BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No. 394(V) of 2016-17,
S.A. No. 205(ET) of 2016-17 &
S.A. No.123(C) of 2016-17

(Arising out of the order of the learned JCST(Appeal), Cuttack-II Range, Cuttack in First Appeal Nos. AA/07/OVAT/CUIIJ/2016-17 **/** 106131613000042, AA/04/OET/CUIIJ/2016-17 **/**108131613000044 & AA/03/CST/CUCIIJ/2016-17 **/** 10713163000043, disposed of on 15.12.2016)

Present: **Shri G.C. Behera, Chairman**
Shri S.K. Rout, 2nd Judicial Member &
Shri B. Bhoi, Accounts Member-I

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

- V e r s u s –

M/s. Chennai Radha Engg. Works (P) Ltd., At-Qr. No. J/50, Madhuban, Paradeep, Dist-Jagatsinghpur. ... Respondent.

For the Appellant : : Mr. D. Behura, ld.S.C.(C.T.)
: : Mr. S.K. Pradhan, ld. ASC(C.T)
For the Respondent: : Mr. P.K. Jena, Advocate

Date of Hearing : 21.12.2023 * Date of Order :19.01.2024**

O R D E R

The State has gone for second appeals challenging the orders dated 15.12.2016 of the Joint Commissioner of Sales Tax (Appeal), Cuttack-II Range, Cuttack (hereinafter called 'Ld. FAA') passed in first appeals as mentioned above allowing refund of

₹1,10,64,507.00 as against demand of ₹6,69,27,661.00 passed under Section 42 of the OVAT Act, allowing refund of ₹23,97,407.00 in respect of assessment completed under Section 9 C of the OET Act and reducing the demand to ₹28,100.00 as against demand of ₹33,91,883.00 passed under Rule 12 of the CST(O) Rules by the learned Assessing Authority, Assessment Unit, Jagatsinghpur (hereinafter called 'ld. Assessing Authority). These three second appeals though filed under different Acts relate to the same tax period involving common question of facts and law. Hence, they are heard together and disposal made in a composite order for convenience.

2. The factual matrix of the case is that M/s. Chennai Radha Engg. Works (P) Ltd., Quarters No. J/50, Madhuban, Paradeep, Dist-Jagatsinghpur is engaged in execution of works contract under different contractees such as Vedanta Aluminum Ltd., Jharsuguda and Lanjigarh, Paradeep Port Trust, Paradeep, EVONIK Energy Service Ltd.,Jharsuguda and Corea Plant Service Ltd.,Jharsuguda. Basing on the Audit Visit Report(AVR), the ld. Assessing Authority assessed the dealer-contractor under Section 42 of the OVAT Act, under Section 9 C of the OET Act and under Rule 12 of the CST(O) Rules relating to the tax period 01.04.2009 to 31.03.2014 raising demand of ₹6,69,27,661.00 under the OVAT Act, holding entry tax paid in excess of that disclosed in returns as admitted tax under the OET Act and demand of ₹33,91,883.00

under the CST Act. In the first appeals, the demand so raised were resulted in refund of ₹1,10,64,507.00 under the OVAT Act, ₹23,97,407.00 under the OET Act and reduction of demand to ₹28,100.00 under the CST Act. The State on being aggrieved with the orders of the ld. FAA approached this forum for justice. Hence, these second appeals.

3. **S.A. No.394(V) of 2016-17**

The dealer respondent was assessed under Section 42 of the OVAT Act for tax period 01.04.2009 to 31.03.2014 raising demand of ₹6,69,27,661.00. The ld.FAA reduced the said demand to Nil and allowed refund of ₹.1,10,64,507.00. The State assails the order of the ld.FAA as unjust and improper holding that deduction allowed as per Rule 6(e)(5) of the OVAT Rules in respect of capital goods without an exhaustive analysis thereon is shrouded with ambiguity. It is submitted that the ld. FAA has not examined the details of the nature of works executed during the tax period under appeal. It is alleged that the first appeal does not depict the quantum of deduction allowed towards labour and service charges, details of materials used and the basis of the determination of TTO. The State urges for restoration of the order of assessment setting aside the order of the ld.FAA.

