BEFORE THE DIVISION BENCH-I, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 296 (VAT) of 2017-18

(Arising out of order of the learned JCST, Koraput Range, Jeypore, in Appeal No. AAV – (RGD) 38/16-17, disposed of on 29.08.2017)

Present: **Shri G.C. Behera, Chairman**
&
Shri M. Harichandan, Accounts Member-I

State of Odisha, represented by the Commissioner of Sales Tax, Odisha, Cuttack ... Appellant

-Versus-

M/s. PSS Infrastructure India Pvt. Ltd., AT/PO- Tikiri, Dist. Rayagada ... Respondent

For the Appellant : Sri D. Behura, S.C. (CT)
For the Respondent : Sri S. Sundaram, Advocate

Date of hearing : 22.02.2023 *** Date of order : 21.03.2023

O R D E R

State is in appeal against the order dated 29.08.2017 of the Joint Commissioner of Sales Tax, Koraput Range, Jeypore (hereinafter called as 'First Appellate Authority') in F A No. AAV – (RGD) 38/16-17 reducing the assessment order of the Sales Tax Officer, Rayagada Circle, Rayagada (in short, 'Assessing Authority') by allowing refund.

2. The facts of the case, in brief, are that –

M/s. PSS Infrastructure India Pvt. Ltd. is a works contractor. The assessment relates to the period 01.04.2009 to 31.03.2014. The Assessing Authority raised tax and penalty of ₹1,65,69,996.00 in assessment

proceeding u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') basing on the Audit Visit Report (AVR).

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority reduced the tax demand and allowed refund of ₹1,95,344.00. Being aggrieved with the order of the First Appellate Authority, the State prefers this appeal. Hence, this appeal.

The Dealer files cross-objection supporting the order of the First Appellate Authority to be just and proper in the facts and circumstances of the case.

3. The learned Standing Counsel (CT) for the State submits that the Dealer was availing the option of composition u/r. 8 of the OVAT Rules, but the fora below went wrong in assessing the Dealer u/s.42 of the OVAT Act by allowing the benefit of TIN, i.e. labour and service charges and ITC set off. So, he submits that the order of the First Appellate Authority is not sustainable in law and requires interference in the appeal.

4. On the other hand, the learned Counsel for the Dealer submits that the First Appellate Authority rightly computed the tax liability of the Dealer in a proceeding u/s. 42 of the OVAT Act in the fault of the Dealer by adopting the provisions of Rule 8(9) of the OVAT Rules. So, he submits that the order of the First Appellate Authority is correct in its perspective which calls for no interference in appeal.

5. Having heard the rival submissions and on going through the materials on record, it transpires from the assessment order that the Assessing Authority completed the assessment exparte on the basis of the allegations raised in the AVR. It is alleged in the AVR and VATIS data that (i) the Dealer had purchased goods worth of ₹10,32,013.00 from outside the State by using Govt. Waybills and disclosed 'nil' purchase; (ii) that the Dealer had received an amount of ₹7,12,97,693.00 towards execution of

works contract during the period from April, 2010 to March, 2014, but the Dealer has not disclosed any sale or execution of works contract in the return nor submitted any payment or TDS particular; (iii) the Dealer has availed ITC of ₹6,81,403.00 during the period under audit and the Dealer has not produced the books of account and purchase invoices for verification; (iv) the Dealer has caused 234 days delay in filing of periodical VAT returns, the Audit Team suggested imposition of penalty u/s. 34(3) of the OVAT Act; and (v) imposition of penalty of ₹25,000.00 u/s. 73(13) of the OVAT Act for non-compliance to the notice of VAT-302.

The Assessing Authority accepted the AVR allegation No. (i), treated ₹10,32,013.00 as sales suppression, calculated VAT @ 13.5% and the same came to a sum of ₹1,39,322.00. As regards Audit charge No. (ii), the Assessing Authority taxed the entire receipt of payment of @ 13.5% in absence of TDS particular and worked out the same for ₹96,25,189.00; Audit charge No. (iii), the Assessing Authority did not accept the ITC amounting to ₹6,81,403.00 for adjustment against output tax during the period under assessment. Regarding Audit charge No. (iv), the Assessing Authority imposed penalty of ₹20,900.00 as per Section 34(3) of the OVAT Act by calculating ₹100.00 each day of default in filing the periodical VAT returns. As regards Audit charge No. (v), the Assessing Authority accepted the AVR's suggestion regarding imposition of penalty of ₹25,000.00 u/s. 73(13) of the OVAT Act.

The Dealer has disclosed the GTO at ₹18,27,408.00 and TTO of ₹17,57,123.00 for the tax period under assessment. The Assessing Authority determined the GTO at ₹7,12,97,693.00 and allowed deduction of ₹1,42,59,539.00 towards labour and service charges. He determined the TTO at ₹5,70,38,154.00 and computed @ 13.5%, which comes to a sum of ₹77,00,151.00. The Assessing Authority did not allow set off of ITC of ₹6,81,403.00 in terms of Section 20 of the OVAT Act as the Dealer failed to

produce the valid tax invoice for verification. The Assessing Authority allowed TDS of ₹21,92,119.00 and computed the net output tax at ₹55,08,032.00, penalty of ₹1,10,16,064.00 u/s. 42(5) of the OVAT Act, imposed penalty of ₹20,900.00 u/s. 34(3) and ₹25,000.00 u/s. 73(13) of the said Act. The Assessing Authority raised the tax liability along with penlty against the Dealer for a sum o ₹1,65,69,996.00.

