

HIGH COURT OF ORISSA: CUTTACKW.P.(C) No.19828 of 2010

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

M/s. Krishi Enterprises,
At:I-4, Civil Township,
Rourkela, P.S. Raghunathpalli,
Dist: Sundargarh, represented by its
Proprietor Sri Krishna Kumar Mittal

... Petitioner

-Versus-

Commissioner of Commercial Taxes, Orissa,
Cuttack and others

... Opp. Parties

For Petitioner : M/s. D. Pati, S.K. Mishra, S.N. Sharma &
S. Agarwal

For Opp. Parties : Mr. R.P. Kar
Standing Counsel (Revenue)

P R E S E N T:

**THE HONOURABLE THE CHIEF JUSTICE SHRI.V.GOPALA GOWDA
AND
THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA**

Heard and disposed of on 24.02.2011

B.N. Mahapatra, J. In this writ petition the petitioner challenges the legality and propriety of the order dated 5.8.2010 (Annexure-1) passed by opposite party no.2-Additional Commissioner, Sales Tax, North Zone, Cuttack (for short, 'Revisional Authority') by which the order of opposite party no.3 –Sales Tax Officer, Rourkela-II Circle (for short, 'S.T.O.') dated 28.05.2010 denying issuance of Form 'C' has been upheld.

2. Bereft of unnecessary details, the facts and circumstances giving rise to the present writ petition are that the petitioner is a proprietorship firm carrying on business in Iron and Steel goods. It is registered under the Orissa Value Added Tax Act, 2004 (for short, VAT Act') and Central Sales Tax Act, 1956 (for short, 'C.S.T. Act'). On 15.3.2010 the petitioner made an application to opposite party no.3 for issuance of 5 folios of 'C' Forms. On being asked by opposite party no.3, the petitioner submitted the details of purchase made by it for which it required statutory declaration Form 'C'. However, opposite party No.3 was not satisfied with the explanation furnished by the petitioner and on 28.05.2010 he rejected the petitioner's application for issuance of declaration form 'C'. The petitioner being aggrieved by the said order dated 28.5.2010 passed by opposite party no.3 approached this Court in W.P.(C) No. 10,618 of 2010 for necessary redressal and the said writ petition was disposed of on 22.7.2010 with a direction to the petitioner to avail the remedy before the revisional authority provided u/s. 79 of the V.A.T. Act read with Rule 22 of the C.S.T. (Orissa) Rules. In pursuance of the aforesaid direction, the petitioner filed revision petition before opposite party no.2 challenging the order passed by opposite party no. 3. Opposite party no. 2 vide the impugned order dismissed the revision petition and confirmed the order passed by opposite party no.3 holding that the petitioner is not entitled to 'C' forms for the reasons stated in the said order. Hence, the present writ petition.

3. Mr. D. Pati, learned counsel appearing on behalf of the petitioner vehemently argued that being a registered dealer under the C.S.T. Act, the petitioner is entitled to be issued with the declaration form 'C' which is the mandate

of Section 8 of the C.S.T. Act read with Rule 12(1) & 12(6) of the C.S.T. (R&T) Rules and Rule 6 of CST(Orissa) Rules. The registration certificate granted under OVAT Act and CST Act specifies the goods to be dealt with by the petitioner. The petitioner received order from MSP Ltd., Hospet Karnataka dated 12.10.2009 for supply of medium grade iron ore fines of a particular specification. The said purchaser is a registered dealer under the provisions of C.S.T. Act in the State of Karnataka. The material was required for the purpose of export. The purchase order specifies the rate. It is indicated in the said order that seller is to raise final invoice along with certificate issued by SGS India Pvt. Ltd. relating to quality. The petitioner in order to fulfil the obligation stated above contacted and visited the mines of Saha Brothers, Jharkhanda and placed purchase order with Saha Brothers, Jharkhanda for supply of the same goods. At the instruction of the petitioner M/s. Saha Brothers booked the goods through railway in favour of M.S.P.L. Ltd. In pursuance of sale of goods there was transportation of those goods from the State of Jharkhand to another State. Subsequent to supply of materials, M/s. Saha Brothers raised bills in favour of the petitioner charging concessional rate of central sales tax in terms of the provisions of the CST Act on the condition that the petitioner shall submit declaration form 'C' to it. The petitioner had made the purchase of the goods from outside the State and supplied the goods on inter state basis. Even though the goods purchased by the petitioner have not moved to Orissa, the transactions made by it was effected by way of transfer of document of the titles to the goods during their movement from one state to another. In support of his contention the petitioner relied upon the decision of the Supreme Court in the case

of Tata Iron and Steel Co. v. B.R. Sarkar and others, 11 STC 655 and Oil India Limited V. The Superintendent of Taxes and others, 35 STC 445.

