BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 355 (VAT) of 2016-17

(Arising out of order of the learned JCST (Appeal), Bhubaneswar Range, Bhubaneswar in Appeal No. AA- 106221622000028/OVAT/BH-IV, disposed of on 30.11.2016)

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

-Versus-

M/s. Andritz Hydro (P) Ltd.,
Plot No. 76, Surya Nagar, Bhubaneswar ... Respondent

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

Date of hearing : 05.09.2023 *** Date of order : 30.09.2023

O R D E R

State assails the order dated 30.11.2016 of the Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (hereinafter called as 'First Appellate Authority') in F A No. AA 106221622000028/ OVAT/BH-IV reducing the demand raised in assessment order of the Sales Tax Officer, Bhubaneswar-IV Circle, Bhubaneswar (in short, 'Assessing Authority') to nil.

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

M/s. Andritz Hydro (P) Ltd. is engaged in construction of civil work at Samal Hydro Electric Project owned by OPCL. The assessment

period relates to 01.04.2009 to 31.03.2014. The Assessing Authority raised tax and penalty of ₹35,31,283.00 u/s. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') on the basis of 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 demand to nil and allowed refund of ₹1,71,14,074.00 to the Dealer. 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.

3. The learned Standing Counsel (CT) for the State submits that the finding of the First Appellate Authority directing the Assessing Authority to refund the TDS amount of ₹1,71,14,074.00 is illegal in absence of evidence on payment of tax by the contractor as per Section 10(4a)(a) and (b) of the OVAT Act read with Rule 6(e)(9) of the OVAT Rules. He further submits that the decisions relied on by the Dealer are not applicable to the present facts and circumstances of the case as the provisions of OVAT Act are not pari materia to the provisions of Andhra Pradesh VAT Act. So, he submits that the order of the First Appellate Authority is otherwise bad in law and liable to be set aside.

4. On the contrary, the learned Counsel for the Dealer submits that the First Appellate Authority has rightly allowed the TDS amount making liable the sub-contractors to pay tax as the sub-contractors are registered dealer in the State and the entire works have been reawarded to them by the Dealer. So, he submits that the impugned order requires no interference in appeal. He relies on the decisions of the Hon'ble Apex Court in cases of ***Larsen & Toubro Ltd. v. Addl. Deputy commissioner of Commercial Taxes & another***, reported in **[2016] 96 VST 512 (SC)**; and ***State of Andhra***

Pradesh & others v. Larsen & Toubro Ltd. & others, reported in **[2008] 17 VST 1 (SC)**.

5. Heard rival submissions of the parties, gone through the orders of the First Appellate Authority and Assessing Authority vis-a-vis the materials on record. It transpires from the assessment order that the Dealer is engaged in execution of works contract. The Dealer is a principal contractor. The Dealer engaged sub-contractors to complete the works. The Dealer has claimed refund of ₹1,71,14,074.00 in the revised return, which was deducted as TDS. The Assessing Authority raised the tax liability on the Dealer along with penalty. The First Appellate Authority observed that the Dealer is not liable to pay tax u/s. 11(4) of the OVAT Act and allowed refund of ₹1,71,14,074.00.

The State assails the refund allowed to the Dealer without verifying the assessment made in respect of sub-contractor and the total deduction granted is in contravention of Rule 6(2) of the OVAT Rules.

6. The record reveals that the Dealer had filed 'nil turnover' in the original return. The Dealer had also filed revised return claiming refund of ₹1,71,14,074.00, which was deducted as TDS. The record further reveals that the sub-contractor has also filed 'nil' return for the period 01.04.2009 to 31.04.2010.

Section 54 of the OVAT Act provides deduction of tax at source from payment to works contractor. Proviso to Section 54(1) of the said Act provides that where a dealer executing works contact entering into further contract with sub-contractor to execute such work, shall not deduct any further amount towards tax in respect of the said work and tax deducted at source by the deducting authority shall be transferred proportionately to sub-contractor by the principal contractor in such manner as may be prescribed.

Proviso to Section 54(2) of the OVAT Act provides that where the tax is deducted from a registered dealer, the assessing authority who receives the certificate shall forward the same along with payment received, to the assessing authority under whose jurisdiction the dealer is registered in the manner prescribed.

A bare reading of the aforesaid proviso, that the Dealer shall not deduct any further amount towards tax in respect of the works executed by the sub-contractor and tax deducted at source by the deducting authority shall be transferred proportionately to the sub-contractor by the principal contractor in such manner as may be prescribed.