The Dealer produced 13 nos. of TDS certificate relating to the periods 2012-13 and 2013-14 which reflect payment of ₹5,48,02,939.00 and TDS of ₹21,92,119.00. The First Appellate Authority confirmed the TDS allowance of the Assessing Authority. The First Appellate Authority accepted the GTO of ₹7,12,97,693.00 .

The First Appellate Authority recorded a finding that the deduction of 20% towards labour and service charges allowed by the Assessing Authority is inadequate. He allowed deduction of 30% towards labour and service charges after verifying all the documents.

The First Appellate Authority allowed ITC of ₹15,59,197.00 to be set off against the assessed amount. Accordingly, the First Appellate Authority accepted the GTO of ₹7,12,97,693.00, allowed deduction of ₹2,13,89,308.00 @ 30% towards labour and service charges and determined the TTO at ₹4,99,08,385.00 and assessed the tax @ 5% on ₹3,74,31,288.75 towards materials used and @13.5% on ₹1,24,77,096.25 towards cement and the total tax comes to ₹35,55,972.00. The First Appellate Authority allowed ITC of ₹15,59,197.00 to be adjusted against the tax due. After adjustment the balance tax comes to ₹19,96,775.00. He Dealer had paid ₹21,92,119.00 by way of TDS and the same was allowed by the Assessing Authority. So, the Dealer had paid excess tax of ₹1,95,344.00. The First Appellate Authority deleted the penalty imposed by the Assessing Authority holding that the same can be done in a separate proceeding, but not in the proceeding u/s. 42 of the OVAT Act.

6. The State has challenged the impugned order on the sole ground that the Dealer has opted to pay the tax by way of composition u/r. 8 of the OVAT Rules and the TIN has been cancelled by granting SRIN w.e.f. 01.08.2012. The State has further argued that Rule 8 of the OVAT Rules was not considered as per the Dealer's option. Rule 8 of the OVAT Rules deals with composition of tax for works contractors. Sub-rule (9) of Rule 8 provides that the Assessing Authority may assess the tax payable by a Dealer in accordance with the provisions of Section 40, 42 and/or 43 for any tax period in the year which the Dealer has been permitted to pay tax by way of composition in lieu of tax assessable on his TTO, if he is satisfied on the basis of Audit or any other information in his possession that the Dealer has suppressed the gross value received or receivable towards execution of works contract or violates any of the conditions prescribed in sub-rule (1) during the tax periods. Sub-rule (9)(b) of Rule 8 provides that where the assessment proceeding is initiated under sub-rule (a), the permission for payment of tax by way of composition shall be deemed to have been revoked for the tax periods to be assessed u/s. 40, 42 and/or 43. Considering the above provisions, the First Appellate Authority has already observed that the Dealer has failed to comply the provisions of Rule 34(6) and 34(6A) and did not file the return in time. So, the First Appellate Authority further observed that there is no bar to assess the Dealer u/s. 42 and the Assessing Authority has not committed any irregularity in the matter by adopting the deeming provisions of Rule 8(9)(b) of the OVAT Rules, which permits assessment u/s. 42. So, we do not find any illegality in the finding of the First Appellate Authority accepting the assessment u/s. 42 of the OVAT Act of the Assessing Authority in the aid of Rule 8(9) of the OVAT Rules.

So, we are unable to accept the contention of the Revenue that the First Appellate Authority went wrong in allowing deduction towards labour and service charges and claim of ITC in a proceeding u/s. 42 of the OVAT

Act when the Dealer is opted for composition u/r. 8 of the OVAT Rules. The impugned order further reveals that the First Appellate Authority vividly examined the payment received from the contractee, i.e. M/s. Utkal Alumina International Limited, Doraguda with the gross value against the works executed with detailed work orders. So, we do not find any illegality or impropriety in the order of the First Appellate Authority to accept the GTO determined by the Assessing Authority. Considering the nature of works, i.e. construction of bridge, drains, retaining walls and approach road, and the documents were already consigned to the Head Office of the Dealer at Hyderabad, the First Appellate Authority felt it proper to allow deduction of 30% for the same, which we do not find any infirmity on this score.

The First Appellate Authority examined 64 nos. of original tax invoice along with the list and found that the selling dealer, i.e. M/s. MMG Associates, Damanjodi has sold sand, chips and boulders for ₹3,11,84,099.00 and collected VAT of ₹15,59,197.00. On such circumstances, the First Appellate Authority allowed ITC of ₹15,59,197.00 to be set off against the assessed amount, which suffers from no infirmity. Accordingly, the First Appellate Authority rightly allowed the deduction @ 30% towards labour and service charges, ITC of ₹15,59,197.00 to be set off against the assessed amount and computed the balance output tax of ₹19,96,775.00. The First Appellate Authority allowed the TDS amount of ₹21,92,119.00 after verifying the required certificates.

7. So, for the foregoing discussions, we are of the unanimous view that the First Appellate Authority rightly computed the tax liability of the Dealer keeping in view the provision of law and allowed the deductions and set off of ITC, which suffers from no infirmity and the same warrants no interference in the instant appeal. Hence, it is ordered.

8. Resultantly, the appeal is dismissed and the impugned order of the First Appellate Authority is hereby confirmed. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

Sd/-
(G.C. Behera)
Chairman

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(M. Harichandan)
Accounts Member-I