IN THE HIGH COURT OF ORISSA: CUTTACK
(Original Jurisdiction Case)

W.P.(C) No. 17017 of 2014

Code No. 170403

In the matter of: An application under Article 226 & 227 of the Constitution of India;

And

In the matter of: An application under Orissa Entry Tax Act, 1999 and Rules framed there under;

And

In the matter of: An application challenging the Assessment order dated 03.05.2014 passed by the Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur under Section 9C of the Orissa Entry Tax Act, 1999 for the period 01.04.2011 to 31.03.2013 by levying additional entry tax @ 0.5% amounting to Rs.2,40,81,536.00 and penalty amounting to Rs.4,81,63,072.00 on coal used by the Petitioner as 'Raw Material' for Generation of Electricity, which is illegal, arbitrary, barred by limitation, vague, outcome of non-application of mind, without jurisdiction and contrary to the provisions of the Orissa Entry Tax Act and Rules 1999;

Presented in Court
B.O. 04/09/14

And

In the matter of :

Odisha Power Generation Corporation Ltd.
a Company registered under the
Provisions of Companies Act, 1956
and a Joint Venture of Govt. of
Odisha & AES Corporation, USA
having office at-Zone-A, 7th Floor,
Fortune Tower, Chandrasekharpur,
Bhubaneswar-751023, Dist.-Khurda
Represented through its Managing Director
Sri Sankaran Subramaniam, aged about 57
years, Son of Sankaran Hariharan Subramaniam

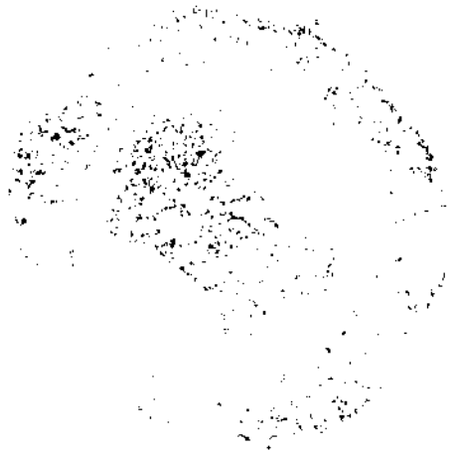
...Petitioner

-Versus-

1. State of Orissa
Represented through its Secretary
Department of Finance,
Orissa Secretariat,
Bhubaneswar, Dist-Khurda

2. Joint Commissioner of Commercial Tax
Sambalpur Range, Sambalpur

... Opp. Parties



A.F.R.

ORISSA HIGH COURT: CUTTACK

W.P.(C) No.17017 of 2014

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

Odisha Power Generation Corporation Ltd. ...Petitioner

-Versus-

State of Odisha & another ...Opposite Parties

For petitioner : Mr.N.Venkataraman
(Sr. Advocate)
M/s. Satyajit Mohanty,
D.P.Sahu, S. Das &
D.K. Mohanty

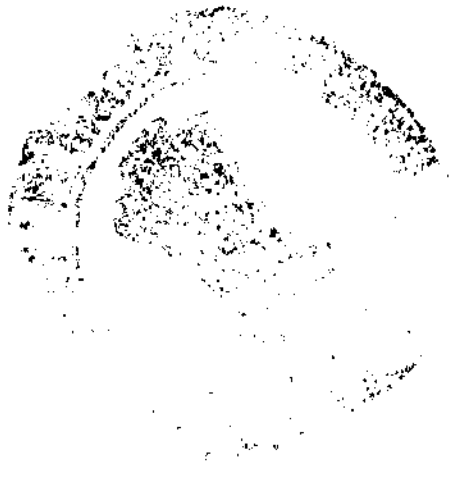
For Opp. Parties : Mr.R.P.Kar
(Standing Counsel for Revenue)

PRESENT:

THE HONOURABLE MR. JUSTICE I.MAHANTY
AND
THE HONOURABLE MR. JUSTICE B.N. MAHAPATRA

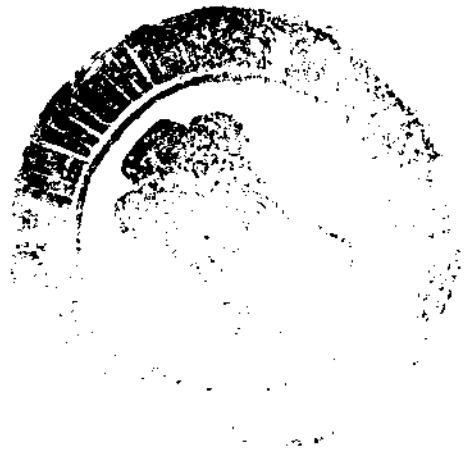
Date of Judgment : 30 .03.2015

B.N. Mahapatra, Petitioner-Odisha Power Generation Corporation Ltd. in the present writ petition challenges the order of assessment dated 03.05.2014 (Annexure-6 series) passed by the Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur (fort short, "Assessing Authority") under Section 9C of the Orissa Entry Tax Act, 1999 (for short, 'OET Act') for the period 01.04.2011 to 31.03.2013 levying



additional entry tax at the rate of 0.5% amounting to Rs.2,40,81,536/- and penalty amounting to Rs.4,81,63,072/- on coal used by the petitioner-Company as raw material for generation of electricity on the ground that such levy is illegal, arbitrary and barred by limitation and outcome of non-application of mind, without jurisdiction and contrary to the provisions of OET Act.

