

**B.P.DAS, J & B.N.MAHAPATRA, J.**

W.P.(C) NO.5588 OF 2004 (Decided on 29.7.2010)

**M/S. SRG IRON & STEEL (P) LTD.,** ..... Petitioner  
**JAMSHEDPUR.**

. Vrs.

**COMMISSIONER OF COMMERCIAL**  
**TAXES, CUTTACK & ORS.** ..... Opp.Parties.

**ORISSA SALES TAX ACT, 1947 (ACT NO.14 OF 1947) – SEC.16-AA r/w Rule 94-C of the OST Rules 1947.**

For Petitioners - M/s. A.K.Mohanty.

For Opp.Parties – Mr. M.S.Raman,

Addl. Standing Counsel (Revenue)

**B.N.MAHAPATRA, J** This writ petition has been filed with a prayer for quashing the order dated 11.09.2009 (Annexure-1) passed by the Sales Tax Officer, Unified Check Gate, Girisola, Ganjam, opposite party No.2 (here-in-after mentioned as “S.T.O.”) in which the S.T.O. levied Rs.4,51,693/- towards tax, surcharge and penalty under the Orissa Sales Tax Act, 1947 (for short “O.S.T. Act”) and Rs.55,536/- towards tax and penalty under the Orissa Entry Tax Act, 1999 (for short “O.E.T. Act”) as well as order dated 08.10.2003 (Annexure-3) passed in PU 224/2003-04 by the Additional Commissioner of Sales Tax, South Zone, Berhampur (for short “Addl. Commissioner”) declining to interfere with the order of the S.T.O.

2. Bereft of unnecessary details, the facts and circumstances giving rise to the present writ petition are that the petitioner is a company registered under the Companies Act, 1956 having its registered office in the district of Singhbhum (East) of Jharkhand State. It carries its business of manufacturing steel and iron rods. The petitioner for its manufacturing process imports white kerosene oil from M/s. Annapurna Niwas Pvt. Ltd., Flat No. B-5, Door No. 31-32, 81 Sri Ram Krishna Arcade, Daba Gardens, Visakhapatnam, Andhra Pradesh, opposite party No.3. On 06.08.2003, the petitioner while transporting 20 KL of super white kerosene from Visakhapatnam, Andhra Pradesh to Jamshedpur, Jharkhand by a tanker bearing registration No. WB-03-A-9467 under Invoice No.547 dated 05.08.2003 valued Rs.2,70,400/-, the same was intercepted at Girisola Unified Check Gate on 06.08.2003. The S.T.O. served show cause notices dated 06.08.2003, 11.08.2003 and 21.08.2003 upon the driver of the tanker to show cause as to why penalty in addition to tax should not be levied for selling the goods carried in the tanker within the State of Orissa in violation of the declaration furnished under Section 16-AA of the Orissa Sales Tax Act, 1947 on different occasions. In pursuance to the said notices, the petitioner appeared before opposite party No.2 on 19.08.2003 and sought for

one month's time to settle the matter by producing all the documents. The S.T.O. allowed two days time. Thereafter on 23.08.2003 a telegram was received at the Girisola Unified Check Gate requesting time upto 28.08.2003. Nobody appeared on 28.08.2003. After waiting for some more days the S.T.O. passed the impugned order under Annexure-1 raising the aforementioned tax, surcharge and penalty.

Being dissatisfied with the said order of the S.T.O., the petitioner filed a revision petition before the learned Addl. Commissioner and the later vide order passed under Annexure-3 did not inclined to interfere with the order of the learned S.T.O. Hence, this writ petition.

3. Mr.A.K.Mohanty, learned counsel appearing for the petitioner submits that the petitioner is a registered dealer in the State of Jharkhand and all the consignments were received by it with their seal and signatures on the body of challan-cum-invoice. In spite of the same, O.P. No.2-Sales Tax Officer on a presumption held that on seven different occasions in violation of the declaration furnished under Section 16-AA of the Orissa Sales Tax Act, white kerosene valued Rs.18,51,200/- carried in the particular tanker was sold within the State of Orissa. There was no evidence on record to show that the Driver of the tanker sold white kerosene on seven occasions within the State of Orissa. The petitioner never complained non-receipt of consignments, rather produced receipts of goods within a stipulated period. Taking the advantage of innocence of the Driver, opposite party No.2 prepared a statement and forcibly obtained his signature. Since, pursuant to the show cause notice, the Driver of the tanker had explained in writing that goods were received outside the State as per the undertaking given at the entry gate, the presumption of violation of the declaration furnished at the entry point is without any basis. Without making proper investigation levy of tax, surcharge and penalty is not justified. Therefore, the orders passed under Annexures-1 and 3 are not sustainable in the eye of law.

