

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

**S.A. No.293(V) of 2014-15**

(Arising out of the order of the learned DCST(Appeal),  
Bhubaneswar Range, Bhubaneswar in First Appeal No. AA-  
106261211000173, disposed of on 28.02.2014)

**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.

**- Vrs. -**

M/s. B.C. Patra, Plot No-45/17,  
Laxmi Sagar, Bhubaneswar,  
TIN No-21191102299.

... Respondent.

For the Appellant: : Mr. S. K. Pradhan, ASC(C.T)  
For the Respondent: : Mr. S.K. Mishra, Advocate

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**Date of Hearing : 23.08.2023      \*\*\*      Date of Order : 22.09.2023**  
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**O R D E R**

The State is in appeal against the order dated 28.02.2014 of the Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (herein after called 'Id.FAA) passed in First Appeal Case No.106261211000173 in allowing refund of ₹60,03,356.00 as against demand of ₹35,78,882.00 in assessment passed under Section 42 of the OVAT Act by the Sales Tax Officer, Bhubaneswar I Circle, Bhubaneswar (in short, 'Id.STO').

2. The summary of the case at hand is that M/s B.C. Patra, Plot No.45/17, Laxmisagar, Bhubaneswar, TIN-21191102299 is

engaged in execution of works contact under different Govt. organizations/contractees. Tax audit as envisaged under Section 41 of the OVAT Act was conducted for the tax period from 01.04.2005 to 31.03.2011. The ld. STO assessed the dealer-contractor under Section 42 of the OVAT Act on the recommendations of the Audit Visit Report and raised demand of ₹35,78,882.00 including penalty of ₹23,85,908.00 imposed under Section 42(5) of the OVAT Act. Aggrieved, the dealer-contractor preferred first appeal. The demand so raised in assessment culminated in flow of refund to the tune of ₹60,03,356.00 in first appeal.

3. The State took avers to the order of the ld.FAA and preferred second appeal before this forum. The grounds of appeal urged substantially hover on the following issues.

(i) That the dealer-contractor failed to produce labour and service account either before the Tax Audit Team or before the ld.STO at assessment. It could produce the same before the ld.FAA. It begets suspicion as to the attitude of the dealer-contractor in doing so.

(ii) Non-levy of tax on monetary consideration received on account of letting out vehicles/machineries to other hirers is challenged. The version of the dealer-contractor owning effective control over the said vehicles/machineries despite the same being in use by others/hirers is held as illegal.

(iii) The order of the ld.FAA does not depict the evidences in support of which, deduction towards labour and service and the like charges has been allowed in first appeal.

(iv) ₹74,57,780.00 has been allowed under 'Similar Expenses' without detail mention in the first appeal order.

The respondent-contractor has filed cross objection. The learned Counsel representing the dealer-contractor claims allowance of deduction of ₹10,82,93,492.00 towards royalty paid.

Gone through the first appeal order and the citation of the decision of the Hon'ble High Court of Bombay in case of Builders Association of India Vs. State of Maharashtra reported in (1994) 95 STC 516 (Bombay). We agree with the observation of the ld.FAA in this score and find no reason to interfere. Furthermore, as to claim of deduction on inter-State purchase of bitumen against declaration Form 'C', the ld.FAA observes that where a contractor purchases goods from outside of the State and transfers such goods in the execution of works contract in the state, he cannot claim exemption of such sale on the plea of inter-State purchase. Such transfer of property in the execution of works contract is fully covered within the definition of sale as observed in the in case of **Utility Engineers India Ltd Jalandhar Vs. State of Punjab** reported in 73 STC 370 (SC). On going through the above observation of the ld.FAA, we find no infirmity in it and thus, the order of the ld.FAA on this score is affirmed.

4. The orders of the forums below vis-à-vis the grounds of appeal are gone through. There is no LCR (Lower Case Record) tabled despite insisted upon. It is perused from the orders of the forums below that the ld.STO has accepted the gross receipt of payment at ₹36,19,04,024.00 as put down in the Audit Visit Report whereas the ld.FAA has accepted the revised gross receipt disclosed at ₹43,15,95,634.00.

The ld.FAA has quoted the observations of the Hon'ble Apex Court in case of **Gannon Dunkerly & Co and Others Vs. State of Rajasthan & Others** reported in 88 STC 204 (SC) in

determination of the value of the goods involved in the works contract amenable to tax. The value of goods involving transfer of property in goods is only taxable deducting there from the following charges.

- a. Labour charges for execution of the works;
- b. Amount paid to a sub-contractor for labour and services;
- c. Charges for planning, designing and architect's fees;
- d. Charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
- e. Cost of consumables such as water, fuel etc. used in the execution of works contract the property in which is not transferred in the course of a works contract;
- f. Cost of establishment of the contractor to the extent it is relatable to supply of labour and service charges;
- g. Other similar expenses relatable to supply of labour and service charges;
- h. Profit earned by the contractor to the extent it is relatable to supply of labour and service charges.

