

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

**S.A. No.13(V) of 2017-18**

(Arising out of the order of the learned DCST(Appeal),  
Bhubaneswar Range, Bhubaneswar First Appeal No. AA  
106221422000166, disposed of on 19.01.2017)

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

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

..... Appellant

**-Vrs.-**

M/s. Srishakti Pasupati Encon Pvt. Ltd.,  
Plot No-3, Gopabandhu Nagar, Bhubaneswar,  
TIN-21201109035.

..... Respondent.

For the Appellant : Mr. D. Behura, Id. A.S.C.(C.T.)

For the Respondent : Mr. S.S. Rout, Id. Advocate

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**Date of Hearing : 01.06.2023      \*\*\*      Date of Order : 30.06.2023**  
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**O R D E R**

This second appeal has been preferred by the State against the order of the Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (in brevity called hereinafter the Id.FAA) passed on 19.01.2017 in the First Appeal Case No.AA-106221422000166 in reduction of demand to the tune of ₹28,73,851.00 against the demand of ₹33,16,754 raised at

assessment u/S. 44 of the OVAT Act by the Sales Tax Officer, Bhubaneswar IV Circle, Bhubaneswar (hereinafter called the Id.STO) for the tax period 01.02.2011 to 31.03.2012.

2. The facts in nutshell of the case are put down for better appreciation. M/s Shrishakti Pasupati Encon Private Limited, Plot No.3, Gopabandhu Nagar, Bhubaneswar is engaged in execution of works contract and construction of residential buildings/apartments and sale thereof to the intending purchasers as per the terms and conditions incorporated in the agreement entered into between the respondent-contractor and the owners of the land. The Registration Certificate issued in favour of the contractor-assessee was cancelled with effect from 31.01.2011. As per the Tax Evasion Report No.13 dated 30.04.2013 submitted by the Sales Tax Officer, Enforcement Range, Bhubaneswar, proceeding under Section 44 of the OVAT Act was initiated by the learned STO and raised demand of ₹33,16,754.00 which includes penalty of ₹19,15,894.00 imposed under Section 43(2) of the OVAT Act. The respondent-contractor being aggrieved preferred the first appeal. The Id.FAA allowed the appeal in part and reduced the demand to ₹28,73,581.00.

3. The State being not satisfied with the first appeal order approached this forum to intervene contending that where a dealer executing works contract fails to produce the evidences in support of the expenses incurred towards labour and services or such expenses are not ascertainable from the terms and conditions of the contract or the books of account maintained for the purpose, a lump sum amount on account of labour, service and like surcharges in lieu of such expenses shall be determined at the rate specified in the

Appendix. The order of the Id.FAA is held as not in consonance with the provision of Rule 6(e) of the OVAT Rules. The State seeks to restore the order of assessment and to set aside the order of the Id.FAA.

4. The respondent- contractor filed cross objection holding that since purchases have been made from the registered dealer on payment of VAT, disallowance of ITC as claimed for ₹14,37,640.47 is not just and proper. The Registration Certificate issued under OVAT Act has been cancelled w.e.f. 31.01.2011 without giving an opportunity to the respondent-contractor of being heard. The tax for ₹5,15,034.00 paid prior to the order of assessment has been considered for adjustment, but while imposing penalty, the amount of tax calculated for ₹16,94,307.50 was taken as the amount of penalty instead of tax due assessed at ₹11,79,273.50.

5. All the materials such as assessment order, first appellate order, grounds of appeal and other allied documents available on record are gone through. It is revealed from perusal of the record that the respondent-contractor has received payment of ₹3,88,72,000.00 and ₹1,02,64,600.00 towards construction of residential buildings/flats and execution of works contract for construction of building of Rajadhani Engineering Collage respectively culminating to ₹4,91,36,600.00 in total during the period under appeal. The learned STO is learnt to have verified the purchases of the materials worth ₹1,63,24,939.79 made from the registered dealer in which, the contractor-assessee has claimed ITC to the tune of ₹14,37,640.47. The learned STO disallowed the ITC as claimed merely due to the respondent-contractor having not disclosed the same in the returns and non submission of the details

