

**BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL:
CUTTACK**

S.A. No. 212 (VAT) of 2012-13

&

S.A. No. 22 (VAT) of 2013-14

(Arising out of order of the learned DCST (Appeal), Bhubaneswar
Range, Bhubaneswar in Appeal No. AA-106111110000098,
disposed of on 31.07.2012)

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

S.A. No. 212 (VAT) of 2012-13

M/s. Bapi Construction Electrical Engineering Pvt. Ltd.,
(Formerly- M/s. Bapi Construction)
N/6- 457, IRC Village, Bhubaneswar ... Appellant

-Versus-

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

S.A. No. 22 (VAT) of 2013-14

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

-Versus-

M/s. Bapi Construction Electrical Engineering Pvt. Ltd.,
(Formerly- M/s. Bapi Construction)
N/6- 457, IRC Village, Bhubaneswar ... Respondent

For the Dealer : Sri A.N. Mohanty, Advocate &
Sri S.K. Das, Advocate
For the State : Sri D. Behura, S.C. (CT)

Date of hearing : 19.07.2023 *** Date of order : 18.08.2023

ORDER

Both the Dealer and the State are in appeals against the same first appellate order dated 31.07.2012, for which they are heard analogously and disposed of by this common order for the sake of convenience.

2. Dealer and State file S.A. No. 212 (VAT) of 2012-13 and S.A. No. 22 (VAT) of 2013-14 respectively against the same order dated 31.07.2012 of the Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (hereinafter called as 'First Appellate Authority') in F A No. AA- AA-106111110000098 reducing the demand raised in assessment order of the Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar (in short, 'Assessing Authority').

3. Briefly stated, the facts of the cases are that –

M/s. Bapi Construction Electrical Engineering Pvt. Ltd. is engaged in supply, erection and execution of works contract under East Coast Railway & South Eastern Railway. The assessment period relates to 01.04.2005 to 30.11.2008. Audit assessment u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') in respect of the Dealer was earlier completed on 10.07.2009. Subsequently, the Assessing Authority raised tax and penalty of ₹3,23,64,378.00 u/s. 43 of the OVAT Act in *ex parte* basing on objection raised by the A.G. (Audit), Odisha.

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority reduced the tax demand to ₹47,47,347.00 and allowed the appeal in part. Being aggrieved with the order of the First Appellate Authority, both the Dealer and State prefer these appeals. Hence, these appeals.

The State files cross-objection against the appeal of the Dealer.

4. The learned Counsel for the Dealer submits that the First Appellate Authority went wrong in not allowing corresponding turnover

through reduced the TDS amount towards transfer of the same to the STO, Visakhapatnam. He further submits that the First Appellate Authority fails to allocate the taxable turnover under different taxable groups. He further submits that the First Appellate Authority and the Assessing Authority did not consider the deduction towards labour and service charges to the tune of ₹6,03,23,290.00 as determined u/s. 42 of the OVAT Act. He produced some checkgate receipts and urged that the same requires examination for adjustment against payment of tax. So, he submits that the orders of the First Appellate Authority and Assessing Authority require interference in appeal.

5. On the other hand, the learned Standing Counsel (CT) for the State submits that the First Appellate Authority wrongly allocated the turnover towards different taxable groups. He further submits that the First Appellate Authority went wrong in allowing ITC to the tune of ₹1,47,334.00. He further argues that Dealer raised the issue of non-consideration of excess carry forward tax relating to previous periods and chekgate payments for the first time before this Tribunal without disclosing the same in the return nor any forum nor in any proceeding. So, he submits that the impugned order needs interference in appeal.

6. Heard the rival submissions of the parties and gone through the orders of the First Appellate Authority and Assessing Authority vis-a-vis the materials on record.

Dealer challenges the impugned order on the grounds of levy of tax @ 4% and 12.5% by determining at ₹11,88,46,745.00 and ₹5,10,572.00 instead of ₹11,93,15,777.42 and ₹41,539.78 respectively besides levy of penalty. By way of additional grounds of appeal, Dealer further challenged the disallowance of TDS of ₹14,90,893.00 and ₹3,50,024.00; labour and service charges of ₹6,03,23,290.00 which is not supported by AG (Audit) objection; payment of ₹81,01,025.00 on various checkgates in between 04/2005 to 11/2008; and non-consideration of excess tax paid amounting to

₹1,34,41,506.00 relating to carry forward of tax paid during previous periods.

On the contrary, State also challenges the impugned order on the grounds of allocating turnover under 12.5% and 4% taxable groups without any details value of goods and allowance of ITC without examining purchases invoices.

7. Audit assessment u/s. 42 of the OVAT Act was completed on 10.07.2009 with GTO and TTO at ₹2,87,62,106.00. The tax was assessed at ₹11,446.00 besides penalty of ₹22,892.00 after adjustment of VAT paid and ITC.

The A.G. (Audit) pointed out that the Dealer had received ₹12,63,57,743.00 which includes supply of materials of ₹11,65,96,365.85, erection works of ₹32,63,999.88 and execution of works contract of ₹64,97,378.12. The TTO was determined at ₹8,77,74,259.00 resulting short levy of tax of ₹1,09,71,782.00. The Assessing Authority determined the TTO at ₹11,82,84,453.00, assessed the tax liability @ 4% and 12.5% and after allowing adjustment of tax already paid, raised the tax demand of ₹3,23,64,378.00 including twice penalty.