4. On being noticed, O.P. No.3, the consigner filed counter affidavit repudiating the allegations made by the Sales Tax Officer (O.P. No.2) in his order. It is stated that O.P. No.3 is the licensed importer of super kerosene oil and the petitioner used to purchase imported super kerosene from it by placing purchase orders. It (O.P. No.3) being the consignor in the transaction had no authority or business to enquire into the manner of utilization of the goods sold on receipt of cost of goods along with CST and after loading the tanker and dispatching the same. It had also deposited tax realized in the transactions with the appropriate taxing authority. Thus, the O.P. No.3 cannot be made liable for any alleged selling of kerosene somewhere in the midway and the observation made against it in the impugned order is entirely baseless and damages its business reputation and good will. Moreover, as O.P. No.3 was not given any opportunity of hearing, the observation made under Annexures-1 and 3 are not sustainable.

5. Mr. Raman, learned counsel appearing on behalf of the opp. parties 1 and 2 supporting the orders of the STO and the Addl. Commissioner passed under Annexures-1 and 3 respectively, vehemently argued that the O.P. No.2 has rightly imposed tax, surcharge and penalty and there is no infirmity in his order as well as in the order of the Addl. Commissioner.

6. The only question that falls for consideration by this Court is whether, on the facts and in the circumstances of the case, the S.T.O. is justified in imposing tax, surcharge and penalty amounting to Rs.4,51,693/- under the O.S.T. Act and tax and penalty of Rs.55,536/- under the O.E.T. Act totaling to Rs.5,07,229/- for the alleged violation of declaration given in transit passes issued at the Unified Check Gate, Girisola.

7. To resolve the issue under the O.S.T. Act, it is necessary to know what is contemplated under Section 16-AA of the O.S.T. Act and Rule 94-C of the Orissa Sales Tax Rules (for short "O.S.T. Rules"). The provisions of Section 16-AA of the O.S.T. Act and Rule 94-C of the O.S.T. Rules are reproduced below:

**Section 16-AA. "Regulatory measures for transport of goods through Orissa**

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(1) When a vehicle or boat carrying goods, coming from any place outside the State and bound for any other place outside the State, passes through the State, the driver or other person in-charge of such vehicle or boat shall —

(a) declare in such form and manner before the officer-in-charge of the first check-post or barrier after his entry into the State that the

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goods under transport shall not be unloaded, delivered or sold in the State;

(b) obtain, in the prescribed manner, a transit pass in such form containing such particulars as may be prescribed from the said officer; and

(c) deliver the transit pass so obtained to the officer-in-charge of the last check-post or barrier before his exit from the State, failing which it shall be presumed that the goods carried thereby have been sold within the State by the owner or person-in-charge of the vehicle or boat:

Provided that where the goods carried by such vehicle or boat are, after their entry into the State, transported outside the State by any other vehicle, boat or conveyance, the onus of proving that the goods have actually been moved out of the State shall be on the owner or person-in-charge of the vehicle or boat.

*Explanation* – In a case where a vehicle or boat owned by a person is hired for transportation of goods by any other person, the hirer of that vehicle or boat shall, for the purpose of this Section, be deemed to be the owner of the vehicle or boat, as the case may be.

(2) The officer-in-charge of any check-post or barrier or any other officer, not below the rank of a Sales Tax Officer, duly authorized by the Commissioner, may detain any vehicle or boat and keep it stationary as long as may reasonably be necessary for examination of the contents therein and the records relating to the goods under transport by such vehicle or boat, and seize the same if —

(a) it is presumed under sub-section (1) that the goods carried by the vehicle or boat, as the case may be, has been sold in the State; or

(b) the driver or the other person-in-charge of the vehicle or boat, as the case may be, fails, without reasonable cause, to produce or deliver the transit pass required under sub-section (1); or

(c) he has reason to believe that the goods carried by the vehicle or boat, as the case may be, has been unloaded, delivered or sold within the State in contravention of the declaration furnished under sub-section (1).

he may direct the driver or the other person-in-charge of the vehicle or boat, as the case may be, to pay within a specified period, by way of penalty, a sum equivalent to twenty per centum of the value of the goods under transport by such vehicle or boat, as the case may be, or rupees twenty thousand, whichever is higher, in addition to tax as otherwise payable under this Act, failing which the officer may confiscate the goods under transport in the prescribed manner to recover such penalty and tax:

Provided that —

(a) before taking any action for confiscation of the goods the officer shall give the driver or the person-in-charge of the vehicle or boat, as the case may be, an opportunity of being heard and, if necessary, may make an enquiry in the manner prescribed; and

(b) where the goods under transport are not available at the time of seizure of the vehicle or boat, as the case may be, the officer may detain the vehicle until such penalty and tax are paid.

