

2022-TIOL-821-HC-ORISSA-GST

IN THE HIGH COURT OF ORISSA

W.P. (C) No. 10052 of 2022 & I.A. No.5190 of 2022

M/s JSW STEEL LTD

Vs

UNION OF INDIA AND OTHERS

Jaswant Singh & M S Raman, JJ

Dated: May 17, 2022

**Petitioner Rep by:** Mr. Arvind Datar, Sr. Advocate, Mr. Tarun Gulati, Sr. Advocate, Mr. Nitya Thakur, Advocate, Mr. Adhiraj Mohanty, Advocate & Mr. K. Visalaksh, Advocate

**Respondent Rep by:**

Mr. Ashok Ku. Parija, Advocate General with Mr. L. Samantaray, Addl. Govt. Advocate for Opp. Party No.2 Mr. Sunil Mishra, Additional Standing Counsel (CT & GST Organization) for Opp. Party No.3

**GST -**

Petitioner [JSW Steel Ltd. (Odisha)] states that JSW Steel Ltd. (Mumbai) participated in the tender process invited by the Government of Odisha and was awarded the lease for undertaking of mining operations for iron ore blocks in the State of Odisha - JSW Steel Ltd. (Odisha) being the recipient of services in the State of Odisha is obligated to pay GST on reverse charge mechanism - It is claimed that iron ore extracted from the iron ore blocks is either supplied by JSW Steel Ltd. (Odisha) to JSW Plants by way of stock transfer; or to the extent permissible, supplied to third parties - Accordingly, it has raised tax invoices towards both the supplies and claims to have paid applicable GST - Scrutiny of returns filed by JSW Steel Ltd. (Orissa) revealed that they paid OGST and CGST under reverse charge mechanism (RCM) on bid premium, royalty, DMF, NMET, NPV etc. (towards availing of licensing services for right to use minerals including exploration and evaluation in respect of four mines located inside the State of Odisha (falling under Heading 9973)) - Having utilized a portion of the tax paid on RCM, the Petitioner-company in Odisha has passed on to JSW Steel Ltd. in Maharashtra (which is declared as ISD) tax in shape of IGST in the garb of outward supply of "facilitation services" to M/s. JSW Steel Ltd. (ISD) - Amount of input tax credit (ITC) that stood transferred by JSW Steel Ltd. (Odisha) has been distributed by JSW Steel Ltd. (Maharashtra) to other units of JSW Steel Ltd. located in the States of Tamil Nadu, Maharashtra and Karnataka - Such a modality in claiming adjustment of unutilized input tax credit is objected to by the Revenue on the premise that such a device to facilitate other units of JSW Steel Ltd. located in other States to claim input tax credit arising in the State of Odisha is contrary to the statutory mandate - Proceedings were initiated and which culminated in demand/order dated 28.03.2022 of Rs.901,48,27,137/- [comprising tax to the tune of Rs.401,16,88,016/- and penalty of Rs.401,16,88,016/- and interest of Rs.99,14,51,105/- (up to 28th March 2022)] - It is against this order that the petitioner is before the High Court and seeks quashing of the same.

**Held:**

No doubt JSW-Company from its Head Office at Bombay had applied and participated in the tender process, however, it cannot be lost sight of that it is JSW-Company, and not Head Office, Bombay, which has been granted the mining lease for the four Iron mines situated within the State of Odisha - The Company, to undertake the process of mining, had to get itself registered in State of Odisha as per the statutory provisions of CGST/OGST to undertake the execution of the mining lease - It is conceded that the execution of work and all transactions including payment of tax being "input recipient" have been conducted by the JSW-Company from its office Barbil (Odisha) - It cannot also be disputed that the outward supply of goods and services of the Company has been provided by the unit at Odisha to other units of the Company and other parties upon payment of tax for supply of such outward goods and services, thereby providing the JSW units in other States to avail the input tax credit on the tax paid to JSW Odisha for their outward supplies from such locations outside the State - It is conceded that the Input Tax Credit with JSW Steel Limited (in the State of Odisha) **was found in excess, which remained unutilized** - This excess input tax credit has been sought to be utilized by raising tax invoices in favour of JSW Steel Ltd. in the State of Maharashtra,

