

BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A.No.91(V) of 2010-11

&

S.A. No.78(V) of 2010-11

(Arising out of the order of the learned DCST, Puri Range,
Puri, in First Appeal Case No. AA. 46 (PUI)VAT-09-10,
disposed of on 16.01.2010)

Present: Smt. Suchismita Misra
Chairman

Shri A. K. Panda
Judicial Member-I

Shri P.C. Pathy
Accounts Member-I

S.A.No.91(V) of 2010-11

M/s. Pratap Chandra Parida
At/Po- Kakatpur, Puri

... Dealer.

-Versus-

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

... State.

S.A. No. 78(V) of 2010-11

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

... State.

-Versus-

M/s. Pratap Chandra Parida
At/Po- Kakatpur, Puri

... Dealer.

For the State:

: Mr. M. L. Agarwal, S.C. (C.T.).

For the Dealer:

: Mr. B Sendha, Advocate.

Date of Hearing: 01.08.2018

***** Date of Order: 02. 08.2018

ORDER

The above two appeals, **S.A.No.91(V)/2010-11** filed by the dealer-appellant, and **S.A.No.78(V)/2010-11** filed by the appellant-State, are directed against the same order passed by the learned Deputy Commissioner of Sales Tax (Appeal) Puri Range, Puri/First Appellate Authority, (in short, the ld. 'DCST/FAA'), and hence, being heard together, are being disposed of by this common order.

2. The dealer in the instant case is a works contractor executing construction and maintenance of rural roads under PMGSY scheme under the Executive Engineer, R.W.D. Jagatsingpur, Construction work for M/s. Maithan Ispat Ltd. Kalinga Nagar, Industrial Complex, Jakhapura, Duburi, Jajpur, building works under Executive Engineer, R & B Division, Cuttack. Construction of building, common wall and concrete road for Daitari Iron Ore Mines Ltd.,. The dealer admitted to have supplied materials like chips, sand, boulder. The instant dealer has also executed Earth work and Culvert Construction for M/s. Xavier Institute of Management, Bhubaneswar. These apart the dealer has received gross amount to the tune of Rs.6,41,014.00 towards private contract work executed. The dealer contractor has received gross payment of Rs.3,76,11,348.00 and TDS deducted and deposited for the period amounts to Rs.8,31,956.00. The Id.AA basing on the Audit Visit Report completed the Audit assessment for the period U/s. 42 of the OVAT Act taking the gross turnover at Rs. 3,59,73,547.00 excluding the amount refunded as E.M.D. allowing deduction of Rs.1,83,93,352.00 towards various heads. The total sale value of material determined at Rs.1,75,80,195.00 which is made exigible to tax @4% on Rs.74,37,589.00 and 12.5% on Rs.38,03,190.00. Total output tax determined at Rs.12,08,742.00 after allowing adjustment of input tax credit to the tune of Rs.2,12,964.00 and payment on account TDS amounting to Rs.8,31,956.00, the dealer contractor is held liable to pay extra amount of Rs.1,63,822.00 . No penalty U/s. 42(5) has been imposed by the Id. AA.

3. Being aggrieved the dealer-contractor preferred first appeal against the order of the Id. AA taking contention that the Id. AA has not allowed profit relatable to labour and service charges on the ground of failure in producing distinct account and denial of ITC by the Id. AA on the plea of purchases made through retail invoice and cash memos by affixing rubber stamps on tax invoice thereon.

4. The Id. DCST carefully considering the contentions of the dealer-contractor and referring the cases of M/s. Builder Association of

India Vrs. State of Karnataka 1993-88 STC 248 (SC) and M/s. Gannon Dunkerly & Co. and Others Vrs. State of Rajasthan & Others reported in 88 STC, Page-204 while deciding the transfer of property in goods i.e. deeming sale which has been taxed at the material rate, the ld. DCST has reduced the deduction already allowed by the ld. AA by disallowing the depreciation charges on machineries used in works contract against the deemed sale determined at Rs. 1,75,80,195.00 by the ld. AA the ld. DCST arrived at a turnover of Rs.1,76,08,228.00.

S. A. No. 91 (V) of 2010-11

The dealer has filed second appeal before this Tribunal assailing order dated 16.01.2010 passed by the ld. DCST(Appeal) Puri Range, Puri in first appeal case No. AA. 46 (PUI) VAT-09-10 enhancing tax to Rs.1,66,418.00 against the demand of Rs.1,63,862.00 raised by the learned Sales Tax Officer/Assessing Authority, Puri Range, Puri (in short, the ld 'STO/AA') Vide order of assessment dated 30.04.2009 for the tax period 01.04.2006 to 31.03.2007 U/s. 42 of the Odisha Value Added Tax Act (in short, 'OVAT Act').