It is further submitted that under the instruction of the petitioner the goods moved out of the State of Jharkhanda through Railway and are delivered at the prescribed Port on account of MSPL. The sales between M/s. Saha Brothers and the petitioner are inter-state sale. The sale between the petitioner and the MSPL are also interstate sale. A plain reading of Rule 12(6) of the CST (R & T) Rules will go to establish that the petitioner is entitled to be issued with Form 'C'. The goods purchased and sold by the petitioner are not different from the iron ore which were transported through Railway. Rule 6 of C.S.T. (O) Rules prescribes the procedure to be adopted for obtaining declaration in Form 'C' which the petitioner complied with. Proviso to Rule 6 of the CST(O) Rules provides issuance of 'C' Form to a registered dealer may be refused who has failed to comply with the order demanding security or additional security. The 2nd proviso stipulates that second or subsequent supply of declaration Form 'C' shall not be made to any dealer unless he furnishes to the Sales Tax Officer a true copy of the accounts certified by him under his signature of the Form last supplied to him. These are the requirements for the purpose of issuance of 'C' Form. Section 10 and Section 10A of the CST Act provide safeguard for any misuse of 'C' form. By virtue of being a dealer under Section 7(2) of the CST Act it is statutory right of the petitioner to be supplied with the declaration form 'C'. Denial of 'C' form to the petitioner amounts to infringement of fundamental right guaranteed under Article 19(1)(g) of the Constitution of India.

The petitioner had also supplied goods to different customers which are required for the purpose of export. Sales made by the petitioner to the exporters are penultimate sales and the petitioner is entitled to tax exemption since those sales are export sales. The purchasing dealer is required to submit form H to the petitioner. The other statutory required documents are also submitted by the buying dealer to the petitioner for and in connection with purchases made by it for export purposes. The sales effected by the petitioner are export sales and such sales fall under the scope of Section 5(3) of the CST Act.

The petitioner disclosed the transaction under the return reflecting as sales falling under Section 5(3) of the CST Act. The tax liability under Section 6 accrued against the petitioner but dispensed since it fell within the scope of Section 5(3) of the CST Act. The petitioner has to meet the statutory requirement like submission of statutory declaration forms and other evidentiary documents for availing tax exemption provided under Section 5(3) of the CST Act. The petitioner has submitted the return for the tax period from 01.03.2010 to 31.03.2010 disclosing the sales made by it for export and claimed exemption on account of the tax. Due to non-receipt of certificate 'H' from M/s. MSPL Ltd., the petitioner revised its return during the month of October, 2010 and had paid Rs.10.00 lakhs as tax. Concluding his argument, Mr.Pati submitted that opp. parties should be directed to supply form 'C' to the petitioner forthwith.

4. Per contra, Mr.R.P.Kar, learned Standing counsel for Revenue submits that the petitioner has not approached this Court with clean hands. He has made certain false averments in the writ petition. In paragraph 4 of the writ petition it is

stated that the petitioner was a registered dealer under Section 7(1) of the CST Act. In fact, the petitioner is a registered dealer under Section 7(2) of the CST Act and not under Section 7(1) of the CST Act which is evident from the certificate of registration (Annexure-2 series). On this solitary ground his petition is liable to be dismissed. The petitioner having been registered under Section 7(2) of the CST Act it is not entitled to effect inter-state sale as claimed by it in paragraph 9 of the writ petition. Placing reliance under Section 3(b) of the CST Act, it is submitted that a sale or purchase of goods shall be deemed to take place in course of inter-State trade or commerce if the sale or purchase is effected by transfer of documents of the title to the goods during their movement from one State to another. Relying on the documents annexed under Annexure-4 it is argued that MSPL Limited is both the consignor and the consignee. Therefore, it cannot be said that there was inter-State transaction between the petitioner and Saha Brothers and between the petitioner and MSPL Limited. Mr. Kar, further submitted that a purchase or sale in order to be inter-State sale/purchase, the goods in question must move from one State to another. The goods in question stated to have been purchased from M/s. Saha Brothers, Jharkhand have not moved to Orissa. Therefore, the same cannot be an inter-State transaction between the petitioner and seller in Jharkhand. Referring to Annexure-3, it was argued that the claim of the petitioner that his sale to MSPL is exempted under Section 5(3) of the CST Act is also not legally tenable.

5. On the rival contentions, the questions that fall for consideration by this Court are—

- (i) Whether the petitioner by virtue of being a registered dealer under Section 7 of the CST Act is entitled to be supplied with declaration form 'C' as provided under Section 8 of the C.S.T. Act read with Rule 12(1) and Rule 12(6) of CST (R&T) Rules and Rule 6 of the C.S.T. (O) Rules ?
- (ii) In the facts and circumstances whether the opp. party department authorities are justified in refusing 'C' form to the petitioner ?