declared ISD, in the garb of "support service" - That apart, it is not clear at all as to what is the support service which has been provided by JSW Steel Ltd.(Odisha) to JSW Steel Ltd.-ISD at Mumbai, much less any common services which could be utilized by other units located in other parts of the country - It also emerges that JSW Steel Ltd. in Odisha has utilized JSW Steel Ltd.-ISD Mumbai as wrongful conduit and facilitated the utilization of input tax credit by other units of JSW Steel Ltd., which, in this manner, have availed input tax credit twice, *i.e.*, once on the strength of the purchase invoices of supply of iron ore and the other on the strength of the tax invoices for alleged services issued by JSW Steel Ltd.-ISD at Mumbai - It is pertinent to notice that in view of definition of "Input Service Distributor" contained in Section 2(61), it is necessary that the ISD as an office is required to receive tax invoices towards inward supply - Since no such supply is being shown to have been made by JSW Steel Ltd. of Odisha to JSW Steel Ltd. of Maharashtra, no ***prima facie*** case is made out by the Petitioner - Thus transactions in question ***prima facie*** amount to siphoning of tax amounts, therefore, apparently warrant invocation of proceeding under Section 74 of the OGST/CGST Act - Bench declines to allow the prayer for restraining the opposite parties from effecting recoveries of the demand more so in equitable jurisdiction under Article 226 of the Constitution of India - Court issues notice in W.P.(C) No.10052 of 2022 along with I.A. No.5190 of 2022 - Matter listed on 12 th August 2022: High Court [para 7, 9, 10, 13]

Matter listed

## JUDGEMENT

### W.P. (C) No. 10052 of 2022 & I.A. No.5190 of 2022

1. This matter is taken up by virtual/physical mode.
2. Assailing the Order dated 28th March, 2022 passed by the Deputy Commissioner of State Tax, CT & GST Enforcement Unit, Barbil under Section 74 of the Odisha Goods and Services Tax [Act, 2017](#) (for short, "the OGST" Act)/the Central Goods and Services Tax [Act, 2017](#) (for brevity, "the CGST Act") for the tax periods from April, 2020 to March, 2021, the Petitioner has approached to this Court invoking provisions of Article 226/227 of the Constitution of India with the following prayers:

***"(a) A writ of and/or order and/or direction in the nature of Certiorari commanding the Opp.Parties to transmit and certify the records relating to Impugned Order dated 28.03.2022 under Annexure-1 so that the said Impugned Order dated 28.03.2022 under Annexure- 1 so that the said Impugned Order and all proceedings relating thereto may be set aside and/or quashed and conscionable justice might be rendered;***

***(b) A writ of and/or order and/or direction in the nature of Mandamus commanding the Opp. Parties to not give any effect to and/or take any step whatsoever pursuant to and/or in furtherance of the Impugned Order dated 28.03.2022;***

***(c) A writ of and/or order and/or direction in the nature of Prohibition commanding the Opp.Parties to forbear from giving any effect to and/or taking any step whatsoever pursuant to and/or in furtherance of the Impugned Order dated 28.03.2022;***

***(d) Costs of any incidental to this application be paid by the Opp.Parties;***

***(e) Such further or other order or orders be made and/or directions be given as would afford complete relief to the Petitioner."***

3. The case of the Petitioner, public limited company, is that being engaged in the business of manufacturing and sale of hot and cold rolled coils and sheets, galvanized coils and sheets, and plates, it has been allotted with GSTIN 21AAACJ4323N2ZR (in the State of Odisha) and GSTIN 27AAACJ4323N2ZF (in the State of Maharashtra). In the State of Maharashtra the said registration number as ISD (Input Service Distributor) as defined under Section 2(61) of the CGST/OGST Act.

**3.1.** It is stated by the Petitioner that JSW Steel Ltd. (Mumbai) participated in the tender process invited by the Government of Odisha and was awarded the lease for undertaking of mining operations for iron ore blocks in the State of Odisha. In Odisha, said company has been allotted four blocks, *i.e.*,

Jajang Block, Ganua Block, Narayanposhi Block and Nuagaon Block. It is claimed by the Petitioner that iron ore extracted from the iron ore blocks is either supplied by JSW Steel Ltd. (Odisha) to JSW Plants by way of stock transfer; or to the extent permissible supplied to third parties. Accordingly, it has raised tax invoices towards both the supplies and claims to have paid applicable GST.