7. In the instant case, the Dealer claims that it is not liable to be assessed as the works had been executed by the sub-contractors. Before delving into the issue, it is pertinent to consider the relevant provisions under the statute.

Sections 9 & 10 of the OVAT Act deals in charging of tax & incidence of taxation and liability respectively. Section 10(4a)(a) & (b) of the OVAT Act provides as under :-

> ***"10. Liability –***
> *(1) xx xx xx*
> *(2) xx xx xx*
> *(3) xx xx xx*
> *4(a) (a) Where a dealer, who transfers property in goods (whether as goods or in some other form) involved in the execution of works contract (hereinafter referred to as the contractor) enters into further contract for assigning such works contract, either wholly or in part thereof to other dealer (hereinafter referred to as sub-contractor), directly or otherwise, and the sub-contractor executes such works contract then each or either of them shall be jointly and severally liable to pay tax, and notwithstanding anything contained in this Act, the contractor and the sub-contractor shall pay tax proportionately in the prescribed manner in respect of transfer of property in goods (whether as goods or in some other form) involved in the execution of such works contract.*

(b) If the contractor proves, in the prescribed manner, to the satisfaction of the Commissioner that the tax has been paid by the sub-contractor on the turnover of the goods involved in the course of execution of the works contract, the contractor shall not be liable to pay tax on such turnover."

Rule 6(e) of the OVAT Rules prescribes that –

"6. Determination of taxable turnover –

xx xx xx

6(e) in case of works contract, the expenditure incurred towards –

(1) labour charges for execution of works;
(2) amount paid to a sub-contractor for labour and services;
(3) charges for planning, designing and architect's fees;
(4) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
(5) cost of consumables such as water, electricity, fuel etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract;
(6) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;
(7) other similar expenses relatable to supply of labour and services;
(8) profit earned by the contractor to the extent it is relatable to supply of labour and service;
(9) amounts paid to a sub-contractor as consideration for the execution of works contract whether wholly or partly, if the contractor proves to the satisfaction of the assessing authority that tax has been paid by the sub-contractor on the turnover of the goods involved in the course of execution of such works contract.

Provided that where a dealer executing works contract, fails to produce evidence in support of such expenses as referred to above or such expenses are not ascertainable from the terms and conditions of the contract or the books of accounts maintained for the purpose, a lump sum amount on account of labour, service and like charges in lieu of such expenses shall be determined at the rate specified in the Appendix."

8. Section 10(4a)(a) of the OVAT Act clearly stipulates that the contractor and sub-contractor shall be jointly and severally liable to pay tax

in case of works contract as the contractor enters into further contract for assignment for such works contract, either wholly or in part thereof, to sub-contractor. Sub-clause (b) of Section 10(4a) of the OVAT Act provides that the contractor shall not be liable to pay tax on such turnover, if the contractor proves in the prescribed manner to the satisfaction of the Commissioner that the tax has been paid by the sub-contractor.

In the instant case, the Dealer (Formerly known as M/s. VA-Tech Escher Wyss Flovel Ltd.) has entered into inter se agreement with the contractee, i.e. Orissa Power Consortium Limited on 27.12.2001. The inter se agreement stipulates a condition in **Article 2.7** regarding payment of taxes. The relevant portion is extracted herein below for better appreciation:-

> "**2.7. Taxes** : Subject to Owner's obligations pursuant to Article 4, Contractor shall administer and pay all Taxes specified in Article 5.3"

Article 5.3 contains the obligation of the Dealer regarding payment of taxes and duties. The relevant portion is quoted herein below for better appreciation :-

> "**5.3 Taxes and Duties :** The Contract Price referred to in Article 5.1 shall be deemed to include all 'Other Indian Indirect Taxes and Duties' and 'Indian Direct Taxes and Duties' forming part of the definition of Taxes and Duties applicable as of 1st July, 1998. The Owner shall provide such forms and certificates as may reasonably be required by the Contractor, having reverence to the nature of the transactions and the feasibility of such issue. The Contract Price shall, however be adjusted to take account of any alteration in the Taxes and Duties, or the imposition of any new Taxes & Duties, (which shall not include a mere revision in the nomenclature of any of the existing Taxes and Duties) coming into effect after the said date; provided that the said change shall apply only to any, services or work made or undertaken after such change became effective and is not the result of any default of the Contractor, Sub-contractor/Contractor(s)."

Admittedly, there is no inter se agreement between the contractee with the sub-contractor. So, the contractor-Dealer is bound by the terms and conditions of the inter se agreement executed with the contractee.