5. On perusal of the first appeal order, it is observed that there were no evidences in support of expenditure incurred towards labour and service charges produced at first appeal. The Id.FAA is found to have allowed deduction towards labour and service and the like charges from the gross receipt basing on facts and figure reflected in the Balance Sheet as under:-

1. Labour charges	₹12,54,81,570.50
2. Hire of machinery & tools	₹ 64,70,846.00
3. Consumables	₹ 1,72,01,602.00
4. Establishment of the contractor	₹ 1,48,64,065.00
5. Other similar expenses	₹ 74,57,780.00

6. Profit earned by the contractor	₹ 47,24,859.91
<b>TOTAL</b>	<b>₹17,62,00,723.51</b>

6 As it appears, there were no supporting evidences in support of the expenses incurred towards labour and service charges produced at first appeal except the Balance Sheets. It is not disputed that these audited accounts are not the statutory documents. They are the mandatory requirements as per Section 65 of the OVAT Act. Failure to submit the same within the stipulated time frame would invite penal action. But the fact remains that Balance Sheets are only the financial statements containing assets and liabilities of a business concern. It is used to evaluate the business. Although these audited accounts are supposed to have been framed in agreement with the books of accounts maintained, it cannot be said to be books of accounts governed under the provisions of Rule 67 of the OVAT Rules. The report in the Balance Sheet cannot be reckoned as evidences in support of the expenses incurred towards labour and service charges. Production of the relevant books of accounts and labour accounts evidencing expenditure incurred towards labour and services ought to be to the satisfaction of the assessing authority. Furnishing of a financial statement in shape of Balance Sheet might not amount to rendering production of evidences on labour and service charges. As the same were not produced before the Tax Audit Team, they recommended 30% deduction towards labour and service charges instead of 42% and 62% as claimed for by the dealer-contractor respectively on construction works and road works. The Id.STO in assessment allowed deduction @30% on construction works and 50% on road works towards labour

and service charges as per Appendix to Rule 6(e) of the OVAT Rules.

7. In the instant case, the ld.FAA seems to have not verified the books of accounts/evidences on expenses incurred towards labour service and like charges. Basing on the information/data appearing in the audited accounts, deductions towards labour and service charges have been allowed. Further, there is mention of the sources of receipt of payments and the nature of works executed during the tax periods under audit in the first appeal order. The first appeal order does not also depict whether the audited accounts those furnished before the ld.STO in terms of Section 65 of the OVAT Act for the tax periods under appeal were produced before the ld.FAA or certificates as required under Rule 73 of the OVAT Rules obtained from the Chartered Accountant concerned. In view of the aforesaid conflicting derivations, it is of the considered view that the ld.FAA is sought to verify the relevant books of accounts/evidences in support of the expenditure incurred towards labour and service charges in the instant case as per Rule 6 (e) of the OVAT Rules. The impugned case befits fresh assessment on the above score. Accordingly, the contention of the State in this regard deserves consideration.

8. The dealer-contractor has learnt to have received payment of ₹2,52,59,256.00 on letting out vehicles and construction machineries owned by it for use in its contract works during the tax periods under appeal. The ld.STO assessed the said hire charges to tax as per Explanation-(c) to Section 2(46) of the OVAT Act which provides that 'in relation to transfer of right to use any goods for any purpose (whether or not for a specified

period) the consideration or the hire charges received or receivable for such transfer shall be the sale price.’

The Id.FAA after going through the contention of the learned Advocate appearing for the dealer-assessee holds that the vehicles and machineries were used in the contract works awarded to the dealer-contractor. But in idle time, when the said vehicles were not at works at project site of the dealer-contractor, they are let out to different hirers on requisitions. The possession and effective control of the vehicles and machineries in all cases remains with the dealer-contractor. There is no transfer of right to use goods in any such cases. So taxing of such hire charges does not come under the purview of Clause (29A) (d) of Article 366 of the Constitution. In this connection, a decision of the Hon’ble Apex Court in case of **20<sup>th</sup> Century Finance Corporation Ltd and Another Vs. State of Maharashtra** reported in (2000)119 STC 182(SC) has been relied upon. The Hon’ble Court have observed that ‘levy of tax is not on use of the goods but on the transfer of the right to use goods. The right to use goods accrues only on account of transfer of right. Unless there is transfer of right, the right to use does not arise.’ Another judgment of the said Court delivered in case of the **State of Andhra Pradesh and Another Vs. Rastriya Ispat Nigam** reported in (2002) 126 STC 114 (SC); provides that hire charges are not taxable when effective control of the machinery rests with the owner. In view of this, the Id.FAA holds that the provision in Explanation (c) to Section 2(46) of the OVAT Act is not acted upon in the present facts and circumstance of the impugned case. As observed in the first appeal order, the vehicles and machineries owned by the dealer-contractor though rented out at times were under the exclusive

control of the dealer-contractor and thus, the transfer of right to use such vehicles and machineries has not taken place. Accordingly, the monetary consideration availed on renting of such vehicles and machineries is not taxable. The order of the Id.FAA in this regard thus needs no interference.

9. In view of the above observations, we conclude hereby that the appeal filed by the State is partly allowed. The order of the Id. FAA stands modified to the extent of allowing labour and service charges. The case is remitted to the Id. FAA for re-consideration in the light of the direction imparted at para-7 above within three months from the date of receipt of this order. Cross objection is hereby disposed of accordingly.

Dictated and corrected by me.

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

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

**I agree,**

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

**I agree,**

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