4. From the impugned Order dated 28.03.2022 it is revealed that scrutiny of returns filed for the tax periods in question depicted that JSW Steel Ltd. bearing GSTIN 21AAACJ4323N2ZR (in the State of Odisha) has paid OGST and CGST under reverse charge mechanism (referred to as "RCM") on bid premium, royalty, DMF, NMET, NPV, *etc.*

(towards availing of licensing services for right to use minerals including exploration and evaluation in respect of four mines located inside the State of Odisha (falling under Heading 9973). Further fact delineated in the said Order shows that having utilized a portion of the tax paid on RCM, the Petitioner-company in Odisha has passed on to JSW Steel Ltd. in Maharashtra which is declared as ISD bearing GSTIN 27AAACJ4323N2ZF in shape of IGST in the garb of outward supply of facilitation services to M/s. JSW Steel Ltd. (ISD). Said fact is apparent from disclosures made in invoices, Part-B of GSTR-2A, GSTR-1 and GSTR-3B and cash ledger of the taxpayer and GSTR-6 filed by JSW Steel Ltd. GSTIN 27AAACJ4323N2ZF (in the State of Maharashtra).

**4.1.**

Further scrutiny also revealed that the amount of input tax credit (ITC) stood transferred by JSW Steel Ld. [GSTIN 21AAACJ4323N2ZR (in the State of Odisha)], has been distributed by JSW Steel Ltd. GSTIN 27AAACJ4323N2ZF (in the State of Maharashtra) to other units of JSW Steel Ltd. located in the States of Tamil Nadu, Maharashtra and Karnataka.

**4.2.** Such a modality in claiming adjustment of unutilized input tax credit is objected to by the Revenue on the premise that such a device to facilitate other units of JSW Steel Ltd. located in other States to claim input tax credit arising in the State of Odisha is contrary to the statutory mandate. Therefore, the ingredients for initiating proceeding under Section 74 being satisfied, the Deputy Commissioner of State Tax has issued notice which culminated in demand of Rs.901,48,27,137/- [comprising tax to the tune of Rs.401,16,88,016/- and penalty of Rs.401,16,88,016/- and interest of Rs.99,14,51,105/- (up to 28th March 2022)].

5. Mr. Arvind Datar, learned Senior Counsel appearing for the Petitioner-company submits that:

*i.* The Order dated 28.03.2022 passed under Section 74 on the premise that there is element of fraud involved in claiming input tax credit by units located in other States being distributed by JSW Steel Ltd. GSTIN 27AAACJ4323N2ZF (in the State of Maharashtra) as ISD is unwholesome, arbitrary and without jurisdiction. JSW Steel Ltd. of Maharashtra being the successful bidder and being allotted the iron ore block in Barbil, Odisha it has paid royalty and other statutory dues in connection with extraction of iron ore through JSW Steel Ltd. bearing GSTIN 27AAACJ4323N2ZF (in the State of Maharashtra). The transaction is only to facilitate. Therefore, the input tax credit (unutilized) of JSW Steel Ltd. bearing GSTIN 21AAACJ4323N2ZR (in the State of Odisha) would be of JSW Steel Ltd. of GSTIN 27AAACJ4323N2ZF (in the State of Maharashtra). Therefore, the Revenue Authority in the State of Odisha has acted without jurisdiction in rejecting the transaction of distribution of unutilized input tax credit available in respect of JSW Steel Ltd. of Odisha to other units located outside the State of Odisha through JSW Steel Ltd. of Maharashtra being ISD.

*ii.* The transfer of unutilized ITC JSW Steel Ltd. bearing GSTIN 21AAACJ4323N2ZR (in the State of Odisha) to JSW Steel Ltd. bearing GSTIN 27AAACJ4323N2ZF (in the State of Maharashtra) to facilitate other units located in different States being not sham, the Deputy Commissioner of State Tax, CT&GST Enforcement Unit, Barbil is not competent to assume jurisdiction.

*iii.* JSW Steel Ltd. bearing GSTIN 27AAACJ4323N2ZF (in the State of Maharashtra) being conduit, it is competent to distribute unutilised input tax credit in respect of tax paid in the State of Odisha by JSW Steel Ltd. bearing GSTIN 21AAACJ4323N2ZR (in the State of Odisha) to the units located in other States like Tamil Nadu, Maharashtra and Karnataka.

*iv.*

The Revenue Authorities in State of Odisha are incompetent to disallow the transactions depicted in the accounts and returns of units of other States.

**v.**

The said authority initially issued notice under Section 73 of the CGST/OGST Act and could not have dropped said proceeding and switch over to initiate fresh proceeding under Section 74 *ibid.* after reply being submitted by the Petitioner-company.

