A.F.R.

HIGH COURT OF ORISSA: CUTTACK

W.P.(C) No.25036 of 2011

In the matter of an application under Articles 226 & 227 of the Constitution of India.

M/s. Bhusan Power & Steel Limited,
A company registered under the
Companies Act,1956, Registered Office at 4th Floor,
Tolstoy House, Tolstoy Marg,
Connaught Place, New Delhi,
Presently At –Village Thelkoloi,P.O. Lapanga
Rengali, Dist: Sambalpur, Orissa,
represented through its Vice President
Sri Prabhat Kumar Mishra. ..... Petitioner

-Vs.-

State of Orissa and another. ..... Opp. parties

For Petitioner : M/s. Sanjit Mohanty, Sr.Adv.
Satyajit Mohanty & Md. Shafique.

For Opp. Parties : Mr.R.K.Mohapatra
Govt. Advocate (For O.P. No.1)

Mr. R.P. Kar, S.C.
(Commercial Tax Deptt.)

P R E S E N T:

THE HON'BLE THE CHIEF JUSTICE V. GOPALA GOWDA
AND
THE HON'BLE MR. JUSTICE B. N. MAHAPATRA

Date of Judgment: 19.10.2012

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer to quash the order dated 30.7.2011 passed under Annexure-1, rectified order dated 15.9.2011 (Annexure-6) and the order dated 30.9.2011 (Annexure-8)

passed by opposite party no.2-Deputy Commissioner of Commercial Taxes (LTU) , Sambalpur Range, Sambalpur under Section 9C of the Orissa Entry Tax Act, 1999 (for short, "the Act, 1999") for the period 1.7.2006 to 31.3.2009. Annexure-1 is the audit assessment order by which tax and penalty to the tune of Rs.39,22,01,484.00 has been raised. Annexure-6 is an order of rectification of mistake passed under Section 20 of the Act, 1999 making some rectification of mistakes occurred in the audit assessment order passed on 30.7.2011. By order under Annexure-8 , opposite party no.2 has rejected the petitioner's application for rectification of the audit assessment order dated 30.7.2011.

2. Petitioner's case in a nutshell is that it is a public limited Company incorporated under the provisions of Companies Act, 1956 having its Registered Office at 4th Floor, Tolstoy House, Tolstoy Marg, Connaught Place, New Delhi and plants at Chandigarh in the State of Punjab and at Kolkata in the State of West Bengal and Branches in all over India. The petitioner has set up an Integrated Steel Plant at village-Thelkoloi, Rengali in the district of Sambalpur, Odisha. The petitioner-Company is engaged in manufacturing and selling of sponge iron, steel billets and HR Coil. For manufacturing sponge iron, steel billets and HR Coil, the petitioner purchases various raw materials including iron ore, Dolomite, pig iron, sponge iron, quartz , coke breeze, coking coal etc. The said raw materials are procured from the State of Orissa and outside the State of Orissa. The petitioner paid taxes on entry of those materials into

the local area as required under Section 3 of the Act, 1999. Since the materials are used as raw materials, the petitioner paid entry tax at the concessional rate of 50 per centum of the scheduled rate. Opposite party no.2 vide order dated 30.7.2011 passed under Annexure-1 has rejected petitioner's claim of concessional levy on the premise that the petitioner after using the above raw materials in manufacturing of sponge iron, billets and HR Coil has transferred the finished products so manufactured to its branches out side the State of Orissa which is treated to be violation of rule 3(4) read with Form E-15. Opposite party no.2 also further relies upon Section 26 of the Act, 1999 read with Rule 19 of the Orissa Entry Tax Rules, 1999(for short, "the Rules, 1999") to deny the petitioner's benefits of the concessional levy of tax. The other reason given by opposite party no.2 to deny the claim of concessional levy of tax in terms of Rule 3(4) is that the coal consumption in the captive power plant of the petitioner for production of electricity cannot be treated as raw material for production of sponge iron as the end product, i.e., electricity produced out of coal consumption is non-scheduled goods. In the impugned order of assessment opposite party no.2 has also levied tax on turnover of Rs.1130,22,17,978.00 @ 2% ignoring the fact that out of the entire turnover a part of the turnover is liable to be taxed at 0.5%, 1% and 2%. The opposite party No.2 in the impugned order also levied tax on return quantity of pig iron and steel billets received from Visakhapatnum Branch despite the fact that the subsequent sales, if any, have been sold within