2. Petitioner's case in a nut-shell is that it is a Government of Odisha Undertaking incorporated under the Companies Act, 1956 and a joint venture of Government of Odisha and AES of USA having main objects to establish, operate and maintain power generating stations and tielines, sub-stations and main transmission line connected therewith. In other words, the petitioner is engaged in business of generation of electricity and distribution thereof in the State of Odisha. Ib Thermal Power Station (ITPS) is one of the thermal power generation units of the petitioner-Company situated at Ib Valley area in the district of Jharsuguda, Odisha. The petitioner has also set up mini hydel projects for furtherance of its business to achieve its objects. It is registered under the Orissa Value Added Tax Act, 2004 (for short 'OVAT Act') and OET Act and in the said registration certificate it has been authorized to purchase coal as raw-material for generation of electricity. The petitioner having thermal power plant is engaged in manufacture and distribution of electricity. It uses coal as primary/only raw-material in its thermal power plant for manufacture of electricity. Petitioner purchases coal for use as raw-material from Mahanadi Coal Fields Ltd. in Lakhanpur area.



In thermal power plant, chemical energy in coal gets converted to heat energy which in turn gets converted to mechanical energy which ultimately gets converted to electrical energy.

Further case of the petitioner is that coal being raw-material in manufacture of electricity, it is entitled to the benefit of concessional levy of entry tax in terms of Rule 3 of OET Rules. The petitioner brings coal into local area for manufacture of electricity and has also furnished declaration in Form- E15 to its seller. During the period of assessment, the petitioner purchased coal for consumption in its power plant as raw-material at a cost of Rs.482,63,03,305.63 and paid entry tax thereon at the rate of 0.5% amounting to Rs.2,41,31,516.52. On the basis of audit visit report, the Assessing Authority passed the impugned assessment order denying the concessional rate of entry tax on coal without affording reasonable opportunity of hearing to the petitioner and without considering written note of submissions in its proper perspective. Hence, the present writ petition.

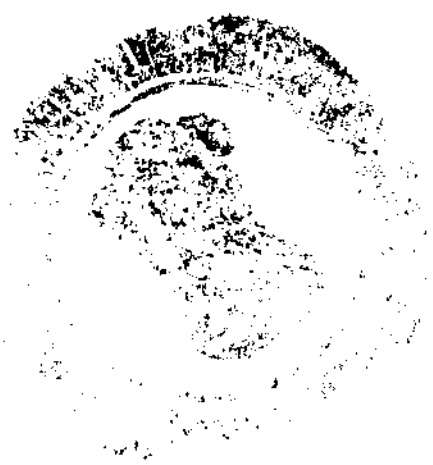
3. Mr.N.Venkataraman, learned Senior Advocate appearing for the petitioner submitted that coal is primary and important raw-material for generation of electricity as held by this Court in the case of ***Bhushan Power and Steel Limited Vs. State of Orissa***, (2012) 56 VST 50 (Orissa). Hence, coal is exigible to entry tax at concessional rate in terms of Rule 3(4) of OET Rules.

The Assessing Authority has grossly failed to appreciate the judgment rendered by this Court in *Bhushan Power and Steel Limited*

(supra) including the other judgment in NALCO in [W.P.(C) No.1597 and 1686 of 2012] relied upon by the petitioner before the Assessing Authority. Decision of this Court in *Bhushan Power and Steel Limited (supra)* holding that coal is a raw-material for the purpose of generating electricity has not been followed by the Assessing Authority on the ground that such finding of this Court is a cursory remark, i.e., Obiter Dicta and the said judgment having been challenged before the Hon'ble Supreme Court, ratio decided in that case has no application to the present case. The above reasons given by the learned Assessing Authority for not following the decision of this Court is impermissible in law.

4. Coal has been mentioned as an item required to be purchased for generation of electricity in the registration certificate and the petitioner during relevant time was purchasing coal from MCL furnishing declaration in Form E-15 in terms of Rule 3(5) of OET Rules stating therein that coal purchased shall be used for production of finished product, i.e., electricity.

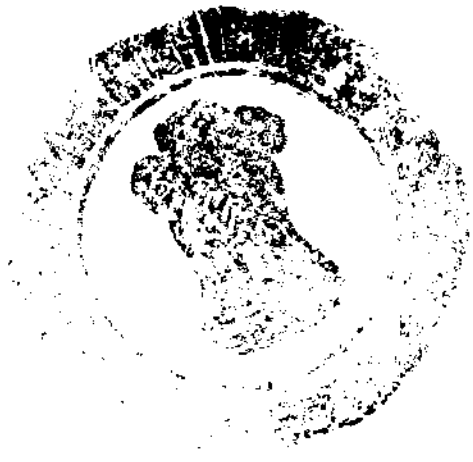
5. It was further submitted that 'manufacture' means bringing into existence a new substance. In other words, manufacture implies that when a change takes place a new and distinct article comes into existence known as a commercial product, which can be no longer regarded as the original commodity. Any process or processes creating something else having a distinct name, character and use would be manufacture. In the instant case, coal is used by the petitioner at its



thermal power station at IB Valley area as a raw-material for generation of electricity by which process coal loses its characteristics and is transformed into electricity which is a finished product. Hence, the finding of opposite party No.2 in the impugned assessment order that generation of electricity cannot be equated with manufacturing activity is illegal and unsustainable.

6. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Collector of Central Excise, New Delhi vs. Ballarapur Industries Ltd., [1990] 77 STC 282 (SC)*, it was submitted that coal is a raw material for production of electricity. Further relying upon the judgment of this Court in the case of *Orient Paper & Industries Ltd. vs. Orissa State Electricity Board, (1989) 42 ELT 552 (Ori)*, Mr. Venkatraman submitted that electricity is a good and generation of electricity involves manufacturing activities.

7. Mr.R.P.Kar, learned Standing Counsel appearing on behalf of the Revenue while supporting the order of assessment submitted that the impugned order of assessment has been passed duly complying with the statutory provisions. It was submitted that 'electricity' is not an article/good which is required to be produced in terms of Rule 2(1)(c) of OET Rules. It was further argued that a joint reading of Section 26 of the OET Act and Rule 3 of the OET Rules makes it clear that only when goods purchased as raw material and used in manufacturing of goods for sale i.e. goods which go into composition of the finished product will be eligible for concessional rate of entry tax as provided in sub-rule (4) of



Rule 3 of the OET Rules. Referring to the counter affidavit filed in another connected case, Mr. Kar submitted that in the present case, since generation of electricity is not a manufacturing activity and coal is not a raw material for generation of electricity, the petitioner is not entitled to avail the concessional rate of entry tax in terms of Rule 3(4) of OET Rules. In support of his contention, Mr. Kar relied upon the decision of the Hon'ble Supreme Court in the case of *Union of India vs. Ahmedabad Electricity Co. Ltd. and others, (2004) 134 STC 24 (SC).*

8. On the rival contentions of the parties, the following questions fall for consideration by this Court.

(i) Whether generation of electricity is a manufacturing activity?

(ii) Whether electricity is an article/a good as referred to in Section 2(28) of the OVAT Act which defines the expression "manufacture"?

(iii) Whether coal is a raw-material for generation of electricity in thermal power station?

(iv) If the answers to question (i), (ii) and (iii) are affirmative whether the petitioner is entitled to avail concessional rate of entry tax on coal in terms of Rule 3(4) of the OET Rules?

9. Question No.(i) is whether generation of electricity is a manufacturing activity.

The expression 'manufacture' is not defined in the OET Act. However, Rule 2(1)(c) of the OET Rules provides that "manufacture" with all its grammatical variations and cognate expressions, means a dealer or

a person in the business of manufacture as defined in the Orissa Value Added Tax Act, 2004.

10. Section 2(q) of the OET Act provides as follows:

> "2(q) Words and expressions used in OET Act and not defined in the said Act, but defined in the OVAT Act shall have the same meaning respectively assigned to them in that Act."

11. Section 2(28) of the OVAT Act defines "manufacture" as under:

> "2(28) "Manufacture" means any activity that brings out a change in an article or articles as a result of some process, treatment, labour and results in transaction into a new and different article so understood in commercial parlance having a distinct name, character and use, but does not include such activity or manufacture as may be notified."

12. It may be relevant to mention here that law is well-settled that where an expression under the Act has been defined, the said expression will have the same meaning and it is not necessary to find out what is the general meaning of the expression.

13. The Hon'ble Supreme Court in the case of ***S.Gopal Reddy Vs. State of A.P.,*** (1996) 4 SCC 596 at page 607 held that where definition has been given in a statute itself, it is neither proper nor desirable to look to the dictionaries etc. to find out the meaning of expression. The definition given in the statute is the determinative factor.

14. The Hon'ble Supreme Court in the case of ***Dy. CST Vs. Plo Food Packers***, 1980 (Supp) SCC 174 at page 176 held that only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but

instead is recognized as a new and distinct article that a manufacture can be said to take place.

15. The Hon'ble Supreme Court in ***Collector of Central Excise, Bombay-II Vs. M/s. Kiran Spinning Mills***, (1988) 2 SCC 348 at page 355 held as follows:

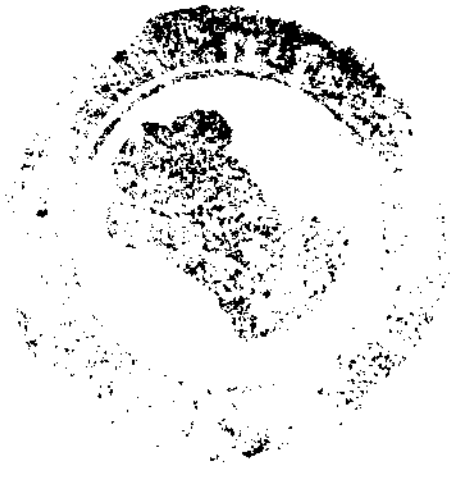
> "It is true that etymological word "manufacture" properly construed would doubtless cover the transformation but the question is whether that transformation brings about fundamental change, a new substance is brought into existence or a new different article having distinctive name, character or use results from a particular process or a particular activity."