**vi.** IGST being paid on the transactions, raising demand of tax under the OGST/CGST Act would tantamount to double taxation which the State of Odisha is not entitled to.

**vii.** The imposition of penalty as a consequence of adjudication by rejecting the input tax credit as claimed in the facts and circumstances of the case is draconian.

**viii.**

Writ petition is maintainable even though statutory remedy is available to question the Order dated 28.03.2022 passed under Section 74 of the CGST/OGST Act in view of ratio of Judgment in the case of

**Raza Textiles Ltd. Vrs. ITO, (1973) 1 SCC 633 = AIR 1973 SC 1362 = [2002-TIOL-872-SC-IT-LB](#)**

rendered by the Supreme Court of India.

6. Sri Ashok Kumar Parija, learned Advocate General assisted by Sri Sunil Mishra, learned Additional Standing Counsel for the CT&GST Organisation on advance notice not only opposed admission of the writ petition on availability of alternative remedy under Section 107 of the OGST Act, but also suggested not to accede to the prayer of the opposite parties in I.A. No.5190 of 2022 by restraining the opposite parties from taking further steps in connection with Order dated 28.03.2022

**6.1.** Mr. Parija, learned Advocate General placing reliance on manner of distribution of credit by Input Service Distributor (ISD) provided under Section 20 of the OGST Act submitted that the term "recipient of credit" has been defined to mean the supplier of goods or services or both having the same Permanent Account Number as that of the Input Service Distributor. In such circumstance clause (viii) of Section 24 which begins with **non-obstante**

clause requires compulsory registration of ISD (whether or not separately registered under the OGST Act). The term "this Act" used in said clause has significance.

**6.2.**

The term "Input Service Distributor" has been defined under Section 2(61) of the OGST Act. It would mean an office of the supplier of goods or services or both which **inter alia** :

**i.** receives tax invoices issued under Section 31;

**ii.** such tax invoices must relate to receipt of input services.

**6.3.**

In furtherance thereto, learned Advocate General has referred to Rule 54 of the OGST Rules which deals with tax invoice in special cases. Under item (i) of clause (a) of sub-rule (1A) of Rule 54 specifies that ISD is required to issue tax invoice having the same PAN and State Code as an ISD.

**6.4.**

Therefore, the objection of the opposite parties against entertainment of writ petition and submission in support of the impugned order of the learned Advocate General is that even though the JSW Steel Ltd., public limited company, may have one PAN, but JSW Steel Ltd. bearing GSTIN 21AAACJ4323N2ZR (in the State of Odisha) having not been allotted the registration ISD with State Code, the transactions in question have rightly been adjudicated as sham. It is fact on record and conceded by both the parties that royalty has been paid JSW Steel Ltd. of Odisha. There is apparent supply of neither goods nor services or both by JSW Steel Ltd. bearing GSTIN 21AAACJ4323N2ZR (in the State of Odisha) to JSW Steel Ltd. bearing GSTIN 27AAACJ4323N2ZF (in the State of Maharashtra). Mere terming the transaction as "facilitation" would not bring the same into the fold of "goods" or "service". There being no "supply" as per definition of "supplier" contained in Section 2(105) of the OGST Act, the writ Petitioner is wrong to contend that its action in claiming input tax credit above reproach.

**6.5.**

The learned Advocate General also submits that it is conceded fact that JSW Steel Ltd. of Maharashtra bears two GST registration numbers, **viz.**, one as ISD being GSTIN 27AAACJ4323N2ZF (in the State of Maharashtra) and another normal taxpayer being GSTIN 27AAACJ4323N3ZE.

Therefore, the JSW Steel Ltd. bearing GSTIN 21AAACJ4323N2ZR (in the State of Odisha) being not declared as ISD, the transfer of unutilized input tax credit by it to Mumbai ISD is not in consonance with the provisions of the statute particularly so in view of Rule 8 of the OGST Rules. Learned Advocate General brought the notice of the Court the provisions contained in proviso to sub-rule (1) of Rule 8 which reads as follows:

**"Provided that every person being an Input Service Distributor shall make a separate application for registration as such Input Service Distributor."**

6.6. JSW Steel Ltd. being the recipient of services in the State of Odisha is obligated to pay GST on reverse charge mechanism.

6.7. In such view of the matter, JSW Steel Ltd. of Odisha bearing GSTIN 21AAACJ4323N2ZR (in the State of Odisha) is not registered as ISD, thereby its input tax credit could not have been distributed by JSW Steel Ltd. bearing GSTIN 27AAACJ4323N2ZF (in the State of Maharashtra) which is ISD to other units located in other States including the State of Maharashtra.