(3) Where the goods seized are of a perishable nature they shall be sold in the prescribed manner.

(4) Where any goods seized under this Section are sold, the sale-proceeds thereof, after deduction of the tax including penalty payable under this Section and the expenses of such sale, be paid to the person from whom the goods are seized.

(5) No order of penalty shall be made under this Section in respect of goods which are not liable to payment of tax under this Act.”

Rule 94-C

“Where a vehicle carrying goods intends to transit through Orissa from a place to another place outside Orissa, the driver or any other person claiming to be in-charge of such vehicle shall produce before the Officer-in-charge of the entry Check-Post/barrier a transit pass in Form-XXXII-T in triplicate, collect the duplicate and triplicate copies duly signed by the said officer and proceed to transit through the Check-Gate/barrier mentioned in the transit pass after depositing the duplicate with the Officer-in-charge of the exit Check-Post/barrier.

*Explanation* – “Transit Pass” duly signed by the officer-in-charge of the check-gate referred to in this rule shall be deemed to be “Way-Bill” as provided under Section 16-A of the Orissa Sales Tax Act.]”

(Underlined for emphasis)

8. A conjoint reading of provisions of Section 16-AA of the O.S.T. Act and Rule 94-C of the O.S.T. Rules makes it clear that when a vehicle or a boat carrying goods coming from any place outside the State and bound for any other place outside the State, passes through the State, the driver or any other person-in-charge of such vehicle or boat, shall produce before the Officer-in-Charge of the entry check-post/barrier a transit pass in Form-XXXII-T in triplicate containing the declaration that the goods under transport shall not be unloaded, delivered or sold in the State. The S.T.O. in-charge of the entry check-post/barrier duly signs the transit pass, keeps the original with him hands over the duplicate and triplicate copies to the driver or any other person claiming to be in-charge of such vehicle. The driver or any other person in-charge of such vehicle or boat shall deliver the triplicate copy of the transit pass obtained from the entry Check Gate to the officer-in-charge of the last check-post/barrier while the vehicle along with goods leaves the State. The transit pass duly signed by the officer-in-charge of the entry check gate serves the purpose of a ‘way-bill’. Under sub-section (2) of Section 16-AA, the officer-in-charge of the check-post/barrier or any other person not below the rank of a Sales Tax Officer duly authorized by the Commissioner may detain any vehicle or boat and keep it stationary as long as may reasonably be necessary for examination of the contents therein and the records relating to the goods under transport by such vehicle or boat. They may also seize the same, if it is presumed that the goods carried by the vehicle or boat has been sold in the State or the driver or any other person-in-charge of the vehicle or boat, as the case may be, fails, without reasonable cause, to produce or deliver the transit pass required under sub-section (1); or he has reason to believe that the goods carried by the vehicle or boat, as the case may be, has been unloaded, delivered or sold within the State in contravention of the declaration furnished at the entry check gate.

Thus, if the driver or any other person in-charge of such vehicle or boat fails to deliver the transit pass obtained from the entry check gate to the officer-in-charge of the last check-post or barrier before he exits from the State, it shall be presumed that the goods carried thereby have been sold within the State by such person. The officer may also direct the driver or the other person-in-charge of the vehicle or boat to pay within a specified period, by way of penalty, a sum equivalent to twenty per centum of the value of the goods under transport by such vehicle or boat, as the case may be, or rupees twenty thousand, whichever is higher, in addition to tax as leviable on such goods. If the driver or the person-in-charge of such vehicle or boat fails to pay the tax and penalty imposed, the officer may confiscate the goods under transport to recover such penalty and tax. Before confiscating the goods, the officer shall give the driver or any other person-in-charge of the vehicle or boat, an opportunity of being heard, and, if necessary, may make an enquiry in the manner prescribed. Where

the goods under transport are not available at the time of seizure of the vehicle or boat, as the case may be, the officer may detain the vehicle until such penalty and tax are paid. Thus, when a vehicle or boat carrying goods, coming from any place outside the State and bound for any other place outside the State, passes through the State, it is obligatory on the part of the driver or any other person-in-charge of the vehicle or boat to deliver the triplicate copy of the transit pass obtained from the entry check gate to the officer-in-charge of last check-post/barrier before the vehicle along with goods leaves the State. On failure to discharge such obligation it shall be presumed that the goods carried by the vehicle has been sold within the State and the driver or the person-in-charge of the vehicle or boat shall pay tax and penalty as provided in Section 16-AA of the O.S.T. Act.