16. In ***Collector of Central Excise, Madras Vs. M/s. Kutty Flush Doors & Furniture Co. (P) Ltd.,*** (1988) Suppl. SCC 239 at page 240, the Hon'ble Supreme Court held as follows:

> "3. It may be worthwhile to note that "manufacture" implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more was necessary and there must be transformation, a new and different article must emerge having a distinct name, character or use."

17. The Hon'ble Supreme Court in the case of ***Collector of Central Excise, Jaipur Vrs. Rajasthan State Chemical Works, Deedwana, Rajasthan,*** AIR 1991 (SC) 2222 held as follows:-

> "....Process in manufacture or in relation to manufacture implies not only the production but the various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to (*sic* that the) manufactured product emerges. Therefore, each step towards



> such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process manufacture or processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture."

18. This Court in the case of ***Orient Paper & Industries Ltd.*** *(supra)* while interpreting Section 2(b) of the Central Excise and Salt Act, 1944 has held that generation of electricity for the purpose of Central Excise and Salt Act is "manufacture or production of electricity", since the term "manufacture or production" is to be given a wide meaning.

19. In view of the definition of 'manufacture' as provided in Section 2(28) of OVAT Act read with Rule 2(1)(c) of the OET Rules and Section 2(q) of the OET Act and all the above judicial pronouncements of the Hon'ble Supreme Court and High Court, we are of the considered view that the activity of generating electricity in thermal power plant by using coal would qualify as a manufacturing activity.

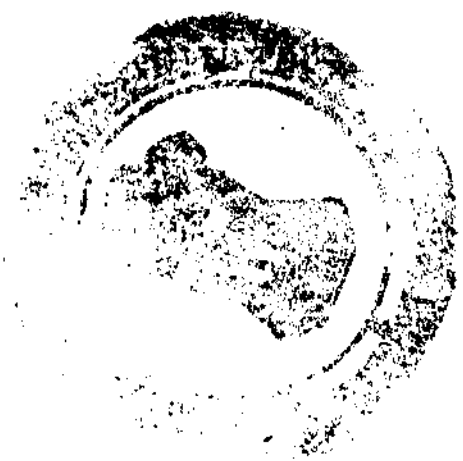
20. Question No.(ii) is as to whether electricity is an article/a good as referred to in Section 2(28) of the OVAT Act which defines the expression "manufacture".

We need not retain ourselves for a longer period to adjudicate this question in view of the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur,*** (1969) 1 SCC 200 at page 204, wherein it has been held as under:

"What has essentially to be seen is whether electric energy is "goods" within the meaning of the relevant provisions of the two Acts. The definition in terms is very wide according to which "goods" means all kinds of movable property. Then certain items are specifically excluded or included and electric energy or electricity is not one of them. The term "movable property" when considered with reference to "goods" as defined for the purposes of sales tax cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be movable property when it has all the attributes of such property. It is needless to repeat that it is capable of abstraction, consumption and use which, if done dishonestly, would attract punishment under s.39 of the Indian Electricity Act, 1910. It can be transmitted, transferred, delivered, stored, possessed etc. in the same way as any other movable property. Even in Banjamin on Sale, 8th Edn., reference has been made at page 171 to County of Durham Electrical, etc., Co. v. Inland Revenue(1) in which electric energy was assumed to be "goods". If there can be sale and purchase of electric energy like any other movable object we see no difficulty in holding that electric energy was intended to be covered by the definition of "goods" in the two Acts. If that had not been the case there was no necessity of specifically exempting sale of electric energy from the payment of sales tax by making a provision for it in the Schedules to the two Acts. It cannot be denied that the Electricity Board carried on principally the business of selling, supplying or distributing electric energy. It would therefore clearly fall within the meaning of the expression "dealer" in the two Acts."

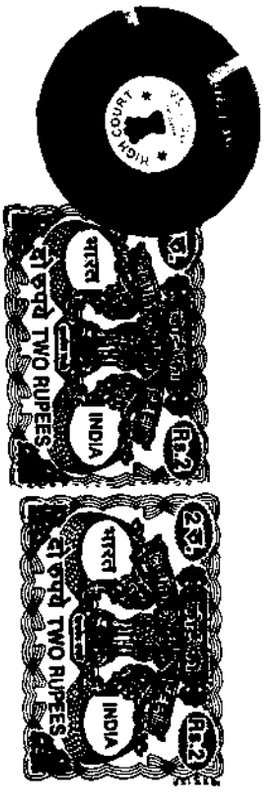
[Also see *State of A.P. vs. National Thermal Power Corporation Ltd. and Others, (2002) 127 STC 280 (SC)]*

21. In view of the above decisions of the Hon'ble Supreme Court, electricity is an article as referred to in Section 2(28) of the OVAT Act read with Rule 2(1)(c) of OET Rules which define 'manufacture'.



22. Question No.(iii) is whether coal is a raw-material for generation of electricity in thermal power plant.

The processes that are involved in manufacture/generation/ production of electricity as narrated in the written submission filed by the petitioner before the Assessing Authority and not disputed by the opposite party-Department, are as follows:-



(a) Coal is the primary material for power generation;
(b) In a Thermal Power Plant chemical energy available in Coal is converted into electricity;
(c) Coal is fed into a boiler along with water and air;
(d) Coal is fired to heat the water and resulting in generation of steam;
(e) Chemical energy in coal gets converted into heat energy and the same is carried by steam which acts as a medium to the Turbine;
(f) The high pressure steam impinges and expands across a number of blades in the turbine and thereby rotating the turbine;
(g) In the process heat energy carried through steam gets converted into mechanical energy;
(h) Mechanical energy gets converted to electrical energy based on Faradey's principle of electromagnetic induction.
(i) In other words, chemical energy in coal gets converted to heat energy which in turn gets converted to mechanical energy which ultimately gets converted to electrical energy.

