
(2009) 03 OHC CK 0001
In the Orissa High Court
Case No : Tax Revision No. 162 of 2001

State of Orissa

APPELLANT

Vs

Steel Authority of India Ltd.

RESPONDENT

Date of Decision : 19-03-2009

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 2(b)(ii)

Citation : (2011) 44 VST 50

Hon'ble Judges : B.S. Chauhan, C.J; B.N. Mahapatra, J

Bench : Division Bench

Advocate : Radheshyam Sharma, Rakesh Sharma, S. Singh Samant, B. Panda, D.K. Das, Bijay Panda and B.B. Sahu, for the Respondent

Judgement

B.N. Mahapatra, J.—The following question of law has been referred by the Orissa Sales Tax Tribunal for opinion of this court: Whether, in the facts and circumstances of the case, Tribunal is correct to apply the test of business to the transaction falling in clause (ii) of section 2(b) of the Orissa Sales Tax Act, 1947?

Bereft of unnecessary details, the facts and circumstances giving rise to the present petition are that opposite party-M/s. Steel Authority of India Ltd., Rourkela, is a Government undertaking and manufactures iron, steel products, chemical fertilizers, etc. It carries on business in these products inside and outside the State of Orissa. It is a registered dealer both under the Orissa Sales Tax Act, 1947 (hereinafter referred to as "the OST Act") and Central Sales Tax Act, 1956 (hereinafter referred to as "the CST Act"). While scrutinizing the books of account for the year 1980-81 produced before the assessing officer in response to the notice issued u/s 12(4) of the OST Act, it was noticed that the opposite party-company had sold old and unserviceable machineries, spare parts and other unserviceable items of machines and tax had not been paid on such sale at the appropriate rate. Tax had been collected at the rate of four percent and seven percent on certain goods, which were taxable at the rate of 10 percent. The Sales Tax Officer, therefore, re-allocated the turnover on this

account under different tax rate groups and extra tax on such re-allocation was worked out at Rs. 29,958.72. The matter was carried in first appeal, but the first appellate authority sustained the view taken by the assessing officer. The matter was thereafter carried to the Orissa Sales Tax Tribunal (for short, "the Tribunal") in second appeal. The learned Tribunal relying on the decision in Steel Authority of India Limited Vs. State of Orissa and Others, held that levy of tax on sale of scrap materials and unserviceable materials was not tenable, as there was no material on record to substantiate the continuance in trading activities. Hence, this tax revision.

2. Mr. S.P. Dalai, learned counsel appearing on behalf of the petitioner vehemently argued that the learned Tribunal is not correct to apply the test of business to the transaction falling in clause (ii) of section 2(b) of the OST Act, which defines "business" as any transaction in connection with or incidental or ancillary to the primary trade, commerce, manufacture, adventure or concern. It is immaterial whether the sale of scrap and unserviceable materials is periodical or occasional or frequent and any profit-motive is there or not. However, if such sale is in connection with or incidental or ancillary to main business, the same shall be exigible to tax. "Dealer" includes "casual dealer" as defined in section 2(bb) of the OST Act. The opposite-party has paid tax on such sales though at a lower rate. In support of his contentions, he relied on the decision of the honourable Supreme Court in State of Orissa Vs. M/s. Orissa Road Transport Co. Ltd. and Others,

3. Mr. B. Panda, learned counsel appearing on behalf of the opposite-party strenuously argued that the main business of the opposite party is to manufacture and sell iron, steel products and chemical fertilizers. Occasionally, it sells scrap materials and old unserviceable parts. There is no continuity and frequency of such transaction. There is also no profit-making motive in the said transaction. In absence of all these ingredients in the transaction under consideration, the sale cannot be treated as sale in course of business and tax under the OST Act cannot be levied on such transaction. Tax on such sale was paid under protest. Mr. Panda in support of his contention, relied upon the judgments of this court in Steel Authority of India Limited Vs. State of Orissa and Others,) and Steel Authority of India Ltd. v. State of Orissa [1999] 116 STC 21 (Orissa).

4. To resolve the issue it is necessary to know how the terms "business", "casual dealer" and "dealer" have been defined under the OST Act, relevant portions of which are quoted hereinbelow:

2(b) "business" includes-

(i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such

trade, commerce, manufacture, adventure or concern; and

(ii) any transaction in connection with, or incidental or ancillary to such trade, commerce, manufacture, adventure or concern.

