BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 2812 of 2004-05

(Arising out of order of the learned ACST, Balasore Range, Balasore in Appeal No. AA – 253/BD – 2003-04, disposed of on 26.10.2004)

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

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

-Versus-

M/s. Larsen & Toubro Limited, At/PO/Dist. Bhadrak ... Respondent

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

Date of hearing : 14.02.2023 *** Date of order : 13.03.2023

O R D E R

State assails the order dated 26.10.2004 of the Asst. Commissioner of Sales Tax, Balasore Range, Balasore (hereinafter called as 'First Appellate Authority') in F A No. AA – 253/BD – 2003-04 enhancing the refund amount passed in the assessment order of the Sales Tax Officer, Bhadrak Circle, Bhadrak (in short, 'Assessing Authority').

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

M/s. Larsen & Toubro Limited carries on business in works contract under National Highway Authority of India. The assessment relates to the year 2001-02. The Assessing Authority allowed refund of ₹5,52,138.00 in assessment proceeding u/s. 12(4) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act').

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority enhanced the refund amount to ₹1,83,43,346.00. Being aggrieved with the order of the First Appellate Authority, the State prefers this appeal. Hence, this appeal.

The Dealer files cross-objection in this case. The Dealer has challenged the impugned order on the ground that the reduction in payments made to the sub-contractors is not proper.

3. The learned Standing Counsel (CT) for the State submits that the First Appellate Authority arbitrarily enhanced the labour and service charges to 62% without any basis. He further submits deduction allowed on both heads of labour and service charges and also consumable are contrary to law and fact involved and the same requires interference in appeal. He further supports the finding of the First Appellate Authority and submits that the First Appellate Authority rightly reduced the payments to the sub-contractors basing on the documents produced by the Dealer, which requires no interference in appeal.

4. On the contrary, the learned Counsel for the Dealer submits that the Assessing Authority assessed the tax liability on best judgment principles. He further submits that the First Appellate Authority rightly followed the notification of SRO No. 40/2010 and enhanced the labour and service charges to 62%, which requires no interference in appal. He further submits that the First Appellate Authority arbitrarily reduced the payments made to the sub-contractors and the same is without any basis. So, he submits the same requires 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 adopted the best judgment principle in absence of proper books of account. The gross payment received by the Dealer is at ₹71,09,24,554.00. The Assessing Authority allowed deductions of

₹46,49,51,206.00 towards the payment to the sub-contractors, ₹9,10,10,138.76 towards labour and service charges, ₹50,02,176.00 towards the purchase of goods from registered dealers inside the State which have suffered tax, ₹1,35,01,647.00 towards staff salary and consumables, thereby determined the TTO at ₹13,64,59,386.24. He levied appropriate rate of tax and surcharge thereon and same came to ₹1,48,41,967.34. As the Dealer had already paid ₹1,53,94,105.00, the Assessing Authority allowed refund of ₹5,52,138.00 in assessment.

The First Appellate Authority allowed 62% towards labour and service charges as the sub-contractor had executed the earth works only such as, clearing, sizing and filling of sand, morrum etc. on the road. The First Appellate Authority determined the GTO at ₹71,09,24,554.00, allowed deductions of ₹40,17,61,565.00 towards payment to the sub-contractors, ₹17,55,95,922.00 towards labour and service charges, ₹1,15,02,176.00 towards purchase of tax paid goods and ₹3,13,09,374.00 towards tax paid purchase of consumables. So, he determined the TTO at ₹5,07,77,989.04 and levied tax and surcharge thereon. The tax payable computed at ₹50,37,022.26. Since the Dealer had paid tax in shape of TDS of ₹2,33,80,368.00, the First Appellate Authority enhanced the refund amount to ₹1,83,43,346.00 in appeal.