In view of the provision of sub-section 4(a) (b) of Section 10 of the OVAT Act, the Dealer has to discharge the burden of proof that the tax has been paid by the sub-contractor on the turnover of the goods involved in course of execution of works contract.

The Dealer has filed the returns for different periods commencing from Q/E. 31.03.2006 basing on separate bills raised on the contractee. Subsequently, the Dealer has also filed e-returns for different tax periods showing 'Nil' transaction claiming refund amount of TDS worth ₹1,71,14,074.00 on 31.03.2014 in respect of bills raised for different periods. The Dealer has not filed any document regarding payment of tax as required under Article 2.7 of the agreement.

The Dealer has only shown that an amount of ₹1,03,24,932.00 has been deducted as TDS from the bills of the sub-contractor and the same has been deposited to the State exchequer. Besides this, the Dealer has not laid any evidence to the effect that the tax has been paid by the sub-contractor on such turnover of works contract executed.

9. In the case of ***State of Madras v. Gannon Dunkerly & Co. (Madras) Ltd.***, **[1958] 9 STC 353 (SC)**, the Hon'ble Apex Court were pleased to hold that the expression 'sales of goods' involve existence of an agreement between the parties for the sale of goods in which eventually property passes.

In the case of ***Gannon Dunkerly & Co. v. State of Rajasthan***, **[1993] 88 STC 204 (SC)**, the constitution bench of the Hon'ble Apex Court were pleased to observe that the measure for the levy of tax contemplated by Article 366(29A)(b) of the Constitution is the value of the goods involved in execution of works contract.

Reiterating the principles enunciated by the Hon'ble Apex Court in the case of ***Builders Association of India***, reported **in [1989] 73 STC 370 (SC)**, the Hon'ble Apex Court in the case of ***State of Andhra Pradesh and***

others v. Larsen & Toubro Ltd. and others, reported in **[2008] 17 VST 1 (SC)**, have been pleased to observe as under :-

> "Ordinarily unless there is a contract to the contrary in the case of works contract the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed, when the goods or materials used are incorporated in the building."

The Hon'ble Apex Court were further pleased to observe by referring to the provision of Section 4(7)(a) read with Rule 17(1)(c) of the Andhra Pradesh Value Added Tax Rules, 2005 that –

> "Affirming the decision of the High Court, that section 4(7) of the Andhra Pradesh Value Added Tax Act, 2005, which dealt with taxability of works contracts, was a code by itself. Section 4(7)(a) as well as rule 17(1)(a) of the Andhra Pradesh Value Added Tax Rules, 2005, indicated that the taxable event was the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods took place when the goods were incorporated in the works. Under section 4(7)(a) read with rule 17(a)(c) where a VAT dealer awarded any part of the contract to a sub-contractor, such sub-contractor had to issue a tax invoice to the contractor for the value of the goods at the time of incorporation in such sub-contract and the tax involved in the tax invoice issued by the sub-contractor had to be accounted by him in his returns. Therefore, the scheme indicated that there is "deemed sale" by the dealer executing the work, viz., the sub-contractor. It was only the sub-contractor who effected the transfer of property in the goods and no goods vested in the assessee (the contractor) so as to be the subject-matter of a retransfer. By virtue of article 366(29A)(b) of the Constitution of India, once the work was assigned by the contractor (the assessee) the only transfer of property in goods would be by the sub-contractor, who was registered dealer, and who claimed to have paid the taxes under the Act on the goods involved in the execution of works. Once the work was assigned by the assessee to the sub-contractor, the assessee ceased to execute the works contract in the sense contemplated by article 366(29A)(b) because the property passed by accretion and there was no property in the goods with the contractor which was capable of re-transfer, whether as goods or in some other form. Thus in such a case the work executed by the

sub-contractor resulted only in a single transaction and not multiple transactions."

The provisions of Section 4(7)(a) of the AP Value Added Tax Act read with Rule 17(1)(c) of the AP Value Added Tax Rules provide that once the work was assigned by the assessee to the sub-contractor, the assessee cease to execute the works contract in the sense contemplated by Article 366(29A) because the property passed by the accretion and there was no property in the goods with the contractor, which was capable of retransfer whether as goods or in some other forms.