4. The dealer respondent has not filed any cross objection. Instead, Mr. P.K. Jena, ld. Advocate appearing for the dealer respondent has submitted a written submission contending that

the nature of works executed by the dealer respondent comprises of Railway Operation and Maintenance(O&M) works at different sites as IPP, CPP, smelter and CHP, AHP of Vedanta Aluminum Ltd., situated at Jharsuguda, Lanjigarh, maintenance of mechanized coal handling plant and IOHP of Paradeep Port Trust, Paradeep, Jagatsinghpur, Operation and maintenance of CHP, Dozer of EVONIK Energy Service Ltd. at Jharsuguda and Operation and maintenance of ash handling system of Korea Plant Service Ltd., at Jharsuguda. The principals were to supply all necessary parts, equipments and consumables for the works as agreed upon and the dealer-respondent has only to purchase consumables like petrol, diesel, kerosene and cotton etc. for use in the assigned works. Mr. P.K. Jena, ld. Advocate appearing for the dealer-respondent pleads that as all the works executed during the period under appeal were of all labour oriented works and there being no transfer of property in goods, charging of tax liability upon the dealer respondent is not warranted. Mr. Jena places reliance of the decision of the Hon'ble of the High Court of Odisha delivered in case of ***Mather & Platt India Ltd Vs. State of Orissa*** reported in OJC No.2349 of 1988 which speaks that "*On going through the records and after considering the argument, we find that in both the cases tax on labour and service charges has been levied which was not in accordance with law, the petitioner is not liable to pay Sales Tax on labour and service charges,*

accordingly the impugned orders are liable to be quashed and are hereby quashed. The Writ applications are allowed." It is further submitted that the dealer appellant has received gross payment of ₹315,69,03,435.00 during the tax period under appeal excluding service tax. Service tax is said to have been claimed against all the bills raised before the Principals/contractees. Mr. Jena, ld. Advocate has placed copies of the returns filed before the Central Board Excise and Customs in forum ST-3 and copies of the invoices claiming payments to show the evidence of payment of service tax. It is, therefore, submitted that since receipt of payments on account of labour and service charges involves no transfer of property in goods, filing of periodical returns under the OVAT Act by the dealer respondent disclosing GTO and TTO as Nil is justified. Thus, the TDS deducted for an amount of ₹1,51,39,379.00 is refundable. Accordingly, it is pleaded that the order of the ld. FAA is justified requiring no interference by this Tribunal.

5. Rival contentions are heard. The orders of the forums below, grounds of appeal, written submission and the materials on record are gone through. Perusal of records reveals that the dealer respondent during the tax period under appeal has executed works contract mostly of operation and maintenance (O & M) works of different plants/companies on deployment of manpower. Consumables like fuel, chemicals, gases and electrodes are said to

have been purchased by the dealer appellant for utilization in the operation and maintenance works. The ld. Assessing Authority is learnt to have accepted the gross receipt of payments at ₹315,69,03,435.00. In absence of any evidence adduced in assessment in support of the expenses incurred towards labour and services, the ld. Assessing Authority determined such expenses at the rare as specified in entry No.8 of the Appendix to Rule 6 (e) of the OVAT Rules and taxable turnover was thus determined at ₹61,70,07,503.00. The sale of waste scraps worth ₹3,24,30,963.00 has been added to the GTO rendering TTO thereby to ₹64,94,38,466.00. Levying tax as applicable on TTO and allowing deduction of ₹1,38,19,019.00 towards TDS, the ld. Assessing Authority calculated tax to ₹3,34,55,504.00. On imposition to penalty and interest of ₹16,653.00, the dealer respondent was held liable to pay ₹6,69,27,661.00.

6. The ld.FAA is learnt to have verified the books of accounts, returns filed under the Service Tax Act, copies of works orders and the details of payment made towards Service Tax. The ld.FAA observed that the sales tax returns were tallied with the returns and statement submitted under the Service Tax Act. The ld.FAA has further observed that the entire payments received from different contractees are exclusively related to service charges and thus, the ld.FAA held that there is no involvement of transfer of property in goods. It is also observed that the tools and