9. In the present case demands have been raised for violation of the declaration made by the driver of the vehicle bearing registration No.WB-03-A-9467 in the transit passes in several times. On 06.08.2003, while the said vehicle reached the Unified Check Gate, Girisola, loaded with 20 KL of super white kerosene valued Rs.2,70,400/-, the S.T.O. issued notices under Section 16-AA of the O.S.T. Act to the driver of the said vehicle for violation of the declaration furnished in seven numbers of transit passes. Admittedly, in the past the driver or any other person-in-charge of the vehicle No.WB-03-A-9467 had not handed over to the officer-in-charge of the Check Gate at exit point six numbers of transit passes issued to the driver/person in-charge of the vehicle by the officer-in-charge of the entry check-gate. Thus, the requirement of Section 16-AA of the O.S.T. Act read with Rule 94-C of the O.S.T. Rules was not complied with and for which it was presumed that the goods carried on seven occasions were sold within the State. The fact of non-delivery of transit pass at the exit point is sufficient to establish a prima facie case against the driver/owner of the vehicle. Needless to say that the presumption that arose out of non-delivery of the transit pass at the exit point is a rebuttable presumption. It is only where the presumption is successfully rebutted, the authorities concerned are required to rely upon the rule of presumption. Under Section 16-AA of the O.S.T. Act, the onus of proving that the goods carried on six occasions were delivered outside the State shall lie on the owner or the person-in-charge of the vehicle. The words contained in Section 16-AA of the O.S.T. Act only require the authorities concerned to raise a rebuttal presumption that the goods must have been sold in the State, if the transit pass is not handed over to the officer at the exit check-post/barrier. Such presumption when drawn against the owner or person-in-charge of the vehicle, he is held to have sold the goods inside the State of Orissa. The person concerned shall be liable to pay the tax and penalty as prescribed under Section 16-AA of the O.S.T. Act. The case of the petitioner is that due to heavy rush at the exit check-post (the Unified Check-Post, Jamsola) the driver of the vehicle did not hand over the transit pass issued by the entry check-post to the officer-in-charge of the exit check-post before passing through the exit gate. However, the petitioner produced copies of delivery-challan-cum-invoices in which the consignee has acknowledged the receipt of the goods affixing their round rubber seal and contended that all the previous six consignments of Kerosene were actually received by the consignee outside the State and not sold inside the State of Orissa as presumed by the learned S.T.O. The Revisional Authority on verification of the case records found that the driver of the vehicle in his statement dated 11.09.2003 recorded by the learned S.T.O. had categorically stated before the learned S.T.O. that he was driving the alleged vehicle only for that particular consignment and did not know anything about the transaction of any consignment by the said vehicle previously. Interestingly, the same driver has signed all the other previous six delivery challans-cum-Invoices etc. But different persons have signed in the declarations in the Transit Passes bearing Nos.00485, 12953, 08523, 21275, 24259, 15344 and 08550 as revealed from the connected records received from the checkpost. This clearly proves that the acknowledgment receipts produced by the consignee are false and fabricated to escape from a valid charge of clandestine sale inside the State of Orissa with an ulterior motive to evade tax. It is also not at all believable that in all the six previous occasions due to heavy rush at the exit check-post at the Unified Check-post, Jamsola, the driver of the vehicle could not hand over the transit pass issued by the entry check gate to the officer in charge of the exit check gate before passing through the said gate. Moreover, if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner. In the instant case as stated above, the petitioner has not complied with the statutory requirements.

10. In the fact situation, levy of tax, surcharge and penalty under the O.S.T. Act under Annexure-1

is found to be just and proper.

11. The issue involved under the O.S.T. Act and O.E.T. Act is same. The provisions contained in Section 16-AA of the O.S.T. Act and Rule 94-C of the O.S.T. Rules are similar to the provisions contained in Sections 24 and 25 of the O.E.T. Act. Tax and penalty under the O.E.T. Act have been levied on the similar grounds on which tax and penalty are levied under the O.S.T. Act. For the reasons stated in the foregoing paragraphs, the levy of tax and penalty under the O.E.T. Act is also held to be valid.

12. In view of the above, we are not inclined to interfere with the orders passed by the S.T.O. and the Addl. Commissioner under Annexures-1 and 3 respectively.

13. In the result the writ petition is dismissed. No order as to costs.

Writ petition dismissed.