the State of Odisha and the goods suffered from tax. Similarly, opposite party no.2 has also levied tax on returned finished goods received from other Branches due to certain defects, despite the fact that subsequent sales, if any, have been sold within the State of Orissa have also suffered tax . The petitioner's request to make rectification of the impugned order passed under Annexure-1 has been rejected by opposite party no.2 under Annexure-2 without any valid reason. Hence, the present writ petition.

3. Mr. S. Mohanty, leaned Senior Advocate appearing for the petitioner submitted that the impugned orders passed by opposite party no.2 under Section 9C of the Act, 1999 are arbitrary, illegal and bad for want of jurisdiction thereby offending Articles 14, 19(1)(g) and 265 of the Constitution of India. The impugned audit assessment order dated 30.7.2011 denying the benefit of concessional levy under Rule 3(4) on the ground that the petitioner had transferred the manufactured goods to the Branches outside the State is wholly without jurisdiction. The condition stipulated under Rule 3(4) being satisfied and the said rule being not in any way contemplated or stipulated the manner in which the goods used or disposed of, denial of benefit to the petitioner under Rule 3(4) is illegal. Form E-15 requires a declaration that the goods purchased under the said declaration shall be used for manufacture of finished products. The declaration does not contemplate nor stipulate the manner in which the goods so manufactured needs to be used or disposed of. Opposite party no.2 has no power to import any condition which is non-existent under

Rule 3(4) which amounts to legislation and is not permissible under the law. Opposite party no.2 is fully unjustified to deny concessional rate of tax to the petitioner placing reliance on Section 26 of the Act, 1999 and Rule 19 of the Rules, 1999 as Section 26 deals with the case where the manufacturer sells his products under Section 3 of the Act, 1999 and not with the case of purchase of raw materials by the manufacturer. Opposite party no.2 is not justified to reject the petitioner's claim of concessional levy in terms of Rule 3(4) on the ground that consumption of coal in the captive power plant of the petitioner for production of electricity cannot be treated as raw material for production of the sponge iron and that electricity produced out of coal consumption is non-scheduled goods. The coal purchased by the petitioner is used in the manufacture of sponge iron as well as generation of power for captive use/sale. Assuming that the scheduled goods i.e. coal purchased by the petitioner is only used in the manufacture of electricity, it satisfies the above requirement for availing concession since Rule 3(4) does not mandate that the final product manufactured ought to be enumerated in the schedule . Coal is required to manufacture /generate electricity which, in turn, is essential to run the plant to manufacture sponge iron. Electricity generation also forms part of manufacturing activity. The opposite party no.2 is wholly unjustified to levy entry tax on return of goods to the petitioner's plant after cancellation of the export order inasmuch the sale of the same, if any, has suffered tax. Similarly, opposite party no.2 is also not justified to levy entry tax on

return of HR coal to the petitioner's plant, the same being found defective inasmuch the sale, if any has already suffered tax. Concluding his argument, Mr. Mohanty, learned Senior Advocate prayed for quashing of the impugned orders.

