

2. The factual matrix of this case is that the dealer-appellant under the name and style of M/s. Voltas Ltd. having place of business located at Kharvel Nagar, Bhubaneswar bearing OST Registration No.CUIW-2089 deals in air-conditioners, air coolers, refrigerators, washing machines and their spare parts and accessories. This apart, the dealer-appellant also executes works contract for air-conditioning systems receiving stock of goods from their manufacturing plant located outside the State on stock transfer basis. The dealer-appellant reported to have disclosed GTO & TTO in respect of the business for the period at Rs.8,61,07,793.49 and Rs.7,00,44,759.92 respectively. The Id. ACST verifying the books of accounts and other documentary evidences relating to works contract executed and sales effected against declaration Form-XXXIV and exempted sale against declaration in Form-II and concessional sales @4% OST against declaration in Form-IV to registered manufacturing dealers and the amount received in respect of execution of works contract for air-conditioning systems determined the GTO & TTO for the period at Rs.8,90,95,178.65 and Rs. 7,43,58,458.62 respectively against the disclosure of gross turnover for the trading activity at Rs.6,75,16,012.52 by deducting turnover of Rs.40,45,899.00 from works contract turnover and adding the same to the turnover shown under the trading activities which resulted in extra demand of tax and surcharge to the tune of Rs.10,08,126.00.

Being dissatisfied with the order of the Id. ACST the dealer-assessee filed appeal before the Id. Addl.CST, Central Zone, Orissa, Cuttack on the following grounds:-

- (i) The GTO was determined at Rs.8,90,55,178.65 as against GTO returned at Rs.8,61,07,793.49 in the following manner:-
 - (a) GTO for trading at Rs.7,15,61,911.52
 - (b) GTO for works contract at Rs.1,74,93,267.13
- (ii) As regards trading sales to registered dealers against Form-XXXIV was disallowed to the extent of Rs.1,78,497.00 in the absence of supporting forms.
- (ii) Disallowed labour & service charges to the extent of Rs.3,13,802.34.

- (iv) Disallowed Rs.8,74,015.00 towards collection of tax on account of works contract.
- (v) Disallowed TDS certificates to the extent of Rs.1,79,599.00.
- (vi) Disallowance of OST payment to the tune of Rs.1,90,229.00.
- (vii) Treating a transaction of Rs.40,45,899.00 as sale of air-conditioner out of the turnover of works contract.

The ld. Addl.CST on careful consideration of the grounds of appeal and the averment of the ld. Advocate and the authorised person at the time of appeal hearing allowed the appeal in part with the direction to ld. ACST to verify the claimed T.D.S. payment and payment of tax through the returns and to re-compute the tax liability taking into consideration payments made as per the stay granted by the higher authority. However regarding other contents of the assessment order the ld. Addl.CST upheld the findings of the ld. ACST.

3. Being further aggrieved, the dealer-assessee has approached this Tribunal on the following grounds:-

- (a) The order passed by the learned Asst. Commissioner, Cuttack-I Range, Cuttack and the order passed by the Addl. Commissioner in 1st appeal are contrary to law and facts on record.
- (b) The order passed by the Courts below are to be set-aside in view of the fact that the GTO & TTO arrived are not in accordance with law and provisions made under the Orissa Sales Tax Act, 1947 and rules made there-under.
- (c) Both the Court's below have arrived at a wrong finding. The contracts entered by applicant with different customers within the State of Orissa are for execution of Air Conditioning System with drawing design engineering, testing, commissioning and installation in turnkey basis with lump sum price inclusive freight delivery and all taxes duties. This Air Conditioning System which does not require any Air Conditioner. Both the Courts below treated the transactions as Sale of Air Conditioner and levying local OST on the same is a grave error in eye of law. The full bench of the Hon'ble Tribunal Orissa Sales Tax has already been

decided on this issue in various cases of the applicant and have decided that Air-Conditioning Systems are works contract & not a sale of Air-Conditioner. Now the orders passed by both the Courts below are to be set-aside.

- (d) Both the Courts below have assessed the turnover of 1996-97 & have included a part of it during the assessment in 1997-98. Hence the same turnover has been assessed twice during 1996-97 and in 1997-98. Hence the order has to be set-aside on this score.
- (e) While assessing the Assessing Officer has not given due credit of labour & service charges while determining the taxable turnover in respect of works contract. The appellate authority has also not given the credit of the same.
- (f) The OST collected for works contract job has not been allowed deduction from the GTO and the tax has been levied on the same which violate the principles of double taxation.
- (g) The GTO on works contract has been enhanced by Rs.29,47,386.63 during the aforesaid period as the said turnover pertains to the period 1996-97 and is included in the turnover for the period 1997-98. The same has to be excluded as because it has been already considered during 1996-97. Further also apart from the above an amount of Rs.40,45,899.00 which pertains to different customer's purchase order of Air Condition system has been stated to be sale of air conditioner and has been taxed @ local rate which is also not permissible in eye of law. Thus the enhancement of such turnover is illegal and liable to be set-aside.
- (h) The enhancement of GTO & TTO are also violative of the judicial pronouncement made in Vol-88 STC Page-488 J. Gopal Rao Vs. State of Orissa.
- (i) The Court's below has acted by committing grave illegality by assessing on basis of payment received and on basis of payment receivable both thereby the turnover has been enhanced. Hence

the GTO and TTO determined by both the Court's below are illegal and liable to be set-aside.