equipments purchased from outside the state of Odisha were meant for own use in the operation and maintenance works for which, Cenvat credit has been availed. In respect of the cost the consumables like fuel, chemicals, gases and electrodes used in the execution of the works contract, the ld.FAA held that the property involved therein having not transferred, it would not attract any tax as per the provision of Rule 6(e)(5) of the OVAT Rules. The ld.FAA opined that the gross payment of ₹315,69,03,435.00 received from different contractees having suffered service tax, there would be no exigibility of OVAT thereon. As far as ₹3,24,30,963.00 received on account of sale of scraps, the ld.FAA levied tax as applicable which calculated to ₹30,58,221.81. Added with interest of ₹16,653.00 charged under Section 34 of the OVAT Act, the amount of tax due stood at ₹ 30,74,875.00 in first appeal. An amount of ₹1,41,39,382.00 having been deducted at source, the dealer-assessee was entitled to refund of ₹1,10,64,507.00 in first appeal. Perusal of the first appeal order reveals that the ld.FAA has verified the books of accounts together with the details of service tax returns filed in Form ST-3. The returns filed in Form VAT-002 are reported as tallied with the service tax returns filed in Form ST-3 in the first appeal order. Mr. Jena, ld. Advocate who appeared on behalf of the dealer-assessee has submitted a bunch of service tax returns filed in Form ST-3 before this forum. It is not denying a fact that the dealer-assessee in the instant case

executed contract works of operation and maintenance works of the contractees mentioned in the foregoing paragraph. The O & M works executed were of labour oriented jobs requiring involvement of mostly manpower. The dealer-assessee is seen to have been registered under Service Tax Act bearing No.AACCC6068RST001 and discharging service tax liability. In the present case, as observed by the ld.FAA, the entire payment received from the contractees were only on account of deployment of manpower against which, the dealer-assessee has discharged its service tax liability. There is no element of transfer of property contained in these contracts. The tools and equipments purchased by the dealer-assessee were for use in the O & M works. There is no involvement of transfer of property in goods. Besides, the consumables like fuel, chemicals, gas, electrodes etc. used in the execution of the works contracts constitute no transfer of property and thus, the cost therein is not subject to tax as per Rule 6(e)(5) of the OVAT Rules. The ld.FAA in the present case is justified in holding that as the entire payments of ₹315,69,03,435.00 received from the contractees on account of services rendered towards O & M works involving no transfer of property in goods, exigibility of OVAT is not warranted. The ld.FAA has rightly taxed on the sale turnover of scraps amounting to ₹3,24,30,963.00. We, therefore, find no reason to interfere in the order of the ld.FAA.

7. **S.A.No.205(ET) of 2016-17**

The dealer-assessee was assessed under Section 9 C of the OET Act. Basing on the Audit Visit Report for the tax period from 01.04.2009 to 31.03.2014, the ld. Assessing Authority relying on the findings contained in the AVR determined the GTO and TTO at ₹29,13,98,008.00. On levy of entry tax @ 2% on TTO, the tax due was worked out to ₹58,27,960.00. The ld. Assessing Authority has also observed that the dealer-assessee has paid entry tax for ₹82,25,420.00 while filing returns. In absence of details of waybills and utilization thereof, the ld. Assessing Authority treated the payment of entry tax of ₹82,25,420.00 as admitted tax. In the first appeal as preferred by the dealer-assessee, the ld. FAA held that the dealer-assessee having paid tax of ₹82,25,420.00 against tax due of ₹58,27,960.00 determined in assessment, the dealer-assessee is entitled to refund of ₹23,97,460.00. The State being not satisfied with the first appeal order preferred this second appeal holding that there has been no detailed analysis made by the forums below with regard to purchases of scheduled goods by the dealer-assessee. Accordingly, the State pleads for remand of the case for re-assessment. On the other hand, Mr. Jena, ld. Advocate appearing on behalf of the dealer-assessee submitted a written note stating that the details of purchases made from inside and outside the State of Odisha along with entry tax suffered goods has been submitted before the ld. Assessing Authority. Accordingly, the tax liability has been

determined at ₹58,27,960.00. It is submitted that entry tax to the tune of ₹82,25,420.00 has been deposited under a wrong notion on the value of in-to-out waybills utilized during the period under appeal. Accordingly, refund of ₹23,97,460.00 has been justifiably administered by the ld. FAA.

8. Having gone through the rival submissions, it is of the view that the ld. Assessing Authority is found to have assessed the dealer respondent to entry tax for ₹58,27,960.00 basing on the purchases of scheduled goods worth ₹29,13,98,008.00 during the tax period under appeal. The ld. Assessing Authority has not disputed the dealer respondent to have deposited ₹82,25,420.00 during the material period. In this context, the dealer respondent submits that such payment of entry tax did take place due to deposit of entry tax on the value of the goods dispatched through in-to-out waybills. The ld. Assessing Authority assumed the entry tax of ₹82,25,420.00 as admitted tax due to non submission of the details of waybills issued and utilization thereof and other related documents. On the contrary, the ld.FAA observed that as the dealer-assessee has deposited excess tax on a wrong notion or by mistake, it is not justified to treat it as payment of admitted tax. There is no dispute as regards disclosure of purchases of scheduled goods during the tax period under appeal. Tax liability is determined as per the purchases of scheduled goods. In the present case, the ld. Assessing Authority has rightly assessed the