23. The above process clearly demonstrates that coal is the primary raw-material for generation/production of electricity in thermal power plant and without coal, no electricity can be produced/generated/ manufactured.

24. In ***Ballarapur Industries Ltd.,*** *(supra),* the Hon'ble Supreme Court held as under:

"5. The question, in the ultimate analysis, is whether the input of Sodium Sulphate in the manufacture of paper would cease to be a "Raw-Material" by reason alone of the fact that in the course of the chemical reactions this ingredient is consumed and burnt-up. The expression "Raw- Material" is not a defined term. The meaning to be given to it is the ordinary and well-accepted connotation in the common parlance of those who deal with the matter.

The ingredients used in the chemical technology of manufacture of any end-product might comprise, amongst others, of those which may retain their dominant individual identity and character throughout the process and also in the end-product; those which as a result of interaction with other chemicals or ingredients, might themselves undergo chemical or qualitative changes and in such altered form find themselves in the end-product; those which, like catalytic agents, while influencing and accelerating the chemical reactions, however, may themselves remain uninfluenced and unaltered and remain independent of and outside the end-products and those, as here, which might be burnt-up or consumed in the chemical reactions. The question in the present case is whether the ingredients of the last mentioned class qualify themselves as and are eligible to be called "Raw Material" for the end-product. One of the valid tests, in our opinion, could be that the ingredient should be so essential for the chemical processes culminating in the emergence of the desired end-product, that having regard to its importance in and indispensability for the process, it could be said that its very consumption on burning-up is its quality and value as raw-material. In such a case, the relevant test is not its absence in the end product, but the dependance of the end product for its essential presence at the delivery and of the process. The ingredient goes into the making of the end-product in the sense that without its absence the presence of the end-product, as such, is rendered

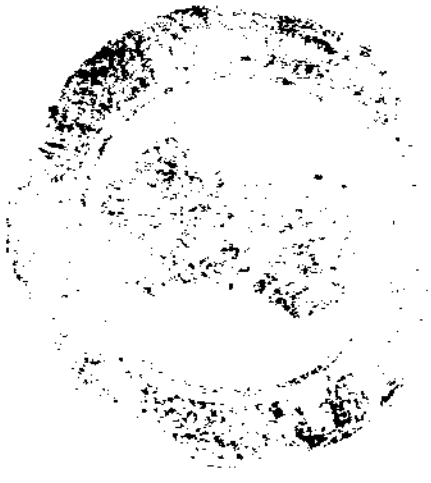
> impossible. This quality should coalesce with the requirement that its utilisation is in the manufacturing process as distinct from the manufacturing apparatus."

25. When the processes that are involved in manufacturing/ generation/production of electricity in a thermal plant as narrated in the preceding paragraph is considered in the light of the above observation of the Hon'ble Supreme Court, it can safely be concluded that coal is a raw material for production/generation of electricity.

26. This Court in ***Bhushan Power and Steel Limited*** *(supra)* held that coal is a raw material for the purpose of generating electricity.

27. Apart from the above, perusal of the impugned assessment order reveals that before the Assessing Authority, the petitioner produced the expert opinion obtained from IIT, Kharagpur, wherein, it has been opined that coal is a raw material which results in the emergence of electricity. The relevant portion of the said report is reproduced herein below:-

> "Coal is the prime material for thermal power plants converting the embedded chemical energy through various stages and finally to electrical energy. The first conversion of energy takes place by burning Coal as raw material which produces steam as a result of boiling water in the boiler. Thereafter, the stage is the Thermo dynamic process that produces heat energy. In the final stage the steam produced as a result of heat energy delivered to the turbine rotates the generator, rotor to produce electrical energy based on Faradyne's Principles of Electro Magnetic Induction...."



Admittedly, the Department has not produced any acceptable evidence in rebuttal. Therefore, the expert opinion given by the IIT, Kharagpur has the binding force on the Department.

28. The Hon'ble Supreme Court in the case of ***Commissioner of Central Excise Vs. Damnet Chemicals (P) Ltd.,*** (2007) 7 SCC 490 at page 495 has held as under:-

> "It is well settled and needs no restatement at our hands that the test reports given by the Chemical Examiner are binding upon the Department in the absence of any other acceptable evidence produced by it in rebuttal. In the present case, the Department has neither produced any evidence to rebut the reports of the Chemical Examiner nor impeached the findings of the test reports."

