier, it contains no new background facts relating to quantum of turnover for the relevant period. As indicated earlier, it only uses new and presumptive artificial parameters, which only reflect a change of opinion. A new artificial formula under the facts and circumstances as invented by the authorities cannot form a new material to open the assessment proceeding when factually there exists no evidence relating to under assessment/escaped assessment. Most importantly, so far as opposite party No.3 is concerned, there exists no legal evidence/a scrap of paper to show that the petitioner has actually sold CLO and not ROM for the years 2008-2011. To our mind power under Section-43 of the "OVAT Act" cannot be exercised for reassessment unless facts relating to suppression/escapement are discovered. It cannot be exercised by inventing a new formula.

16. Further, there is nothing on record to show that the petitioner has received an undisclosed sum beyond the records, which were suppressed during self-assessment/audit assessment proceeding or has concealed the turnover. Here facts clearly bear out that the entire process of reassessment has been occasioned on account of change of opinion as there exists no fresh material/facts/information for reassessment under Section-43 of the OVAT Act. In such background, we are satisfied that since change of opinion is the basis for issuance of notice under Annexure-7 and for passing the impugned order under Annexure-11, thus, both the impugned orders have been issued without jurisdiction and thus the writ application is maintainable.

Now to the judgments relied upon by Revenue.

With regard to M/s.Mideast Integrated Steel Ltd. and another (supra), the said judgment is factually distinguishable. There, the issue related to payment/

otherwise of royalty and it had nothing to do with re-opening of assessment under Section-43 of the "OVAT Act" and parameters for such reopening. Even otherwise, in the present case, the petitioner has paid royalty at the highest rate even on dispatch of ROM.

Secondly, though the case *M/s.Mideast Integrated Steel Ltd. and another (supra)* refers to report of Controller of Auditor General with regard to 100% output of CLO and Fines, vis-?-vis ROM, input but it nowhere says that under such circumstances entire ROM is to be treated as CLO. Further, there exists no scientific data to show that 100% output of CLO and Fines from a given quality of ROM is not possible. In the case of *M/s.Mideast Integrated Steel Ltd. and another (supra)*, this Court was concerned with the issue that once converted to CLO and fines, the quantum of royalty received by the State became less. Here, the said issue does not arise, as the petitioner is paying royalty at the highest rate. So there is no question of the State loosing on royalty. There the approved mining scheme clearly stipulated that no mineral beneficiation was permissible within the leased area, which was violated by the petitioner there.

With regard to *M/s. Bhushan Power and Steel Ltd. (supra)* cited by the Revenue, the said case is clearly distinguishable on facts. There, the Vigilance report was utilised in audit assessment under CST (O) Rules, 1957 illegally. This Court held that audit assessment has to be completed only on the basis of materials available in audit visit report and that audit assessment and assessment of escaped turnover cover separate and distinct field. With regard to *M/s. Bharat Petroleum Corporation Ltd. (supra)*, there it has been made clear that reassessment proceeding for the self-same year cannot be said to be without jurisdiction on the ground of change of opinion unless and until it is established that turn over brought to the tax in the reassessment was subject-matter of earlier assessment and no tax was levied by the assessing officer by taking a particular view. In other words, it makes it clear that if the re-assessment is sought to be done on same turn over, which was subject-matter of earlier assessment and no tax was levied by the assessing officer by taking a particular view, then re-assessment proceeding cannot be initiated as it would be a re-assessment only on the ground of change of opinion. Thus, it would become without jurisdiction. In the present case, as indicated earlier, here there has been no suppression of turn over and no higher turn over was discovered by the STO (Investigation) or by opp. party No.3. In such background, the attempt to re-open the assessment proceeding is clearly by taking another view of the matter, which is legally impermissible. In the case of *M/s. Bharat Petroleum* the re-assessment was done as on verification of records, it was found that the alleged turn overs were not disclosed by the assessee. Therefore, the said case is factually distinguishable.

With regard to the case of *Commissioner of Income Tax and others v. Chhabil Dass Agarwal (supra)*. In that case returns were not furnished for the relevant years 1995-96 and 1996-97. Secondly, the facts do not show that in that case the re-assessment proceeding was challenged as one being without jurisdiction

on the ground of change of opinion. Unlike the present case, in that case as indicated earlier, there was concealment of turn over atleast for the years 1995-96 and 1996-97, but here as indicated earlier, there is no suppression of turn over and no finding to that effect by any of the authorities. Therefore, the ratio said case with regard to availing alternative remedy has no application to the present case.

With regard to the case of State of Orissa v. Durgadutta Moda (supra), cited by the Revenue it can also be said that the same is factually distinguishable. In the present case, the allegation of underassessment is based on mere change of opinion based on three artificial parameters like abysmal low price, peculiar business module being followed by the petitioner and a suspicion relating to 100% output of input. While the parameter of abysmally low price is not backed by fact, suspicion relating to impossibility of 100% output is not backed by scientific study. In the case of State of Orissa v. Durgadutta Moda (supra), there was suppression of turn over but in the present case, there was no such suppression. In the background of such suppression, this Court came to hold that the Tribunal was not correct in law in holding that it was the duty of the department to fix actual amount of escapement and that the Assessing Officer can make best judgment assessment. But while making best judgment, assessment supporting estimate material must be found and indicated. Further interestingly in the present case, the impugned order under Annexure-11 has travelled beyond the tax evasion report under Annexure-9/Annexure-C, which never disputed sale of ROM. In other words, while tax evasion report admits sale of ROM, the impugned order under Annexure-11 reaches a conclusion that CLO was being sold instead of ROM.

Thus, the judgment cited by the Revenue are of no help to it. In such background, when the notice under Annexure-7 and the impugned orders under Annexure-11 including the demand are products of change of opinion, thus, it is clear that these have been issued without jurisdiction. Accordingly, we quash Annexures-7 and 11 including the demand notice.

The writ application is accordingly allowed. No costs.