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

S.A.No.8(V) of 2014-15.

(Arising out of the order of Ld. DCST(Appeal) Cuttack I Range, Cuttack, in First Appeal Case No.AA-(VAT)28/CUIW/ 2012-13, disposed of on dated 5.2.2014)

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

M/s. Kalinga Marketing,
Dewan Bazar, Cuttack ... Appellant,

- V e r s u s –

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

For the Appellant ... Mr.S.Nanda, Adv. & Mr.S.K.Dhal, Adv.
For the Respondent ... Mr.D.Behura, Standing Counsel, (CT & GST Organisation)

Date of Hearing: 20-11-2023. Date Order:15-12-2023

O R D E R

The dealer appellant on filing this second appeal U/s.78 of the Odisha Value Added Tax Act, 2004 (in short; OVAT Act) seeks the intervention of this forum against the order dated 5.2.2014 passed by the Deputy Commissioner of Sales Tax (Appeal), Cuttack I Range, Cuttack, (hereinafter referred to as Learned First Appellate Authority/Ld. FAA), in confirming the order of assessment passed U/s.42 of the OVAT Act by the Learned Sales Tax Officer, Cuttack I West Circle, Cuttack, (hereinafter referred to as Ld. Assessing Authority/Ld.AA) for the tax period from 1.6.2007 to 31.3.2010.

2. Briefly stated the facts of the case are that the dealer which carries on business in manufacturing and sale of boards, banners, flex prints etc. and execution of works contract was subjected to

audit assessment, resulting in creation of extra demand of Rs.17,85,102.00 which includes imposition of penalty of Rs.11,90,068.00 U/s.42(5) of the OVAT Act.

3. On being aggrieved with the order passed by the Ld. AA, the dealer has preferred an appeal before the Ld. FAA, who confirmed the impugned assessment order vide his order dated 5.2.2014 in First Appeal Case No.AA(VAT)28/CUIW/2012-13.

4. On being aggrieved with the aforesaid order passed by the Ld. FAA, the dealer has preferred the present appeal on the ground that the said order is improper and unjust particularly in respect of levy of tax against the works contract which is purely labour and service oriented without involvement of any transfer of property in goods or any other form. The dealer appellant has also questioned the validity of imposition of penalty U/s.42(5) of the OVAT Act without establishment of any contumacious design of the dealer in defrauding the revenue.

5. When the matter stood thus, the dealer appellant has raised the additional grounds stating that since the audit visit report was not submitted by the audit team within statutory period of 7 days the consequent assessment by the Ld. AA is infructuous. Besides, the appellant has taken stand that although it has deposited tax of Rs.12,17,526.00 the Ld. AA has allowed adjustment to the tune of Rs.10,83,435.00 without assigning any reason.

6. The State Respondent has filed memo of cross objection seeking for non-intervention in the order passed by the Ld. FAA as

the same is in accordance to the provisions of law. The procedural issue raised by the dealer appellant was also objected by the State Respondent due to want of any corroborative evidence.

7. Heard the case from both the rival parties. The procedural issue as raised by the dealer appellant in the additional grounds has not been pressed for, nor supported with any material evidence. Hence the claim in this respect is rejected.

8. As transpires from the impugned orders, the dealer was in receipt of Rs.2,95,71,178.71 towards fabrication works for which it has claimed deduction @ 20% to the tune of Rs.59,14,235.74 towards labour and service charges which was accepted by the Ld. AA. The dealer too does not dispute on the deduction allowed in this score.

9. However, the dealer raises dispute with regard to the determination of deduction towards labour and service charges @ 30% on the balance contractual receipt of Rs.55,29,491.33 on application of Section 11(2)(c) of the OVAT Act read with Rule 6(e) of the OVAT Rules. In stating so, the dealer claims that out of the aforesaid amount of Rs.55,29,491.33, an amount of Rs.39,71,771.57 relates to the contractual receipt involving no transfer of property in goods or in any other form and as such qualifies for cent percentage deduction on account of labour, service and other like charges.

10. In a way to substantiate its claim the dealer has submitted the copies of the work orders and invoices against such receipt of Rs.39,71,771.57. On examination of the same, it is noticed that there is no involvement of material component and as such, the said

amount of Rs.39,71,771.57 is considered to be against such work which are purely labour and service oriented.

11. In this context, the Proviso to Rule 6(e) of the OVAT Rules, has been referred to which reads as follows:-

> ***"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 account of the labour, services and like charges in lieu of such expenses shall be determined at the rate specified in the Appendix.]"

12. The said Rule speaks about the cases where the expenses on account of labour, service and other like charges are not ascertainable from the terms and conditions of the contract. But in the present case, it is discernible from the work orders and invoices that the entire receipt of Rs.39,71,171.57 involves no material component being service oriented in nature. As such, the contentions made by the dealer is accepted and the entire amount of Rs.39,71,771.57 qualifies for deduction towards labour, service and other like charges. However, the determination of labour, service and like charges on the balance amount of Rs.15,57,719.76 i.e. @ 30% which is not disputed by either of the parties remains unaltered.

13. Thus, in toto the dealer is found to be eligible for deduction of Rs.1,03,53,323.24 (i.e. @ 20% on Rs.2,95,71,178.71, @30% on Rs.15,57,719.76 and @100% on Rs.39,71,771.57) towards labour, service and other like charges against its GTO as determined at Rs.3,80,88,950.12

15. Further, in respect of less adjustment of admitted tax it has been contended by the Learned Advocate that while the dealer has deposited a sum of Rs.12,17,526.00, the Ld. AA without assigning any reason thereof has allowed adjustment of Rs.10,83,435.00. In order to substantiate the claim the Ld. Advocate has submitted a detailed statement supported with the photo copies of relevant challans before this forum. In view of the same, it is felt proper to direct the Ld. AA to consider the claim after making necessary reconciliation with official records.

16. However, with regard to the appeal on levy of penalty U/s.42(5) of the OVAT Act as raised by the dealer, we find there is no good ground to interfere, since the same is mandatory in nature in view of the decision of the Hon'ble High Court of Orissa, in case of M/s. Jindal Stainless Ltd, Vrs. State of Orissa and others, reported in (2012) 54 VST 1(Orissa).

17. In view of the aforesaid facts and circumstances, the appeal preferred by the dealer appellant is allowed in part. The case is remanded to the Ld. AA with a direction to re-compute the tax liability of the dealer afresh after allowing deduction as determined above towards labour and service charges and considering the deposits made by the dealer. If on doing so, any tax payable comes out, penalty U/s.42(5) of the OVAT Act should strictly be imposed. This exercise should be completed preferably within three months from the date of receipt of this order. Cross objection, additional

grounds of appeal and counter additional grounds of appeal of the respective parties are disposed of accordingly.

Dictated and corrected by me

Sd/-
(S.R.Mishra)
Accounts Member-II.

Sd/-
(S.R.Mishra)
Accounts Member-II.

I agree,

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

I agree,

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