4. Per contra, Mr. R.P. Kar, learned Standing Counsel appearing on behalf of the Revenue vehemently argued that in view of the proviso to Section 26, the petitioner is not entitled to avail concessional rate of tax in terms of Rule 3(4), if the finished goods are not sold inside the State and transferred/despatched to outside the State on branch transfer basis. The petitioner, in order to avail the concessional rate of tax as provided under Rule 3(4) of the Rules, 1999, is required to sell finished product inside the State itself. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Union of India v. Ahmedabad Electricity Co.Ltd. and others,* (2004)134 STC 24, Mr. Kar submitted that the coal used by an assessee as fuel for producing steam to run the machines used in their factories to manufacture the end product and in the process of burning, coal was burnt in the boilers of furnaces for producing steam. So it was used only for the ancillary purpose as fuel and coal was not transformed into the end product. He further submitted that for the purpose of manufacture the raw material had ultimately to get a new identity by virtue of the manufacturing process either on its own or in conjunction with other raw materials. Therefore, coal is not a raw material of the end product. Burning of coal for the purpose of producing heat cannot be said to be a

manufacturing activity. Therefore, coal consumed in the CPP by the instant dealer for production of electricity cannot be treated as raw material for production of sponge iron. Further, the end product i.e. electricity which is produced out of coal consumption is a non-scheduled goods under E.T. Act. The basic objective of allowing purchase of raw materials at concessional rate of tax of fifty per centum aims at collection of balanced fifty per centum of tax on sale point as provided under Section 26 of the Act, 1999. No where in the statute there is provision for waiving out balance fifty per centum tax due at the cost of Govt. revenue where the raw material is purchased at concessional rate tax, but on sale point the finished product is non-taxable. Therefore, disallowance of concessional rate of tax as provided under Rule 3(4) by opp. Party no.2 is justified.

5. Mr.Kar further submitted that petitioner is not producing any separate account with regard to purchase and consumption of coal in CPP for generation of electricity with reference to purchases made inside and outside the State. The petitioner failed to produce separate books of account of purchases, consumption out of purchases, account of finished product, sale/dispatches and account of closing stock etc. with particular reference to inside and outside the state purchase. Placing reliance on computation made at page 15 of the impugned order of assessment Mr. Kar submitted that computation of Entry Tax has been rightly made taking into consideration the various adjustment claimed by the petitioner. Mr. Kar further submitted that opposite party no.2 having assigned valid

reasons for rejecting the petitioner's petition for rectification, this Court need not interfere with Annexure-8. Concluding his argument Mr. Kar prayed for dismissal of the writ petition.

6. On the rival contentions of the parties, the following questions arise for consideration by this Court:

(i) Whether transfer of finished product by the petitioner to its other branches situated outside the State disentitles the petitioner to avail concessional rate of tax as provided under Rule 3(4) of the O.E.T. Rules, 1999?

(ii) Whether in absence of any condition stipulated in Rule 3(4) of the Rules and declaration in Form E-15 to avail the concessional rate of tax, the petitioner is required to sell its finished products inside the State and debarred to transfer the same on branch transfer basis?

(iii) Whether opposite party no.2 is justified to deny the petitioner the benefits of availing concessional rate of tax as provided under Rule 3(4) placing reliance on Section 26 of the Act and Rule 19 of the O.E.T. Rules?

(iv) Whether opposite party no.2 is justified in rejecting the petitioner's claim of availing concessional levy of Entry Tax in terms of Rule 3(4) on the ground that consumption of coal in the captive power plant of the petitioner for production of Electricity cannot be treated as raw material for production of sponge iron and that electricity produced out of coal consumption is a non-scheduled goods?

(v) Whether levy of Entry Tax on the finished product sent out to other branches situated out side the State and subsequently returned for some reason is valid in law?

7. Question nos. (i) and (ii) being interlinked, they are dealt with together. To deal with the above two questions, it is necessary to quote the relevant provision of Section 3 of the Act, 1999 and Rule 3(4) of the Rules, 1999.