But, in the case at hand, Section 10(4a)(a) of the OVAT Act stipulates jointly and severally liability on the contractor as well as sub-contractor on the execution of works contract to pay tax. It further stipulates under sub-clause (b) of Section 10(4a) of the OVAT Act that the contractor shall not be liable to pay the tax on such turnover if the contractor proves that the tax has been paid by the sub-contractor to the satisfaction of the Commissioner. In view of embargo provided in the statute, unless the contractor discharges the liability that the tax has already been paid by the sub-contractor, the contractor will not escape from the liability to pay tax as per the provisions and the terms and conditions stipulated in the agreement. So, the decision of the Hon'ble Apex Court in the case of ***Larsen & Toubro Ltd.*** cited supra by the Dealer is not applicable to the facts and circumstances of the present case.

10. In the present case, the assessment order reveals that the GTO was determined at ₹7,81,15,630.00, out of which works for a sum of ₹4,41,32,352.00 was allocated to sub-contractor and the rest amount of ₹3,39,83,278.00 was the turnover of the instant Dealer. The Assessing Authority has already allowed deduction @ 30% towards labour and service charges to the tune of ₹1,01,94,983.00 and determined the TTO at

₹2,37,88,295.00. Though the assessment order reveals the turnover of both the contractor and sub-contractor for ₹3,39,83,278.00 and ₹4,41,32,352.00 respectively and both contractor and sub-contractor filed 'nil' returns without adducing any evidence to the contrary relating to the works executed by each of them and the tax paid thereof. The contractor went to the extent that all the works were re-awarded to the sub-contractor, which is contrary to the assessment order, which reveals that the contractor and sub-contractor have executed as aforesaid. It is also strange that Assessing Authority whispers no single word, if at all the sub-contractor has paid any tax on the transfer of property in goods in course of execution of works contract, i.e. on the allocated turnover of ₹4,41,32,352.00. The Assessing Authority as per the provisions of Section 10(4a)(a) and (b) of the OVAT Act read with Rule 6(e)(9) of the OVAT Rules, he ought to have fixed the joint and several liability to pay the tax on the contractor as well as sub-contractors and the contractor is liable to pay tax unless he proves to the contrary that the tax has already been paid sub-contractors.

11. However, the State is not claiming tax both from the contractor and sub-contractor. The State does not dispute that the transfer of property in goods in course of execution of works contract by the sub-contractor is not in the form of single deemed sale. The only question remains in this case to be answered is whether the Dealer is entitled to get the refund of TDS without discharging the burden to pay the tax due on the awarded contract works. The Dealer fails to discharge the burden of proving liability to pay tax as per the statutory requirement of Section 10(4a)(a) and (b) of the OVAT Act read with Rule 6(e)(9) of the OVAT Rules.

Therefore, the finding of the First Appellate Authority in fixing liability on the sub-contractors to pay tax and thereby allowing refund of TDS on the ground that the Dealer is not liable to pay tax as the sub-

contractors have executed the works, is contrary to the aforesaid provisions of the OVAT Act and Rules thereunder. The First Appellate Authority lost sight of provisions of Section 10(4a)(b) of the OVAT Act that the contractor has to prove that tax has already been paid by the sub-contractor on the turnover of works executed. The First Appellate Authority has also lost sight of the fact that the provision of Section 10(4a)(a) of the OVAT Act regarding jointly and severally liability of the contractor and sub-contractor to pay tax. The Assessing Authority should have assessed the contractor and sub-contractor jointly in the assessment proceeding to decide the joint and several liability to pay tax on the execution of works contract. The Assessing Authority should have taken pain to ascertain whether the sub-contractor has paid the tax on the transfer of property in goods in course of execution of works contract on the allocated turnover.

12. Therefore, for the foregoing discussions, we are of the considered view that the finding of the First Appellate Authority directing the Assessing Authority to refund the TDS amount of ₹1,71,14,074.00 to the Dealer as the sub-contractors have executed the works suffers from illegality and needs interference in appeal without any finding regarding payment of tax. Hence, it is ordered.

13. Resultantly, the appeal stands allowed and the impugned order of the First Appellate Authority is hereby set aside. The matter is remanded to the Assessing Authority for assessment afresh as per law keeping in mind the provisions of Section 10(4a)(a) & (b) of the OVAT Act read with relevant OVAT Rules as per the observations above within a period of three months from the date of receipt of this order. The Assessing Authority is required to examine the matter afresh keeping in view the observations made herein above with regard to payment of tax by the contractor and sub-contractor on the transfer of property in goods in course of execution of works contract. The Assessing Authority is directed to allow reasonable

opportunity of being heard to the Dealer and the sub-contractor and the sub-contractor and contractor are at liberty to place their material facts with explanation in such reassessment proceeding. 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-I