29. The Hon'ble Supreme Court in the case of ***Commissioner, Sales Tax, U.P. Vs. Bharat Bone Mill,*** (2007) 4 SCC 136, at page 139 held as under:-

> 11. Moreover, it is well-known that the question as to whether a commodity would be exigible to sales tax or not must be considered having regard to its identity in common law parlance. If, applying the said test, it is to be borne in mind that if one commodity is not ordinarily known as another commodity; normally, the provisions of taxing statute in respect of former commodity which comes within the purview of the taxing statute would be allowed to operate. In any event, such a question must be determined having regard to the expert opinion in the field. We have noticed hereinabove the difference between 'bone meal' and 'crushed bone'. Different utilities of the said items has also been noticed by the Allahabad High Court itself. The High Court or for that matter, the Tribunal did not have the advantage of opinion of the expert to the effect as to whether crushed bones can be used only for the purpose of fertilizer or whether crushed

bones are sold to the farmers for use thereof only as fertilizer."

30. In view of the above, we are of the considered opinion that coal is a raw material for production of electricity in thermal plant.

The facts and the issues involved in *Ahmedabad Electricity Co. Ltd. and others (supra)* are completely different from the present case and therefore, it is of no assistance to the Department.

31. Now, let us examine whether the reasons given by the learned Assessing Authority for disallowing the petitioner's claim to avail concessional levy of entry tax in terms of Rule 3(4) of the OET Rules are legally valid.

The reasons assigned by the Assessing Authority to disallow the petitioner's above claim are as follows:

(a) coal generates steam and steam so generated rotates the turbine and in the process of rotation of turbine electricity is generated. Therefore, coal does not transform into electricity;

(b) Though coal contains chemical energy that does not convert to electric energy;

(c) In absence of any standard input and output ratio between coal and generation of electricity, it cannot be said that coal is a raw material for consumption of electricity;

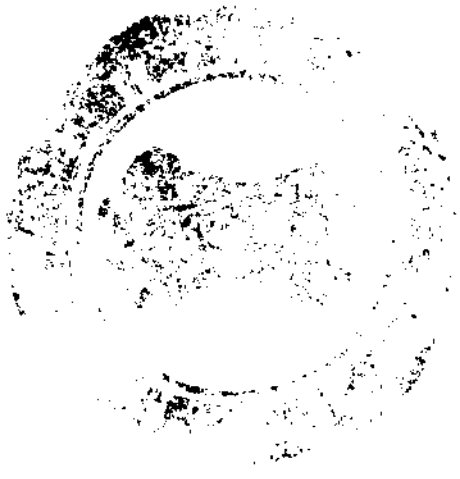
(d) In the process of generation of hydro electricity, water remains with all its ingredients even after completion of process of generation of hydro electricity. Thus, neither

water nor coal transforms to hydro electricity and thermal power. To strengthening his view, the Assessing Authority further observed that does the wind is a raw material for non-conventional energy like wind energy, similarly, what is the raw material for solar energy?

(e) Generation of thermal power being not manufacturing activity, the dealer-company cannot be considered to be a manufacturer and as such cannot avail the privilege of concessional rate of entry tax granted under Rule 3(4) of the OET Rules;

(f) Being burnt coal undergoes a change but every change is not a manufacture as held by the Hon'ble Supreme Court in the case of *Kutty Flush Doors and Furniture Co.*(supra), hence, although coal undergoes the change, yet it cannot be said that it transforms into a new article and hence, it does not satisfy the condition of transformation from one article or another as envisaged under Rule 3(4) of the OET Rules;

(g) The contention of the dealer that the coal is a raw material for the purpose of generating electricity as held by this Court in *Bhusan Power and Steel Limited* (supra) is not a settled ratio and it has no application to the case at hand since in that case the question before the High Court was as to whether coal is a raw material for production of iron and steel and the case was not certainly determined or adjudicated as to



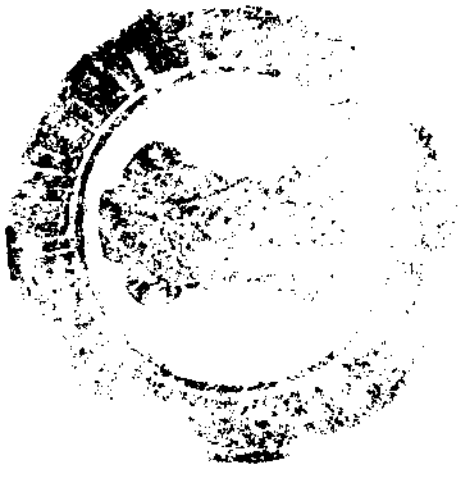
whether the coal is a raw material for generation of electricity. Therefore, the observation of the High Court that coal is a raw material for generation of electricity is a cursory remark, i.e., obiter dicta and the said judgment having been challenged in the Hon'ble Supreme Court and the matter is subjudice, the same is not a settled ratio,

32. For the following reasons, we feel it extreme difficult to accept the above reasons given by the Assessing Authority to hold that coal is not a raw material for generation/production of electricity in thermal power station and that generation of electricity is not a manufacturing activity and therefore the petitioner is not entitled to avail concessional rate of entry tax as provided under Rule 3(4) of the OET Rules.

(a) It is not the case of the Assessing Authority that without coal thermal power which is finished product in a thermal power station can be produced and therefore, coal is not a primary/principal raw material to generate/produce thermal power. On the other hand, use of coal and production of electricity in a thermal power plant is an integral process and so inextricably connected that no thermal power can be produced without use of coal;

(b) Consumption and output ratio between coal and electricity is not necessary/relevant in deciding whether coal is a raw material for generation/production of thermal power.