> **"Section 3- Levy of Tax: (1)**- There shall be levied and collected a tax on entry of the scheduled goods into a local area for consumption, use or sale therein at such rate not exceeding twelve per centum of the purchase value of such goods from such date as may be specified by the State Government and different dates and different rates may be specified for different goods and local areas subject to such conditions as may be prescribed.
>
> (2) The tax leviable under this Act shall be paid by every dealer in scheduled goods or any other person who brings or causes to be brought into a local area such scheduled goods whether on his own account or on account of his principal or customer or takes delivery or is entitled to take delivery of such goods on such entry:
>
> ***Provided that*** no tax shall be levied under this Act on the entry of scheduled goods into a local area, if it is proved to the satisfaction of the assessing authority that such goods have already been subjected to entry tax or that the entry tax has been paid by any other person or dealer under this Act.
>
> ***Explanation***- Where the goods are taken delivery of on their entry into a local area or brought into the local area by a person other than a dealer, the dealer who takes delivery of the goods from such person or makes carriage of the goods shall be deemed to have brought or caused to have brought the goods into the local area."

Thus, under sub-section (1) of Section 3 Entry Tax shall be levied and collected on entry of scheduled goods into the local area for consumption or sale therein. Rule 3(4) of the O.E.T. Rules, 1999 speaks that –

> "**Rule-3(4)** - Goods specified in Part I and Part II of the Schedule to the Act shall be exigible to tax at a concessional rate of fifty per centum of the rate to which goods are exigible under sub-rule (3) and sub-rule (2) respectively to this rule, when such goods are bought –
>
> (a) for use as raw material by the manufacturer on first entry into a local area of the State from outside the State; or
>
> (b) for use as raw material by a manufacturer on first entry into a local area from another local area; or
>
> (c) by a registered dealer into any local area and then sold to a manufacturer for use as raw material:"

8. In the instant case it is not in dispute that the petitioner paid entry tax on the entry of the scheduled goods which includes iron ore, dolomite, pig iron, sponge iron, quartz, coke breeze, coking coal etc. on entry into the local area as required under Section 3 of the Act, 1999. But the petitioner paid 50 per centum of the scheduled rate on entry of the raw materials into the local area to be used as raw material for production of finished product in terms of Rule 3(4) of the Rules, 1999. A bare reading of Rule 3(4) of Rules, 1999 makes it clear that a manufacturer is entitled to avail concessional levy of entry tax if the scheduled goods are used as raw material by a manufacturer and a declaration in Form E-15 is furnished by such manufacturer to the seller. At this juncture, it is necessary to

know what is the condition stipulated in Form E-15. For ready reference, Form E-15 is reproduced below:

"FORM E15
(See Rule 3(4))

DECLARATION BY THE BUYING MANUFACTUER

I/We.....hereby declare that the goods purchased by me/us in Cash/Credit Memo/Bill No. .....Dated ..... from..... Bearing the[TIN/ SRIN/ Identification No..... under the Orissa Value Added Tax Act, 2004] and/or Registration No..... under the Orissa Entry Tax Act, 1999 shall be used as raw material for manufacture of the finished products, namely.....

Date: **Signature of buying manufacturer/dealer"**

Place:

9. A careful reading of Rule 3(4) of Rules, 1999 and the declaration given in Form E-15 reveals that the only condition to avail concessional levy of Entry Tax in terms of Rule 3(4) by a manufacturer is that he is required under the rule to use the scheduled goods as raw material for manufacture of the finished product. There is nothing in Rule 3(4) or declaration given in Form E-15 that in order to avail the concessional rate in terms of Rule 3(4), manufacturer is required to sell the finished products inside the State and he will be disentitled to avail the concessional levy of tax in terms of Rule 3(4) if the goods are dispatched/transferred to out side the State. In other words, neither Rule 3(4), which confers the benefit of concessional levy nor the corresponding declaration Form E-15 imposes a condition that the manufactured goods

should be sold in Odisha or they contain an embargo against the manufactured goods being transferred to branches out side Odisha. Opposite party no.2 has no authority/power to import any condition into the Rule 3(4) of Rules, 1999 as the same results in legislation which is clearly impermissible under law. Therefore, opposite party no.2 cannot nullify the benefit conferred under Rule 3(4) by importing any condition which is non-existent.