(bb) "casual dealer" means a person, who has, whether as principal, agent or in any other capacity, occasional transactions of a business nature involving purchasing, selling supplying or distributing goods in the State whether for commission, remuneration or otherwise.

(c) "dealer" means any person who carries on the business of purchasing, selling, supplying or distributing goods (including goods used or involved in the execution of works contract, whether as goods or in some other form), directly or otherwise, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration and includes,--

....

(iv) a casual dealer;

....

5. The definition "business" is inclusive one. Only trading, commercial or manufacturing activities or any such adventure or concern would come within the definition of "business". Thus, a person in order to be a businessman should be a trader or a person indulging in commerce or manufacture activities. Transactions, which are incidental or ancillary to the activity of business, are also coming under the term "business". In view of the provisions contained in section 2(b)(ii) of the OST Act any transaction, which is incidental or ancillary to the activities of main business also attracts tax liability. The word "incidental" means something having a minor role in relation to a more important thing accompanied, committant, occasionally, casual and something that incidentally happens or exists in connection with something else that is more important. The word "ancillary" means sub-serving, ancillary, supplemental, subsidiary, supporting. The words "in connection with" or "incidental" or "ancillary" appearing in section 2(b)(ii) have widened the scope of taxation and the incidental sale of certain commodities are treated as amounting to "business". A casual dealer carries on occasional business. There need not be plurality, frequency, continuity and regularity of the transactions of sale or purchase to treat a person as casual dealer. It is enough that a particular person enters into transaction of business nature. The word "dealer" means any person who carries on business of purchase or sale, supply or distribution of goods including the goods used or involved in execution of works contract directly or otherwise whether for cash or for deferred payment or remuneration or commission or for other valuable consideration. It is enough that a particular person enters into transaction of business nature. "Dealer" includes "casual dealer".

6. The question that arises for consideration in this case is whether the opposite party, who is carrying on business in manufacture and sale of iron, steel products

and chemical fertilizers, etc., in its regular course of business when it sells scrap materials and old unserviceable materials occasionally is liable to pay tax on such sale under the OST Act and whether the Tribunal is justified in holding that in absence of continuous trading activities of those materials the levy of tax is not sustainable.

7. The words "in connection with" occurring in the definition of "business" fell for consideration in State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, . In that case, sales fell into two periods. The oil company's sales during April 1, 1964 to August 31, 1964 and those during September 1, 1964 to March 31, 1965 were in question. The amendment which made profit-motive irrelevant and included sales made "in connection with" main business in the definition of "business" came into force with effect from September 1, 1964 in Madras State. In respect of the pre-amendment period, the honourable apex court held that the sale of miscellaneous, old and discarded items could not be treated as part of the activities or carrying on business even if the sales were frequent and their volume was large. But in respect of the period after September 1, 1964 it was held that the addition of the words in section 2(d)(ii) of transaction in connection with or incidental or ancillary to such trade, commerce, manufacture, adventure or concern and the exclusion of "profit-motive" made the definition of "business" wider. It was, therefore, held that the scrap that was sold after August 31, 1964 was "connected with" the business of the company and was liable to sales tax.

8. The honourable Supreme Court in Commissioner of Sales Tax Vs. Sai Publication Fund, held that inclusion of incidental or ancillary activity in the definition of "business" pre-supposes the existence of trade or commerce, etc.

9. It was further held that the question of profit-motive or no profit-motive would be relevant only where person carries on trade, commerce, manufacture or adventure in the nature of trade, commerce, etc.

10. In The District Controller of Stores, Northern Railway, Jodhpur Vs. The Assistant Commercial Taxation Officer and Another, the honourable Supreme Court held that sale of unserviceable stores and scrap by Northern Railway was exigible to sales tax.

11. The honourable Supreme Court in Hindu v. State of Tamil Nadu [1987] 67 STC 477 (SC), affirmed the decision of the Madras High Court, wherein it was held that the turnover of the appellant relating to sale of stock of unused glazed newsprint as well as old newspapers, print waste and cut waste was liable to tax under the Tamil Nadu General Sales Tax Act, 1959.