6. The State disputes the finding of the First Appellate Authority regarding deduction of 62% on labour and service charges and deduction towards consumables on the ground that both deductions are not appropriate. The assessment order reveals that the Assessing Authority adopted best judgment principles in the absence of proper books of account and allowed deduction of ₹9,10,10,138.76 against the claim of ₹17,55,95,922.00. The notification issued by the Finance Department vide SRO No. 40/2010 dated 06.02.2010 provides deduction towards labour and service charges for different works wherein 65% deduction is allowable in case of earth work, canal work, embankment work etc.. As it appears, the

First Appellate Authority allowed deduction of 62% towards labour and service charges considering earth works. The Dealer has not challenged the allowance of 3% less as per SRO No. 40/2010 for which it is not necessary for us to adjudicate the same as the same has not been questioned by the Dealer. So, we do not find any illegality in the order of the First Appellate Authority on this score.

7. With regard to deduction on account of consumables of ₹1,35,01,647.00 in assessment, the Assessing Authority allowed deduction towards payments made to staff salary and consumables. The First Appellate Authority enhanced the same to ₹3,13,09,374.00. He found the deduction towards consumables relates to POL and spare parts used in machineries. He also verified the details of expenses incurred in the execution of works contract and the Dealer had accounted for in the books of account. Being satisfied, he was allowed the deduction of ₹3,13,09,374.00 claimed towards consumables utilized in the works contract. So, we are of the unanimous view that the First Appellate Authority has rightly enhanced the deduction on account of consumables after due verification as per law, which does not require any interference in appeal.

8. On the other hand, the Dealer-respondent has also filed cross-objection against the finding of the First Appellate Authority regarding reducing the amount of ₹40,17,61,565.00 from ₹46,49,51,206.00 towards the payment to the sub-contractors.

The impugned order of the First Appellate Authority reveals that the Dealer has executed the works through the sub-contractors and the payments made to the sub-contractors to the tune of ₹46,49,51,206.00.

The First Appellate Authority after detailed verification found that the Dealer had paid the amount to the sub-contractors as given below :-

M/s. Sadhav Engineering Ltd.	-	₹33,38,72,939.00
M/s. NKB Industries Products	-	₹ 6,38,90,481.44
M/s. Shridhar Dixit Works	-	₹ 3,52,357.00

M/s. Manoj Kumar Sahu - ₹ 34,15,739.00

The impugned order further transpires that the Dealer failed to produce the document for the balance amount to the sub-contractors. So, the First Appellate Authority disallowed the rest amount and reduced the payment made to the sub-contractor from ₹46,49,51,206.00 to ₹40,17,61,565.00. Therefore, we do not find any illegality in the order of the First Appellate Authority regarding reducing the payments made to the sub-contractors as per documents furnished.

9. It came to our notice from the LCR produced by the Revenue that the Assessing Authority had initiated the proceeding u/s. 12(8) of the OST Act and completed the same on 20.11.2007 during pendency of the second appeal before the Tribunal. It is settled principle of law that the 12(8) proceeding can be initiated in case of escaped assessment or under assessment or for any reason as per the statutory provision. But, 12(8) proceeding cannot be initiated to defeat the purpose of 12(4) proceeding especially when the same was subjudiced before the Tribunal. The assessment order was not in existence as the same has already been merged in the first appeal order and now the first appellate order is under challenge before this forum. In the case of ***State of Orissa v. Ugratara Bhojanalaya***, reported in **[1993] 91 STC 76 (Orissa)**, wherein Hon'ble Court have been pleased to observe that it was not open to the Assessing Officer to take resort to Section 12(8) of the OST Act in respect of an assessment which has merged with the appellate order, it would be without jurisdiction. If at all there are any other materials which are not connected to the proceeding u/s. 12(4) of the OST Act, the observation above shall not be binding on the Assessing Authority.

10. So, for the foregoing discussions, the First Appellate Authority rightly enhanced the deduction towards labour and service charges keeping in view the nature of works executed and the reduction in payments made to the sub-contractor basing on the documents filed. Therefore, we do not find

any illegality in the order of the First Appellate Authority to call for any interference in appeal. Hence, it is ordered.

11. Resultantly, the appeal at the instance of State and the cross-objection at the instance of the Dealer are dismissed and the impugned order of the First Appellate Authority is hereby confirmed.

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/-
(M. Harichandan)
Accounts Member-I