7. We have patiently heard both the sides, and with able assistance of counsel perused the pleadings. It is apparent that JSW Steel Ltd., public limited company, has units located in different States including the State of Odisha with its Head Office at Mumbai. The Head Office at Mumbai is registered as ISD bearing GSTIN 27AAACJ4323N2ZF. It is also registered as normal taxpayer being GSTIN 27AAACJ4323N3ZE in the State of Maharashtra. No doubt JSW -Company from its Head Office at Bombay had applied and participated in the tender process, however it cannot be lost sight of that its JSW -Company, and not Head Office, Bombay, which has been granted the mining lease for the four Iron mines situated within the State of Odisha. The Company to undertake the process of mining had to get itself registered in State of Odisha as per the statutory provisions of CGST/OGST to undertake the execution of the mining lease. It is conceded that the execution of work and all transactions including payment of tax being input recipient have been conducted by the JSW -Company from its office Barbil (Odisha). It cannot also be disputed that the outward supply of goods and services of the Company has been provided by the unit at Odisha to other units of the Company and other parties upon payment of tax for supply of such outward goods and services, thereby providing the JSW units in other States to avail the input tax credit on the tax paid to JSW Odisha for their outward supplies from such locations outside the State. It is conceded that the Input Tax Credit with JSW Steel Limited (in the State of Odisha) was found in excess, which remained unutilized. This excess input tax credit has been sought to be utilized by raising tax invoices in favour of JSW Steel Ltd. in the State of Maharashtra, declared ISD, in the garb of support service. That apart, it is not clear at all as to what is support service which has been provided by JSW Steel Ltd.(Odisha) to JSW Steel Ltd.- ISD at Mumbai, much less any common services which could be utilized by other units located in other parts of the country. It also emerges that JSW Steel Ltd. in Odisha has utilized JSW Steel Ltd.- ISD Mumbai as wrongful conduit and facilitated the utilization of input tax credit by other units of JSW Steel Ltd., which in this manner have availed input tax credit twice, *i.e.* , once on the strength of the purchase invoices of supply of iron ore and the other on the strength of the tax invoices for alleged services issued by JSW Steel Ltd.-ISD at Mumbai.

8. In view of the foregoing Para, we are not very impressed by the argument that it is the JSW Steel Ltd.-ISD Mumbai which has been awarded with the contract for four mines in the State of Odisha and therefore whatever tax has been deposited by its unit in Odisha, the same is actually paid on behalf of the JSW Steel Ltd.- ISD in Maharashtra, which we find is not supported by any documentary evidence nor has the statutory backing.

9. It is pertinent to notice that in view of definition of "Input Service Distributor" contained in Section 2(61), it is necessary that the ISD as an office is required to receive tax invoices towards inward supply. Since no such supply being shown to have been made by JSW Steel Ltd. of Odisha to JSW Steel Ltd. of Maharashtra, no *prima facie* case is made out by the Petitioner. Thus transactions in question *prima facie* amount to siphoning of tax amounts, therefore, apparently warrant invocation of proceeding under Section 74 of the OGST/CGST Act.

10. We decline to allow the prayer for restraining the Opposite Parties from effecting recoveries of the demand more so, in equitable jurisdiction under Article 226 of the Constitution of India. The Petitioner has not questioned *vires* of relevant and related provisions as discussed above. However, considering the other challenges as to jurisdiction (lack of jurisdiction or otherwise) of the State of Odisha as set out in the writ petition and pressed into service by the senior counsel for the Petitioner, while declining to allow prayer for restraining the opposite parties from effecting recovery of demand, this Court issues notice in W.P.(C) No.10052 of 2022 along with I.A. No.5190 of 2022.

11. Sri Lalatendu Samantaray, Additional Government Advocate appearing for opposite party No.2 and Sri Sunil Mishra, Additional Standing Counsel appearing for opposite party No.3 waive issue of notice. Let requisite number of copies of writ petitions be served on them within three working days for taking steps to file counter affidavit in writ petition as also objection to the I.A. Since none appeared for the opposite party No.1, requisites for service of notice by speed post with A.D. be filed by the Petitioner within seven working days specifying returnable date of four weeks.

12. Counter affidavit and objection be filed within a period of six weeks from today and rejoinder affidavit be filed within a period of three weeks thereafter.

13. List this matter on 12th August, 2022.

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