(c) While adjudicating as to whether coal is a raw material for generation/production of thermal power, it is irrelevant to find out whether water, wind, solar power are raw material for generation of hydro electricity, wind energy and solar



energy respectively. Such questions may be adjudicated in appropriate case (s).

(d) There is no dispute over the legal proposition that every change in a processing is not manufacture as held by the Hon'ble Supreme Court in *Kutty Flush Doors & Furniture Co. (supra)*. As in the present case a new and different article, i.e., electricity energy emerges which is distinct in name, character and use from coal, the above case of the Hon'ble Supreme Court supports the petitioner.

(e) While dealing with question Nos. (i) and (iii) above, we have already held for the reasons stated therein that generation of electricity is a manufacturing activity and coal is a raw material for generation/production of electricity.

33. We are shocked to notice that the learned Assessing Authority held that the observation of this Court that "coal as a raw material for generation of electricity" is a **"cursory remark, i.e., obiter dicta"** and the said judgment having been challenged in the Hon'ble Supreme Court which is subjudice, the same is not a settled ratio and therefore, the petitioner-company cannot take advantage of the said decision. In other words, the said decision is not binding on him (on the Assessing Authority).

34. At this juncture, it would be appropriate to note as to what is "obiter dicta". The expression "obiter" means "by the way"; "in passing"; "incidentally".

Obiter dictum is the expression of opinion stated in the judgment by a judge which is unnecessary of a particular case. Obiter

dicta is an observation which is either not necessary for the decision of the case or does not relate to the material facts in issue.

35. Now, let us see whether the observation/finding of this Court in the case of ***Bhusan Power & Steel Ltd.*** *(supra)* that "coal is a raw material for generation of electricity" is not necessary for the decision of the case or such observation does not relate to the material facts in issue.

In *Bhusan Power & Steel case* (supra) the petitioner was engaged in manufacturing of sponge iron, billet and H.R. Coil as well as generation of power. The petitioner's claim was that coal is required to manufacture the electricity, which is, in turn, essential to run the plant for manufacturing sponge iron, billets and HR coil. Therefore, when the electricity generation is a captive arrangement and the requirement is for carrying out manufacturing activity, the electricity generation also forms part of the manufacturing activity and the raw material used in that electricity generation qualifies for availing of concessional levy of entry tax in terms of Rule 3(4) of the OET Rules. On the basis of the above contention of the petitioner, this Court held that requirement of Rule 3(4) of the OET Rules is that 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.

36. In view of the above analytical discussion of this Court, by no stretch of imagination, it can be said that the findings/observations of this Court that 'coal is a raw material for generation of electricity' are unnecessary for the decision of that case or it does not relate to the material facts in issue. Therefore, the learned Assessing Authority is wholly unjustified to hold that the observation of this Court in ***Bhusan Power and Steel Ltd. (supra)*** that "coal is a raw material for generation of electricity" is a cursory remark, i.e., obiter dicta.

37. It may be relevant to note that the Assessing Authority is not competent to declare any observation/finding of the High Court as obiter dicta.

38. Now let us see whether the decision of the High Court is of binding nature and if so to whom. Undoubtedly, there is no express provision in the Constitution like Article 141, in respect of the High Court, Tribunals within the jurisdiction of the High Court are bound to follow its judgment, but as the High Court has the power of superintendence over them under Articles 226 and 227 of the Constitution, the law declared by the High Court in the State is binding on them.

39. The Hon'ble Supreme Court in the case of ***East India Commercial Co. Ltd., Calcutta and Another vs. Collector of Customs, Calcutta, AIR 1962 SC 1893,*** held as under:

> "We therefore, hold that the law declared by the highest court in the state is binding on authorities or Tribunals under its superintendence and they cannot ignore it."

40. The Hon'ble Supreme Court in the case of ***Sri Baradakant Mishra vs. Bhimsen Dixit,*** *(1973) 1 SCC 446,* held as follows:

> "15. The conduct of the appellant in not following the previous decision of the High Court is calculated to create confusion in the administration of law. It will undermine respect for law laid down by the High Court and impair the Constitutional authority of the High Court. His conduct is therefore comprehended by the principles underlying the law of Contempt. The analogy of the inferior court's disobedience to the specific order of a superior court also suggests that his conduct falls within the purview of the law of Contempt. Just as the disobedience to a specific order of the Court undermines the authority and dignity of the court in a particular case, similarly the deliberate and malafide conduct of not following the law laid down in the previous decision undermines the Constitutional authority and respect of the High Court. Indeed, while the former conduct has repercussions on an individual case and on a limited number of persons, the latter conduct has a much wider and more disastrous impact. It is calculated not only to undermine the Constitutional authority and respect of the High Court, generally, but is also likely to subvert the Rule of Law and engender harassing uncertainty and confusion in the administration of law."

41. The Hon'ble Supreme Court in the case of ***Union of India and others vs. Kamlakshi Finance Corporation Ltd.,*** *AIR 1992 SC 711,* in paragraph 6 has observed as follows:

"The High Court has, in our view, rightly criticized the conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department-in itself an objectionable phrase and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessee and chaos in administration of tax laws."