6. The first question relates to the petitioner's entitlement to be supplied with form 'C' being a dealer registered under Section 7(2) of the CST Act. Sub-section (2) of Section 7 enables those dealers who though not liable to pay tax under the C.S.T. Act but are liable to pay tax under the Sales Tax Laws of the appropriate State or where there is no such law in force in the appropriate State or any part thereof who have place of business in that State or any part thereof, to apply for registration under this sub-section. Thus, a dealer who is not himself a seller in inter-state trade but he is only a purchaser of goods from outside the State if he gets himself registered under Section 7(2) can obtain goods with concessional rate of tax under Section 8(1)(b) if those goods are specified in its certificate of registration.

Section 8(4) of the CST Act provides that the declaration form is to be submitted in the prescribed form obtained from the prescribed authority when a dealer claims concessional rate of tax on his sale under Section 8(1) of the said Act. Rule 12(1) of the CST (R & T) Rules, 1957 provides that the declaration shall be in Form 'C'. Under Rule 12(6) of the said Rules form 'C' shall be obtained by the

purchasing dealer in the State in which goods covered by such form are delivered. In the explanation under Rule 12(6), it is further laid down that when the dealer is not registered in the State in which goods were delivered then Form 'C' may be obtained by him in the State in which the dealer is registered under Section 7 of the CST Act.

Rule 6 of the CST(O) Rules provides that the registered dealer, who wishes to purchase goods from any such dealer on payment of tax at the rate applicable under the CST Act on sales of goods by one registered dealer to another for the purpose specified under the certificate of registration shall obtain on application declaration forms for furnishing them to the selling dealer.

In view of above statutory provisions, it is the statutory right of a dealer registered under Section 7(2) of the CST Act to be supplied with declaration form 'C' to avail concessional rate of tax against the purchase of goods from outside the State.

7. The second question is with regard to legality and validity of the order passed by opposite party Nos.2 and 3 refusing to issue 'C' forms to the petitioner. The petitioner's case is that opposite party Nos.2 and 3 are not justified in refusing to issue 'C' forms to the petitioner on the ground that the transaction between the petitioner and M/s. Saha Brothers, Jharkhand are not inter-state in nature. According to the petitioner, by virtue of being a dealer registered under Section 7(2) of the C.S.T. Act, it is entitled to be supplied with declaration form 'C' which is a statutory right under law. Opposite parties are not empowered to examine the nature of utilization of 'C' forms at the time of issuing Form 'C'. The C.S.T. Act provides adequate safeguard by way of enacting Section 10 and Section 10A, which

provides for imprisonment or fine or imposition of penalty, for misuse of declaration forms. In support of his contentions, Mr. Pati, relies upon the decision of the apex Court in the case of **State of Orissa and another vs. K.B. Saha and Sons Industries Pvt. Ltd. and others**, (2007) 7 VST 214.

Mr. Kar, learned counsel for the Revenue submits that the correctness of the decision of the apex Court in **K.B. Saha** (supra) has been referred to Larger Bench of the apex Court in the case of **M/s. Malayagiri Sandalwood Oil Distillery vs. SP. Commissioner and Commissioner of Commercial Taxes & others** (Civil Appeal No.2421 of 2006, disposed of on 07.08.2007)

Be that as it may, if at the time of issuance of 'C' declaration form, the Issuing Officer has knowledge about use of 'C' forms by the dealer and on enquiry into the nature of transaction he comes to a finding on the basis of materials available before him that the claim of Inter-state purchase by the dealer is not correct, it cannot be said that the S.T.O. lacks jurisdiction in refusing to issue 'C' declaration forms.

Therefore, if at the time of issuance of form 'C' it comes to the knowledge of the Issuing Officer that the declaration form if issued shall be misutilized, then he is not expected to issue declaration form 'C' and allow those to be misutilized and till that time he will remain as mute spectator awaiting initiation of criminal/penal action under Section 10 or Section 10A of the C.S.T. Act.

8. In the instant case, the petitioner claims that it has purchased goods from one M/s. Saha Brothers, on the condition of 'C' declaration forms and while goods were in transit, it sold the goods by transfer of documents as provided under