5. (i) In the grounds of appeal, it has been contended that both the ld. AA as well as the ld. FAA has arbitrarily and whimsically determined the value of works without proper interpretation of the principles laid down by their lordship of Hon'ble Apex Court of India for assessment of works contract. It has been contended that the materials utilised in works contract were incorporated in the work is subject to output tax but not an imaginary and presumptive sale value thereof on the basis of theoretical calculation.

(ii) The denial of ITC on the plea of purchases made through retail invoice and cash memos by affixing rubber stamps of tax invoice thereon is violative of the provisions of section 20(3) of the OVAT Act since the purchases are made from registered dealers having valid TIN. The findings of the ld. DCST contravenes the provisions of section 20(6) of the OVAT Act, when all the original purchase invoices issued by the selling registered dealers in respect of claim of ITC has been filed at the assessment stage.

(iii) The Id. DCST has made an illegality by disallowing the claim of the appellant towards deduction of depreciation on machineries thereby enhancing the turnover, without giving opportunity of being heard in the matter of enhancement which violates the principles of natural justice.

(iv) Both the Id. STO and Id. DCST have determined the output tax by wrong calculation.

The dealer-appellant has also filed the following additional grounds along with written submission:-

(a) The transactions being made between two registered dealers having valid TIN & the retail invoice/cash memos having contained all the particulars as on tax invoice, appropriate tax having collected by the selling dealer, there is no justification to deny I.T.C. merely because certain purchases are effected through retail invoice/cash memos due to clerical/technical errors apparent on the face of the record which shall not alter the nature & character of transaction between the parties, who are admittedly & undoubtedly two registered dealers.

(b) With the above aim & objectives of section 20(6) have been provided & powers to allow input tax credit in absence of Tax invoice has been delegated to the ACST & JCST Vide Commissioner of Sales Tax Notification No-12726 & 12731-V (VI)-53/05/CT dated 16.07.2005 giving retrospective effect from 01.04.2005.

(c) Further following citations have been relied upon:-

(i) M/s. Builders Association of India Vs. State of Karnataka
1993, 88 STC Page 248 (S.C)

(ii) M/s. Gannon Dunkerly & Co. Ltd. Vs. State of Rajasthan
88 STC Page 204

(iii) Input Tax Credit:-

“The Gujarat High Court while disposing of a petition under Article 226 of the Constitution, held that if the transaction for Which Input tax credit was claimed, was genuine & bona fide one & the supplier is

identified, there is no reason why benefit of input tax credit should be denied to the assessee merely on Technical grounds.”

(iv) List of citations on royalty.

6. The Respondent-Revenue has filed memo of cross objection stating the fact that as the Revenue has already filed second appeal against the very erroneous order of the Id. FAA in the interest of natural justice both the appeals may be heard simultaneously.

S.A. No.78(V) of 2010-11

The State is the appellant impugning the aforementioned order passed by the Id. first appellate authority.

7. The State has filed appeal with the following grounds:-

- (i) The orders of both the fora below are arbitrary, erroneous and bad in law.
- (ii) The Id. 1st appellate authority is not justified is not imposing penalty which is equal to twice the amount assessed as per provision contained U/s. 42(5) of the OVAT Act 2004.
- (iii) Royalty paid towards procurement of soil and sand is not permissible for deduction as per the decision of honourable Apex Court in case of Gannon Dunkerly V. State of Rajasthan.
- (iv) The cost of Esst. And profit earned is not apportioned to material & labour.
- (v) The orders may be set aside for fresh assessment as provision contained U/s. 42(5) of the OVAT Act and decision pronounced by Hon'ble Apex Court Supra have not been followed.

The dealer-respondent has not filed any cross objection.