The Hon'ble Supreme Court in the case of Union of India and another v. Deoki Nandan Agrawal, AIR 1992 SC 96 observed that the Court cannot usurp legislative function. The Court cannot re-write the legislation for the reason that it had no power to legislate. The power of legislation has not been conferred on the Courts.

10. Question No.(iii) is whether opposite party no.2 is justified to deny the petitioner the benefits of availing concessional rate of tax as provided under Rule 3(4) placing reliance on Section 26 of the Act and Rule 19 of the O.E.T. Rules. According to Mr. Kar, in view of the proviso to Section 26 of the Act, 1999 read with Rule 19 of the Rules, 1999, the petitioner is not entitled to avail the concessional levy of entry tax in terms of Rule 3(4) as finished goods were transferred by the petitioner to outside the State on branch transfer basis. At this juncture, it is necessary to quote relevant portion of Section 26 of the Act, 1999 and Rule 19 of the Rules, 1999, which are reproduced below :

> **Section 26 (1)** : **Manufacturer to collect and pay tax .-** "Notwithstanding anything contained in this Act, every manufacturer of goods who is registered under the VAT Act shall in respect of sale of its finished products effected by it to a buying dealer or person, either directly or through an intermediary, shall collect by way of tax an amount equal to the tax payable on the value of such finished products under Section 3 of this Act by the buying dealer or person in prescribed manner and shall pay the tax so collected into the Government Treasury:
> ***Provided that*** the tax so payable by a manufacturer under this sub-section during a year shall be reduced by the amount of tax paid under this Act on the raw materials which directly go into the composition of the finished products during that year in the prescribed manner:
> ***Provided further that*** where a buying dealer, under the Rules providing for the rates of tax required to be specified with reference to Section 3, is entitled to pay tax at a concessional rate or not to pay any tax, as the case may be, in respect of such finished products, the manufacturer shall, on a declaration furnished by the buying dealer in the prescribed form, collect the tax at such concessional rate or shall not collect any tax, as the case may be.
> ***Explanation.-*** For the purposes of this section, 'manufacturer' shall include a person who is engaged in mining and sells goods produced or extracted therefrom."
>
> "**Rule 19:** "Every manufacturer of scheduled goods who is registered under VAT Act shall, in respect of the finished products which are scheduled goods and are sold by it to a dealer or person, as the case may be, either directly or through an intermediary, collect tax payable under Section 3 of the Act from the buying dealer or person, as the case may be."

11. Bare reading of Section 26 of the Act, 1999 and Rule 19 reveals that every manufacturer of scheduled goods who is registered under the VAT Act when sells the scheduled goods shall collect tax payable

under Section 3 of the Act from the buying dealer or a person. These provisions do not envisage any thing regarding purchase of raw material by the Manufacturer. Therefore, the benefit of concessional levy under Rule 3(4) cannot be denied to the petitioner on the ground of transfer of manufactured goods to the branches situated outside the State.

In the instant case there is no dispute that the petitioner's claim is that he has purchased the scheduled goods to be used as raw material in manufacturing of finished product.