dealer to tax of ₹58,27,960.00 in so far as the purchase of scheduled goods is concerned. There is no purchase suppression of scheduled goods detected either in tax audit or in audit assessment. Accordingly, the ld.FAA is right in allowing refund of excess payment of entry tax for ₹23,97,460.00. In view of this, the order of the ld.FAA is not infringed upon. The contention taken by the State merits no consideration.

9. **S.A. No.123(C) of 2016-17**

The dealer-assessee has been assessed under Rule 12 of the CST (O) Rules for the tax period 01.04.2009 to 31.03.2014 on the basis of the Audit Visit Report raising demand of ₹33,91,883.00 including penalty of ₹16,95,942.00. In the first appeal, the said demand has been reduced to ₹28,100.00 evolving thereby refund of ₹33,63,783.00. The State rebuts the findings made by the ld. FAA and pleads for restoration of the order of the ld. Assessing Authority in consideration of the grounds taken in the second appeal filed under OVAT Act.

10. The dealer-respondent has not filed any cross objection. Mr. Jena, ld. Advocate appearing for the dealer-assessee has filed a written submission holding that the dealer-assessee in the instant case has executed labour oriented work discharging operation and maintenance works of different plants as discussed in the forgoing paragraphs. It does not transact any interstate sale. It is submitted that there were as many as 23 nos of in-to-

out waybills utilized during the tax period under appeal for dispatch of plants and machineries to outside the state of Odisha for repairing and reconditioning for which, no declaration in form 'F' are required. Since the plants and machineries dispatched to outside the State of Odisha for repairing and reconditioning constituting no sale thereunder, levy of CST thereon is illegal. Mr. P.K. Jena, ld. Advocate appearing for the dealer-assessee has filed additional evidences showing details of utilization of in-to-out waybills, copies of waybills, self-declaration and delivery challans evidencing the plants and machineries dispatched through waybills were for the purpose of repairs and reconditioning jobs. In view of this, the ld. Advocate pleads that the ld. FAA is justified in not agreeing with the Assessing Authority in levying CST on plants and machineries sent out of the state for repairs and reconditioning.

11. Rival contentions are gone through. The contention taken by the State in the grounds of appeal and the contention taken by Mr. Jena, ld. Advocate are perused. On perusal, it is observed that the dealer-assessee in the instant case is engaged in execution of works contracts primarily doing operation and maintenance works of different companies/plants. The nature of works executed during the tax period has been vividly discussed in the order framed in S.A. No. 394(V) of 2016-17 above. It is not denying a fact that during the course of execution of works,

repairs and return of some machineries and transfer of plants and machinery from one site to another of the same firm are inevitable. In the present case, the ld.FAA pursuant to the utilization statement of waybills could observe that the plants and machineries dispatched for repairs and transfer to other branch sites/head office outside the state of Odisha evaluated at ₹62,17,735.00 as has been disclosed by the dealer assessee and taken the same into account in assessment. Dispatch of plants and machineries outside the state for repairs is not taxable under the CST Act, as it does not constitute any interstate sale as envisaged under Section 3(a) of the CST Act subject to production of the relevant documents in support of such claims. The ld.FAA has derived ₹5,62,100.00 as branch transfer of plants and machineries to other branch sites for use without supported with statutory declaration in Form 'F' and held the dealer-assessee liable to pay tax thereon. There is no exhaustive explanation apparent in the first appeal order as to how NTO for ₹5,62,100.00 has been derived. The order of the ld.FAA appears to be not comprehensive. We find it legally prudent to remit the case back to the ld.FAA to re-look the matter afresh in presence of the dealer-assessee.

12. Under the above facts and in the circumstance, the second appeal filed by the State under the CST Act is allowed. The impugned first order passed in respect of the CST Act is set aside with direction to the ld.FAA to re-examine the case in the light of

the observations imparted while disposing S.A. No.123(C) of 2016-17 above. The second appeals preferred in S.A. No.394(V) of 2016-17 and S.A. No. 205(ET) of 2016-17 are dismissed and the orders of the ld.FAA passed in respect of the OVAT Act and OET Act stand confirmed.

Dictated and corrected by me.

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member