8. In course of hearing Mr. M. L. Agarwal, Id. Standing Counsel (C.T.) reiterated the grounds of appeal filed and vehemently argued for disallowance of royalty paid towards procurement of soil and sand allowed by the lower fora as the same are not permissible in the light of the decision of Hon'ble Apex Court. Royalty expenses are not relatable to labour and service charges. The Id. Standing Counsel (C.T.) supported the reduction of ITC claimed by the dealer-assessee on the ground that proper tax invoices were not produced before the fora below

in support of the entire claim preferred. He brought to the notice of the Bench a copy of tax invoice submitted by the Id. Advocate on behalf of the dealer-assessee before the Id. FAA. On perusal of the tax/retail invoice bearing No.387 dated 29.04.2006 issued by M/s. M.G. Traders, Bhubaneswar goods i.e. sarees (not a taxable item under the VAT Act) worth Rs.9,600.00 was purchased by M/s. Mangovind of Khelar. The Id. Standing Counsel (C.T.) forcefully argued that such invoices produced by the dealer-assessee ought not to be allowed which the fora below have justifiable disallowed. It is also contended that the Id. FAA has rightly disallowed the deduction of Rs.20,031.00 previously allowed by the Id. AA on the ground that depreciation calculated on capital goods like machineries are not allowable to the works contractor. He has also taken the contentions that both the fora have not acted in accordance with the provisions contained under Statute for they have not imposed mandatory penalty U/s. 42(5) of the OVAT Act, an amount equal to twice the amount of tax assessed.

9. Mr. B. Sendha, the Id. Advocate appearing on behalf of the dealer-contractor vehemently argued that the Id. fora below have not rendered justice by determining the sale turnover properly. He has reiterated the grounds, additional grounds and written submission filed with citations. He has vehemently argued that enhancement of TTO by the Id. FAA disallowing the depreciation on machineries being not a relatable charge on labour and service is not proper. The expenses incurred towards royalty is not to be made exigible to tax in view of the decisions cited in the case of M/s. Titilagarh Paper mills Vrs. State of Orissa and AIR 2005 (S.C) page 3955, 1646 and Para 50 taking the contention that royalty is not a tax but an expense. He has also taken the contention that denial of ITC merely because certain purchases are effected through retail invoice/cash memos due to clerical/ technical error apparent on the face of the record shall not utter the nature and character of transaction between two registered dealer having valid TIN. He has argued that the instruction imparted by the Id. Commissioner of Sales Tax in this connection has not been properly taken care of.

10. Heard the rival contentions. Carefully considered the arguments advanced by the both the parties, gone through the orders of the fora below, the relevant appeal record, grounds of appeal and Cross objection filed by the Revenue, grounds of appeal/additional grounds of appeal with written submission filed by the dealer-assessee. The question raised in this appeal is “whether the order of the Id. FAA on the facts and circumstances of the case is sustainable?”

On careful consideration it is noticed that as the dealer-assessee could not produce distinct account towards profit relating to labour and service no deduction on this score could be allowed by the Id. AA. The Id. Advocate appearing on behalf of the dealer-assessee could not justify with documentary evidences to the effect that the dealer-assessee is eligible to get deduction on depreciation of machineries which are capital goods. It was also not explained as to how the royalty paid towards procurement of soil and sand is relating to labour and service charges qualifying deduction from the gross payment receipt. On perusal of the tax invoice as available in the record of Id. FAA there is every reason on the part of the Id. AA to disallow the claim of ITC. The Id. Standing Counsel (C.T.) could not adduce documentary evidence in support of denial of ITC on other purchases effected from registered TIN dealers inside the State before the Bench. It is observed that though the audit assessment was completed U/s. 42 of the OVAT Act and the dealer-assessee was assessed to tax amounting to Rs.1,63,862.00 no mandatory penalty was imposed U/s. 42(5) of the OVAT Act. As all the purchases against which the claim of ITC was denied is not produced before the Bench, it is felt desirable to ascertain the veracity of the transactions effected by the dealer-assessee from registered TIN dealers inside the State ignoring the mere technicality of retail invoices/cash memos with stamp of tax invoice. The desirability of allowing claim of ITC ought to be transactions between two registered TIN dealers with proper collection of VAT separately on the invoices/bills.

In view of the above the orders of both the fora below are not sustainable hence the matter is remanded to the Id. AA to add the

royalty amount shown as incidental expenditure and amount pertaining to depreciation of machineries used in work to taxable turnover and verify the purchases involved in claim of ITC disallowed earlier merely on technical ground without verification of genuineness of transactions. The desirability of imposition of mandatory penalty would come in case the dealer-assessee is assessed to tax.

11. In the result, appeals are partly allowed and the matter is remanded back to the ld. AA to make fresh assessment in the light of observations made above within a period of four months from the date of receipt of this order.

Dictated and Corrected by me,

Sd/-
(P.C. Pathy)
Accounts Member-I

Sd/-
(P.C. Pathy)
Accounts Member-I

I agree,

Sd/-
(Suchismita Misra)
Chairman.

I agree,

Sd/-
(A. K. Panda)
Judicial Member-I