12. The honourable Andhra Pradesh High Court in State of Andhra Pradesh v. Sri Bhramaramba Mallikarjuna Swamy Devasthanam, Srisailam [1989] 73 STC 321 (AP), held that the main activity of the Devasthanam was neither commercial nor trading in nature, and the incidental activity of running a canteen for the pilgrims, although of a business nature, was for the supply of foodstuffs to

visiting pilgrims at a reasonable prices, which was functionally integral to the main activity. The sales of food in the canteen were therefore not liable to tax. Coming to the second activity pertaining to disposal or sale of unserviceable motor parts disposed of as scrap, the sale of human hair offered by pilgrims to the temple in fulfilment of vow as an activity not commercial and no tax was therefore is exigible on it as the main activity of the Devasthanam was neither commercial nor trading in nature.

13. The honourable apex court in *State of Orissa Vs. M/s. Orissa Road Transport Co. Ltd. and Others*, held (i) that the respondent, as a prudent organization, in the course of the carrying on of its business sold some obsolete parts, spare parts, etc., which were used or intended for use in its business, when they were not required by it. Such sales were occasional sales of a business nature which would make the respondent a "casual dealer" within the meaning of the definition in section 2(bb) of the Act. The respondent was a "dealer" carrying on the business of selling spare parts, etc., and thereby became liable to pay sales tax on the sale of such items; and (ii) that, though the attention of the High Court was not drawn to section 2(bb), on the facts as found by the Tribunal, it was evident that the provisions of section 2(bb) were attracted. The fact that the High Court had ignored a relevant statutory provision could not be a ground for the respondent to contend that the Supreme Court should not also refer to that provision of the Act.

14. The apex court in *State of Tamil Nadu and Another Vs. Board of Trustee of the Port of Madras*, held as follows (page 539 in 114 STC):

We agree with the above observations subject to the following clarification or modification. If the main activities are "business" then the sales in connection with or incidental or ancillary thereto need not have been intended as a business or commercial activity. Their mere connection with or being incidental or ancillary to something else which was "business" was sufficient to include such sales in the main business. The second part of the last extract starting with the words "but the converse is not true", is to be modified to mean that if the main activity falling under sub-clause (i) did not amount to business, normally these sales made in connection with or were incidental or ancillary to the main activity would not be "business" but there could still be an exception where the sales so connected or incidental or ancillary to the main "non-business" activity were proved to have been made with an independent intention to do business and the burden of proof to prove the exception would fall on the Revenue....

15. In the light of the above legal propositions, the present case is to be examined.

16. In the present case, manufacturing and selling of iron, steel products, chemical fertilizers, etc., are the main business activities of the petitioner. It is a registered dealer both under the OST and CST Acts and it regularly pays tax on sale of these goods. It is an ongoing big business concern and sporadic/

occasional sale of scrap materials and old unserviceable materials is obvious. It cannot be said that such transaction is not in connection with, or incidental or ancillary to the main business in terms of section 2(b)(ii) of the OST Act. Therefore, the sale of scrap materials and old unserviceable materials is liable to tax.

17. This court in Steel Authority of India Limited Vs. State of Orissa and Others, following its earlier decision in State of Orissa Vs. Orissa Road Transport Company Ltd., , held that sales by the dealer of unserviceable materials such as empty drums, scrap, waste material, etc., do not constitute the business of the dealer (Steel Authority of India) and are therefore not includible in the turnover of the dealer for the purpose of assessment to sales tax.

18. Again this court in Steel Authority of India Ltd. v. State of Orissa [1999] 116 STC 21 (Orissa) following the decision of this court in State of Orissa Vs. Orissa Road Transport Company Ltd., and Steel Authority of India Limited Vs. State of Orissa and Others, held that sales of scrap and unserviceable materials do not constitute business of the dealer and therefore, are not includible in the turnover of the dealer for the purpose of assessment to sales tax.

19. Since the case of State of Orissa Vs. Orissa Road Transport Company Ltd., has been reversed in State of Orissa Vs. M/s. Orissa Road Transport Co. Ltd. and Others, both the decisions of this court in Steel Authority of India Limited Vs. State of Orissa and Others,) and in Steel Authority of India Ltd. v. State of Orissa [1999] 116 STC 21 (Orissa) are of no help to the petitioner.

20. In view of the above, we answer the question in negative, i.e., in favour of the petitioner-Revenue and against the dealer. The tax revision is accordingly disposed of.

B.S. Chauhan, C.J.

I agree.