Section 3(b) of the C.S.T. Act to one M/s. M.S.P.L. Ltd., Karnataka. The further claim of the petitioner is that its second sale to M/s. M.S.P.L. Ltd., is in course of export and exempt from payment of tax since the said transaction falls within the ambit of Section 5(3) of the C.S.T. Act against Form-H. Thus, there are two sales; one by M/s. Saha Brothers, Jharkhand to the petitioner and the other is from the petitioner to the exporter, M/s. MSPL Ltd. According to the Department, both two sales are independent of each other in the sense that there is no movement of goods to State of Orissa in pursuance of contract if any between M/s. Saha Brothers, Jharkhand and the petitioner. Further case of the Revenue is that the goods sold by M/s. Saha Brothers, Jharkhand were mixed dump of iron and goods transported in Railways were iron ore and the goods sold by the petitioner to M/s. MSPL Ltd. were iron ore fines and do not qualify for exemption as provided under Section 5(3) of the C.S.T. Act as both the goods are not same goods. The Revisional Authority in his order referring to various provisions of the C.S.T. Act and the judicial pronouncements, held that the sale between M/s. Saha Brothers and the petitioner was not an Inter-state sale as there is neither transfer of document by the dealer to MSPL Ltd. nor there is movement of goods in pursuance of the sale if any between M/s. Saha Brothers and the petitioner. The sale in question was from outside State to outside State. The petitioner is the first seller in the State of Jharkhand after purchasing the goods in Jharkhand. Transaction in order to be inter-state transaction must come from one State to another. As the goods have not moved to Orissa, the same cannot be an inter-state transaction between the petitioner and the seller. When there is no CST purchase by the petitioner from M/s. Saha

Brothers, the petitioner-dealer is not entitled to be supplied with form 'C' to furnish to Saha Brothers, Jharkhanda. The documents produced by the petitioner show that the goods were moved by MSPL Ltd., to Paradeep/Visakhapatnam Port. By analyzing various documents furnished by the petitioner in detail, the Revisional Authority upheld the order of opposite party No.3-Assessing Officer, who refused to grant 'C' declaration forms to the petitioner.

9. An Inter-state sale as contemplated under clause (b) of Section 3 is one which is effected by transfer of documents of title to the goods during their movement from one State to another. In other words, Section 3(b) applies to a sale effected after such despatch but before actual delivery of goods. Documents attached to the writ petition under Annexure-4 series reveal that in some Railway receipts the consignor was shown as M/s. Saha Brothers and the consignee was shown as M/s. MSPL Ltd. In some other Railway receipts both the consignor and consignee are shown as M/s. MSPL Ltd. In those Railway receipts (document of title of goods) the name of the petitioner does not appear. Moreover, in cases where consignor & consignee is described as same person, the question of transfer of title does not arise. Therefore, the petitioner is not entitled to be issued with Form 'C' to claim the concessional rate of tax in respect of movement of goods from one State to another where the petitioner is not a party.

10. There is much argument and counter argument with regard to the petitioner's claim of export sale. The claim of the petitioner that sale to M/s. MSPL Ltd., Karnataka is in course of export and therefore, the said transaction falls under the ambit of Section 5(3) of the C.S.T.Act and qualifies from exemption from tax is

also not correct. Section 5(3) of the C.S.T. Act provides that the last sale or purchase preceding the sale or purchase occasioning the export of goods out of the territory of India shall be deemed to be a sale or purchase in course of export. In order to qualify the sale in course of export of goods out of the territory of India within the meaning of Section 5(3), three conditions laid down in the said provisions are to be satisfied. The three conditions are; (i) transaction of such last sale or purchase must take place after the agreement or order received by the exporter from his various buyers, (ii) the last purchase must have been taken place after entering into the agreement with the foreign buyer, (iii) the transaction of such last sale or purchase was entered into for the purpose of complying with the agreement order received by the exporter from his foreign buyer. Therefore, to claim exemption within the meaning of Section 5(3), the transaction between the exporter and the foreign buyer must be entered into first and thereafter, the exporters should enter into the transaction with penultimate seller with a view to fulfilling the commitment with the foreign buyer. The further requirement under Section 5(3) is that both the goods should be the same goods.

11. In the instant case, we find that the foreign buyer placed purchase order with M.S.P.L. Ltd., Karnataka on 18th January, 2010, whereas M/s. Saha Brothers, Jharkhand raised Bills in the name of the petitioner on 04.11.2009, 24.11.2009, 06.12.2009, 27.12.2009, 08.01.2010 (Annexure-5 series) which is prior to the purchase order placed by the foreign buyer on M/s MSPL Ltd., Karnataka. We further notice from copy of Form 'H' in SL.No.F 176853 at page-93 to the writ petition that M/s. MSPL Ltd., Bangalore has purchased the goods from the petitioner

vide Cash Memo No.1 dated 21.08.2009. Thus, the claim of the petitioner that its sale to M/s. MSPL Ltd. is in course of export and fall within the ambit of Section 5(3) of the C.S.T. Act is not tenable.

12. In view of the above, we do not find any infirmity or illegality in the order passed by opposite party Nos.2 and 3 under Annexures-1 and 6 respectively warranting any interference by this Court.

13. In the result, the writ petition is dismissed.

No order as to costs.

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V.Gopala Gowda, C.J

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B.N.Mahapatra, J