12. Question no.(iv) relates to petitioner's entailment to avail concessional levy of entry tax in terms of Rule 3(4) on coal used as raw material in manufacturing of electricity. Placing reliance on the judgment of the apex Court in ***Ahmedabad Electricity Co.*** (supra) Mr. Kar submitted that coal consumption in CPP by the instant dealer for production of electricity cannot be treated as raw material used for production of finished product i.e., sponge iron. The further contention of Mr. Kar is that the end product, i.e., electricity produced out of consumption of coal is non-scheduled goods. Petitioner's case is that the petitioner is engaged in manufacturing of sponge iron, bellets and HR Coil as well as generation of power. Coal is used as raw material for generation of power. Under Rule 3(4) the benefit of concessional levy is extended on purchase of scheduled goods subject to the condition that it is used as a raw material by a manufacturer. Mr.Sanjit Mohanty submitted assuming that the scheduled goods viz. coal purchased by the petitioner is used only

in the manufacture of electricity, it satisfies the requirement of Rule 3(4) of the Rules, 1999. Further, the coal is required to manufacture electricity which in turn, is essential to run the plant to manufacture sponge iron, billet and HR Coil. Therefore, when the electricity generation is a captive arrangement and the requirement is for carrying out the manufacturing activity, the electricity generation also forms part of the manufacturing activity and the raw materials used in that electricity generation qualify for availing concessional levy of entry tax in terms of Rule 3(4) of the O.E.T. Rules.

13. The above submission of Mr. Mohanty, learned Senior Advocate for the petitioner does not enure to the benefit of the petitioner. The requirement of Rule 3(4) is that the scheduled goods purchased must be used as raw material in manufacturing the finished product. Thus, those scheduled goods are exclusively confined to 'raw material' only used in manufacture of the finished products. The petitioner-company manufactures sponge iron billets and HR coil and undisputedly to manufacture such finished goods the coal is not the raw material. Coal is a raw material for the purpose of generating electricity, which is, in turn, essential to run the plant and for that it cannot be said that the coal is a raw material for manufacturing sponge iron, billets and HR coil. The Hon'ble Supreme Court in the case of ***Ahmedabad Electricity Co.*** (supra) has categorically held that the coal is used for fuel for producing steam to run the machinery used in the factories to manufacture end product and

in the process of burning coal is burnt in the boiler of furnaces for producing steam. Thus, it is used for ancillary purpose as fuel and it is not transferred into the end product. For the purpose of manufacture, raw material has ultimately to get a new identity by virtue of manufacturing process either of its own or in conjunction with the raw material. Therefore, the coal is not a raw material of end product, i.e., sponge iron, billets and H.R. coil.

14. In view of the above, the petitioner is not entitled to avail concessional levy of entry tax on purchase of coal which is used to generate electricity in the captive plant.

15. Question no.(v) is as to whether opposite party no.2 is justified to levy entry tax on the finished goods sent by the petitioner to outside the State which are returned back to the plant of the petitioner either being not exported to foreign country or found defective. Petitioner's case is that he has transferred certain quantity of finished product to outside the State branch for export to foreign country. Because of cancellation of purchase order placed by the foreign buyer, the goods were returned by the Visakhapatnum Branch of the petitioner to its plant in the State of Odisha. Similarly some finished products were sent to Calcutta Branch. Since some manufacturing defects were noticed, the same were returned to the petitioner and the Assessing Officer is levying entry tax on those goods. The case of the petitioner is that on sale of the finished goods, if any,

inside the State, the same already suffered tax and therefore, further levy of entry tax is illegal.

From the above contention of the petitioner, it transpires that the petitioner is not sure as to whether goods returned from outside State for some reason or the other were sold inside the State or not. This speaks volumes about the maintenance of accounts of the petitioner. Therefore, it is the duty of the petitioner to show how the petitioner dealt with those finished products returned to its plant. If the petitioner could establish that entry tax has been collected on sale of those goods inside the State, no further entry tax is leviable. Otherwise, it is always open to opposite party no.2 to complete the assessment in accordance with law.

16. In the fact situation, Annexures-1, 6 and 8 are set aside. The matter is remanded back to the Assessing Officer to redo the assessment in terms of the observations/direction made above.

17. In the result, the writ petition is allowed in part.

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B.N.Mahapatra, J.

V. Gopala Gowda, C.J. I agree.

.....
Chief Justice

Orissa High Court, Cuttack
The 19th October, 2012/ssd