- (j) The Addl. Commissioner should have allowed the credit of OST paid through challans and TDS certificate which amounts to Rs.1,90,229.00 and Rs.1,79599.00 respectively. Hence on that score the assessment as well as the order of appeal are based on surmises and conjecture and hence to be set-aside and therefore order of remand is bad in law.

4. No cross objection has been filed by the respondent-State.

5. Mr. S.R. Pattnaik, the Id. Advocate appearing on behalf of the dealer-appellant before this Bench reiterated the points raised in the grounds of appeal and vehemently opposed to the findings of the lower court in levying tax on a turnover of Rs.29,47,386.63 for the period 1997-98 which amount pertains to the year 1996-97 and already assessed for the relevant period. He strenuously argued that the Id. ACST has levied tax on amount of receipt and not on the amount receivable on the basis of which the appellant files its returns. He also vehemently argued that enhancement of taxable turnover by Rs.40,45,899.00 as sale of Air conditioner and not as the air conditioning system with different customers in course of execution of works contract is not proper and there is no justification in levying tax @16% on turnover relating to execution of works contract on the grounds that the contract value is inclusive of sales tax collected @8% from the customers. He also submitted that there is no justification in disallowing the labour and service charges reasonably claimed by the dealer-appellant. The Id. Advocate has filed in course of appeal hearing before this Bench a note of argument along with the following documents:-

- i. Note of Argument.
- ii. Statement of Accounts for 1997-98.
- iii. Order copy of Appellate authority in appeal no-AA-CUIW-02/2000-01 for the period 1998-99 dt.11.06.2012.

- iv. Judgment of Andhra Pradesh on T.D.S. Vol-101 STC Page-350.
- v. Judgment of Orissa High Court regarding enhancement Vol.88 STC 488.
- vi. Judgment of Supreme Court, in respect of labour and Service charges. Vol.88 STC Page-204 at Page-237.
- vii. Agreement and purchase order copies of different customers showing supply, erection & commissioning of Air conditioning system.
- viii. Photo copy of the order of this Tribunal (Full Bench) in S.A. No.4097 of 1993-94 passed on 23.02.1996 in respect of the dealer-appellant pertaining to the assessment period 1991-92 wherein the Hon'ble Tribunal has held that there is a difference between sale of Air conditioner and Air conditioning system and the latter should be treated as works contract.

6. Mr. M.S. Raman, the Id. Addl. Standing Counsel (C.T.) appearing on behalf of the State/Revenue supported the order passed by the Id. Addl.CST as just and proper and in accordance with the provision under the law. He submitted that the dealer has not disclosed proper figure in respect of turnover towards works contract executed for which the Id. ACST has recorded the reason at pages- 6 & 7 in his order passed with the observation that "in order to put an end to this confusion, it will be wise to accept the payment received as per TDS certificates to be the correct figures for determining the gross turnover in respect of works contract. Accordingly I now determine the gross turnover of the works contract executed for which payments have been received by the assessee at Rs.1,74,93,267.13." He further vehemently argued that keeping in view the material intensive nature of works i.e. air conditioning system, the Id. ACST has allowed 20% of the gross payment received towards labour and service charges which amounts to Rs.34,98,653.43 against the claim of payment of labour charges to the tune of Rs.38,74,928.77. He further submitted that the bills raised by the dealer-appellant against the contractees are silent about the sales tax being collected separately which the dealer-appellant claimed that

the bill amount is inclusive of OST collected as applicable to the works contract turnover.

7. We have heard the ld. Counsel for the appellant and the State and perused the documents furnished by the ld. Advocate on behalf of the dealer-appellant as well as gone through the grounds of appeal, impugned orders of assessment and appeal. There is no incongruity find in the order of the ld. Addl.CST in directing the ld. ACST to verify the claims of TDS payment and payment through Challan and deposit made as per the stay granted by higher authority so as to ascertain the payment position and tax liability in respect of the dealer. It is to be seen now, whether the conclusion arrived at by the ld. ACST and confirmed by the ld. Addl.CST, in the given facts and circumstances, is just and proper? On perusal of the order passed by this Tribunal on 23.02.1996 in case of the dealer-appellant in S.A.No.4097 of 1993-94 relating to the year 1991-92 it is clear that the dealer is engaged in execution of indivisible works contract for design, supply, erection, testing and commissioning of Air-Conditioning system. This Tribunal has held that transfer of material involved in the execution of works contract in the nature of Air-conditioning system is not a contract for supply of goods but an indivisible works contract. At the time of hearing the ld. Advocate on behalf of the dealer-appellant produced certain documentary evidences/agreement concerning execution of Air-conditioning system with the contractees like OCL India Ltd., Rajgangpur, Indo German Club, Sector-2, Rourkela, Steel Authority of India limited., Rourkela and M/s. Nalco Ltd., Hotel 'the garden inn', Raymond Retail Shop, Bhubaneswar and M/s. NTPC etc.. Sales tax is included in the price offered by the dealer-appellant and indicated in the agreements executed though there is no separate mention of sales tax collected on the bills raised by the dealer-appellant. From the commercial terms and conditions of the dealer-appellant in respect of Air-conditioning business Division, Calcutta Branch contained in Annexure-VI/E-3032/PK/20.09.1997 the contract price mentioned in the quotation includes works contract tax/sales tax on works contract