42. The Hon'ble Supreme Court in the case of ***Sri Baradakant Mishra (supra)*** held that a Subordinate Court or Tribunal/Authority refusing to follow a High Court's decision where a petition for leave to appeal to Supreme Court against that High Court decision was pending would amount to deliberate disobedience and willful disregard of the High Court and is contempt of Court. Therefore, in the case at hand the plea of the Assessing Authority with regard to not following the decision of this Court on the ground of pendency of SLP before the Hon'ble Supreme Court amounts to deliberate disobedience and willful disregard of this Court.

43. In the case of ***K.N. Agarwal vs. CIT,*** *[1991] 189 ITR 769,* while emphasizing the need of following judgments of the High Courts by the Assessing Officer, the Allahabad High Court has observed as under:

> "Indeed, the orders of the Tribunal and the High Court are binding upon the Assessing Officer and since he acts in a quasi judicial capacity, the discipline of such functioning demands that he should follow the decision of the Tribunal or the High Court, as the case may be. He cannot ignore merely on the ground that the Tribunal's order is the subject matter of revision in the High Court or the High Court's decision is under appeal before the Supreme Court. Permitting him to take such a view would introduce judicial indiscipline, which is not called for even in such cases. It would lead to a chaotic situation."

44. The Andhra Pradesh High Court in the case of ***State of A.P. vs. CTO, (1988) 169 ITR 564,*** held as under:

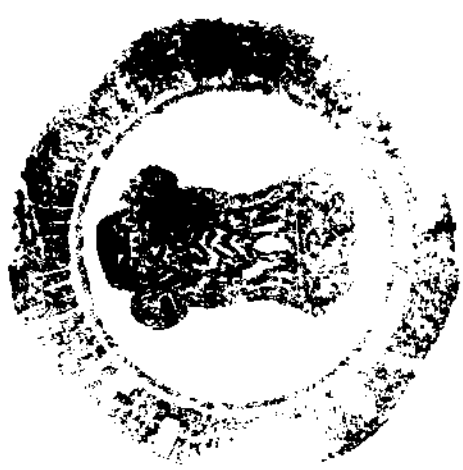
> "...if any authority or the Tribunal refuses to follow any decision of the High Court on the above grounds, it would be clearly guilty of committing contempt of the High Court and is liable to be proceeded against."

45. Needless to say that if the Tribunal and authorities functioning within the territorial jurisdiction of the High Court would not follow the order of the High Court that will lead to chaos. Everybody would be then seeking interpreting the law according to their own whims and fancies. In such situation, lawyers may confuse not knowing how to advise their clients. The general public would be in dilemma as to what is the correct position of law. As a result, the judiciary would lose its credibility.

46. It may be noted that it is not the case of the Assessing Authority that the decision of this court in *Bhusan Power and Steel Ltd. (supra)* has been stayed or varied by the Hon'ble Supreme Court. Therefore, the Assessing Authority cannot refuse to follow the judgment of the High Court on the ground that a challenge has been made to the judgment of this Court in the Hon'ble Supreme Court and the same is pending. Hence, the Assessing Authority is clearly guilty and committed contempt of this Court and is liable to be proceeded against.

The Registry of this Court is directed to separately initiate a contempt proceeding against Mr. A.C. Nayak, Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur by name, who has passed the assessment order dated 03.05.2014 under Section 9C of the OET Act for the period 01.04.2011 to 31.03.2013.

47. We are afraid to notice that even though the petitioner has filed a written submission in course of the assessment proceeding as evident from the impugned assessment order relying on various statutory provisions, the Supreme Court judgments, judgments of the High Court in support of its contention, the Assessing Authority without dealing with the contention of the petitioner with reference to the judgments relied upon by it passed the assessment order raising huge tax and penalty amounting to Rs.7,22,44,608/-. Thus, the impugned order shows complete non-application of mind which ultimately amounts to judicial indiscipline and impropriety. The Assessing Authority, who is Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur, being a fairly



senior officer is always expected to take note of various decisions of the Hon'ble Supreme Court/High Court placed before him by the assessee before passing any order. It may not be appropriate to say that competent and efficient Assessing Authorities are to be posted because the fate of litigants is dependent upon their proper adjudication.

48. Question No.(iv) is whether the petitioner is entitled to avail concessional rate of entry tax on coal in terms of Rule 3(4) of the OET Rules.

49. In view of our answer to question Nos.(i), (ii) and (iii) in favour of the petitioner, we are of the considered opinion that the petitioner is entitled to avail concessional rate of entry tax on coal in terms of Rule 3(4) of the OET Rules.

50. Accordingly, the impugned order of assessment dated 03.05.2014 (Annexure-6 series) passed by the Assessing Authority is quashed.

51. In the result, the writ petition is allowed, but without any order as to costs.

Sd/- B. N. Mahapatra, J.

I. Mahanty, J. *I agree.*

Sd/- I. Mahanty, J.

Orissa High Court, Cuttack
Dated 30th March, 2015/ss/skj/bks

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Date of Notification : 10
Date of Supply : 2.4
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Date of Delivery : 3.4.15

CA No 2189 of 15

MEMO OF COSTS

	Rs.	P
Application Fee.....	5	50
Searching Fee.....	—	—
Extra Fee for Urgency.	25	00
Folios.....27.....	67	50
Fee For Hologram	27	00
Other Items if any.	17	55
Total	142	55

(C R — pees one hundred forty two & paise fifty five only)

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ORISSA HIGH COURT
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