of the utilization thereof. Besides, Purchases valuing ₹2,69,22,316.79 are reported to have been made from the unregistered dealers. Deductions towards electricity charges for ₹9,22,262.00, design and drawings charges for ₹2,87,500.00 and hire charges of machinery for ₹4,60,000.00 have been allowed at assessment. Deduction of the cost of the land @30% on ₹3,88,72,000.00 worked out to ₹1,16,61,600.00 has been allowed. After effecting the above deductions from the gross receipt, the TTO was determined at ₹2,45,62,738.00. Output tax @4% on ₹1,47,37,643.00 and @13.5% on ₹98,25,095.00 calculated to a total tax of ₹19,15,894.00. The dealer-contractor having deposited ₹5,15,034.00 on 3.2.2014 voluntarily, the deduction of the same has been allowed. The total tax due calculated to ₹14,00,860.00 which on imposition of penalty of ₹19,15,894.00 under Section 44(1) of the OVAT Act arrived at ₹33,16,754.00. The Id.FAA in terms of the agreement made between the respondent-assessee and the owner of the land inclined to allow 33% of the cost of the land used for construction of the residential buildings/flats. Thus, the Id.FAA allowed deduction towards the cost of the land @33% on ₹3,88,72,000.00 (payment receipt towards construction of buildings) which calculated to ₹1,28,27,760.00. The Id.FAA has disallowed ITC to the tune of ₹14,37,640.47 as claimed for as per the provision of sub section (1) of Section 20 of the OVAT Act which provides that ITC shall only be allowed to the registered dealers. Determination of deduction towards labour and service charges @30% as has been allowed at assessment in terms of Rule 6(e) of the OVAT Rule read with appendix 3(a) is affirmed by the Id. FAA. After allowing deductions of ₹1,28,27,760 towards the cost of the land,

₹1,08,92,652.00 towards labour and service, ₹9,22,262.00 towards electricity charges, ₹2,87,500.00 towards design and drawings out of the gross receipt of ₹4,91,36,600.00, the TTO stood determined at ₹2,37,46,426.00. The TTO as determined is divided up on the basis of the share of taxable purchases made by the contractor assessee i.e. 4% and 13.5 tax groups which respectively calculated to 67% and 33%. Accordingly, 4% tax on ₹1,59,10,105.42 and ₹13.5% on ₹78,36,320.58 worked out respectively to ₹63,64,404.22 and ₹10,57,903.28. Thus, the total output tax came to ₹16,94,307.50. The contractor having paid ₹5,15,034.00 before assessment passed u/S 44 of the OVAT Act, deduction of the same has been allowed. The amount of tax due calculated ₹11,79,273.50. Penalty of ₹16,94,307.50 was levied. The dealer-contractor was required to pay ₹28,73,581.00. After going through the order of assessment, first appeal order, the contract Agreement, we are, prima facie, of the view that from the facts as merging from the Agreement, 'the land owner shall be entitled to get 33% of the super built up space of the Apartment on preferential basis and the builder shall have no right of claim over the same'. Accordingly, allowing deduction of 33% as the cost of the land from the gross receipt (payment receipt from construction of residential buildings) by the ld.FAA is justified. Allowance of deduction @30% towards labour and service charges as per Rule 6(e) (Appendix-3(a)) by the ld.FAA is proper and justified, since the works executed falls under civil works categorized as construction of buildings. The ld.FAA has rightly disallowed the ITC as claimed by the respondent-contractor in terms of the provision of 20(1) of the OVAT Act. As regards levy of penalty u/S. 44(1) of the OVAT Act, the ld. FAA has rightly held the tax assessed as the

amount of penalty. Accordingly, imposition of penalty of ₹16,94,307.50 is justified

6. From the above account of discussion, we are of the considered view that the order passed by the Id.FAA in the instant case justifies no interference. The grounds taken by the State bear no merit.

7. Thus, we order as under:-

The appeal filed by the State is dismissed being devoid of merit and the order of the Id.FAA is confirmed.

Dictated & corrected by me.

**Sd/-**  
**Bibekananda Bhoi)**  
**Accounts Member-II**

**I agree,**

**Sd/-**  
**(Bibekananda Bhoi)**  
**Accounts Member-II**

**I agree,**

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

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