on the value of materials used in the execution of contracts @8% applicable within the State of Odisha. In view of the documents furnished and the order of this Tribunal dtd.23.02.1996 it is evident that the ld. Addl.CST has erred in not reversing the view that the turnover of Rs.40,45,899.00 is the sale turnover of air-conditioner and not the turnover relating to the works contract executed in nature of air-conditioning system as per the purchase order with different customers. We find that there is considerable force in the contention advocated by the ld. Counsel on behalf of the dealer-appellant. Hence the same is accepted. So far as statement of works contract turnover mentioned in TDS certificate produced before the ld. ACST for the year 1997-98 is concerned the dealer-appellant has shown to have issued invoices for works contract amounting to Rs.1,74,93,240.00 with TDS amount of Rs.6,99,690.00 out of which three transactions appearing at Sl. Nos.1, 11 and 22 (wrongly mentioned as sl. No. 27) relate to the period 1996-97. From the appeal order dtd. 11.06.2012 passed by the ld. Addl.CST (appeal) Central Zone, Cuttack for the period 1998-99 under the OST Act it is learnt that the dealer-appellant has challenged the order on the ground that enhancement of GTO by Rs.11,69,710.85 is illegal since the said amount has already been taken into consideration during the previous year i.e. 1997-98. From this it is evident that due to non-clarification arising out of confusion on payment received and payment receivable such enhancement of GTO and consequential enhancement of TTO has occurred. The ld. Advocate in the instant case has stated that an amount of Rs.29,47,386.63 pertaining to the year 1996-97 for which the dealer has already been assessed for the assessment period 1996-97 has wrongly been subjected to tax by the ld. ACST for the assessment year 1997-98. This matter can only be sorted out by the ld. AO on careful consideration of the figures taken for the period 1996-97, 1997-98 and 1998-99 under the OST Act which is not possible at this stage. The Judgment of Orissa High Court regarding enhancement cited by the ld. Advocate (Vol. 88 STC Page-488) is not relevant for the subject matter before the Hon'ble

Court was estimation of daily sale and fixation of liability under the OST Act but in the instant case of the dealer-appellant, enhancement is not due to best Judgment assessment basing on mere presumption or suppression of turnover but on account of confusion due to payment received/receivable so far as works contract turnover is concerned. The ld. Advocate cited the Judgment of High Court of Andhra Pradesh concerning allowance of tax deducted at source (Vol.101 sales tax cases page-350). This was wrongly contended before the ld. Addl.CST as the Judgment of Hon'ble Kerala High Court mentioned at Page-3 of first appellate order for which the ld. Addl.CST has reproduced the extract of relevant section under the OST Act at page-5 of the appeal order. As a matter of fact mere submission of TDS certificate is not enough if the requisite information pertaining to deduction and deposit of the amount with the sales tax authorities are not clearly reflected on the face of TDS certificate which would facilitate in confirming the payment position by assessing authority. The dealer appellant should take necessary step to ensure that the TDS certificates contain all the requisite information and to be produced before the ld. AO for necessary consideration. Hence there should not have been any hesitation on the part of dealer-appellant in producing relevant evidences before the ld. ACST as per the direction contained in appeal order of the ld. Addl.CST. Limiting labour charges to 20% of the gross payment so far the works contract turnover is concerned by the ld. ACST on the ground that the works executed by the dealer is of material intensive nature for the work is Air-conditioning system is not convincing for no concrete evidence for such reduction was reflected in the assessment. The labour and service charges claimed by the dealer being not unreasonable or at higher side, is accepted in absence of any valid or cogent evidence for reduction of the claim.

In view of the above this is a fit case for remitting the same to the ld. ACST to assess the dealer afresh verifying the payments as ordered by the ld. Addl.CST earlier and to ascertain whether the turnover relating to the period 1996-97 was wrongly included in the

turnover determined for the assessment year 1997-98 with reference to the turnovers accepted for the years 1996-97 and 1998-99 and to treat the turnover of Rs.40,45,899.00 as a turnover relating to Air-conditioning system which is not a sale of Air-conditioner but related to works contract.

8. In the result, the appeal is partly allowed. The ld. STO is directed to complete the assessment afresh keeping in view the aforesaid observations providing reasonable opportunity of hearing to the dealer-appellant 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

I agree,

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

Sd/-
(Suchismita Misra)
Chairman

I agree,

Sd/-
(Subrat Mohanty)
2nd Judicial Member