In appeal, the First Appellate Authority re-determined the gross receipt at ₹12,87,80,823.00 as per detailed calculation. The First Appellate Authority computed tax @4% and 12.5% on the turnovers of ₹11,88,46,745.00 and ₹5,10,572.00 respectively, thereby reducing the tax demand to ₹47,47,347.00 including penalty.

8. As regards allowance of deduction to the Dealer during assessment proceeding, it was allowed ₹35,63,417.00 by way of TDS basing certificates issued by the contractees. A sum of ₹3,50,024.00 was transferred to the STO, Visakhapatnam. So, the TDS amount was reduced to ₹32,45,239.25. The Dealer claims that the First Appellate Authority ought to have reduced the corresponding turnover in respect of TDS amount from the

GTO determined for the impugned period. The impugned order does not disclose any corresponding reduction of turnover although the TDS amount of ₹3,50,024.00 was transferred to the STO, Visakhapatnam relating to execution of part works. So, the contention of the Dealer on this score merits consideration.

As per additional grounds of appeal, Dealer further claims TDS of ₹14,90,893.00 relating to corresponding gross payment of ₹3,72,72,325.00. The assessment order and the impugned order do not disclose any inclusion of such gross payment. Dealer fails to furnish relevant material evidence before this forum to substantiate the claim. Therefore, we are unable accede to the claim of the Dealer on this score.

9. As regards the allocation of turnover towards taxable goods of 4% and 12.5%, on verification of purchase invoices along with way bills and 'C' forms, the First Appellate Authority found that the Dealer has effected purchases various goods which comes under 4% category except the battery charger and erecting drawings. It appears from the first appeal record, the First Appellate Authority examined the supply of materials and payment received in details thereof at Page-58 and arrived at a finding that the taxable goods under 4% comes to ₹11,88,46,745.00 and under 12.5% at ₹5,10,572.00 besides local purchase of ₹33,36,559.00 and ITC of ₹1,47,334.00. So, we do not find any illegality in the finding of the First Appellate Authority regarding allocation of turnover towards taxable groups of 4% and 12.5%.

10. As regards the claim of the Dealer regarding payment of ₹81,01,025.00 on various checkgates in between 04/2005 to 11/2008, the Dealer files some copies of checkgate receipt in support of his claim. On the contrary, learned Standing Counsel (CT) vehemently objects the contention on the ground that the Dealer raised the issue for the first time before this forum without disclosing the same in the returns nor in any proceeding nor

before the Assessing Authority and First Appellate Authority. Admittedly, the impugned order and the assessment order are silent on this issue. The Dealer has raised the same for the first time before us. Therefore, we are of the considered view that the same requires examination by the Assessing Authority as per law, if the Dealer files the materials evidence to that effect and explains sufficient cause or ground for non-filing of the same before the Assessing Authority or First Appellate Authority in any earlier proceeding.

11. As regards the claim of the Dealer relating to deduction of labour and service charges for ₹6,03,23,290.00 as per 42 proceeding, the Dealer fails to substantiate the said claim before this forum by adducing material evidence to that effect. Moreover, proceedings u/s. 42 and 43 of the OVAT Act are two independent and separate proceeding. Therefore, the contention raised on this score fails.

12. As regards the claim of the State regarding allowance of ITC of ₹1,47,334.00, it has already observed above that the First Appellate Authority after detailed verification of the supply of materials and payment received thereof found the ITC of ₹1,47,334.00. So, we do not find any illegality on this score.

13. As regards the claim of the Dealer relating to non-consideration of carry forward of excess tax paid during the previous tax periods amounting to ₹1,34,41,506.00, Dealer has not filed any document regarding payment of such excess tax in the previous tax periods. Dealer claims that the same was reflected in the periodical returns filed under self-assessment tax regime. Learned Standing Counsel (CT) objects such claim on the ground that the Dealer raised the issue for the first time before this forum. He further contends that the Dealer did not raise the same in any proceeding nor before the Assessing Authority and the First Appellate Authority. As there is no material before us regarding such excess tax payment by the Dealer, we are unable to accept such submission of the Dealer, hence fails.

14. So, for the foregoing discussions, the First Appellate Authority has examined the supply of materials and payment received thereof and determined the turnovers to levy VAT under different taxable groups and allowed deduction of ITC, which needs no interference. But, the First Appellate Authority did not reduce the corresponding turnover though reduced the TDS amount which was transferred to the STO, Visakhapatnam, so the same needs interference in appeal. Further, the Dealer produced some copies of checkgate receipt before this forum which requires examination by the Assessing Authority on production of original receipts thereof by the Dealer. Hence, it is ordered.

15. Resultantly, the appeal filed by the Dealer is allowed in part and the appeal at the instance of the State is dismissed. The impugned order of the First Appellate Authority stands modified to the above extent. The Assessing Authority shall recompute the tax liability of the Dealer in accordance with law keeping in view the observations made supra within a period of four months from the date of receipt of this order. Dealer is at liberty to produce all the original checkgate receipts for due verification of the Assessing Authority with sufficient explanation, or else the claim on this score merits no consideration. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

**Sd/-
(G.C. Behera)
Chairman**

**Sd/-
(G.C. Behera)
Chairman**

I agree,

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

I agree,

**Sd/-
(B. Bhoi)
Accounts Member-II**