BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 243(V) of 2019

(Arising out of the order of the learned JCST, CT & GST, Territorial Range, Jajpur, Jajpur Road, in First Appeal case No. AA-987 (CUIII) 18-19(OVAT) disposed of on 19.06.2019)

P r e s e n t: **Sri. S.K.Rout**
Judicial Member-II

M/s. Premco Rail Engineers Ltd.,
Raksol, Duburi, Jajpur. ... 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.K.Das, Advocate.
For the Respondent ... Mr. M.L. Agarwal, SC(CT).

Date of hearing: **10.06.2022** * * * Date of Order:**18.07.2022**

O R D E R

Challenge in this appeal is the order dated 19.06.2019 passed by the learned Joint Commissioner of Sales Tax, Territorial Range, Jajpur, Jajpur Road (in short, JCST/FAA) in first appeal case No.AA.987 CUIII 18-19 (OVAT), thereby reducing the tax for the tax periods 01.04.2009 to 31.03.2014 and granting refund as against the demand raised vide assessment order dated 14.09.2016 assessed under Section 42 of the OVAT Act, 2004 passed by the learned Sales Tax Officer, Jajpur Circle, Jajpur (in short, AA/STO).

2. The case at hand is that the dealer appellant is engaged in works contract such as railway formation works, civil construction works as well as sales materials to the contractee. After the audit visit, the assessment was taken up. On verification of books

of accounts, it was found that the dealer appellant had received a sum of Rs.29,99,86,733.04 on execution of works contract (against the disclosed turnover of Rs.29,46,47,038.00) and has directly supplied goods and have received Rs.5,09,15,675.00 (excluding tax) from four contractees namely (i) RML, (ii) Tata Sponge (iii) HPCL (iv) Sesa Goa Ltd. The assessee returned the GTO at Rs.35,55,17,667.00 and TTO at Rs.20,74,13,992.00 and admitted output tax at Rs.78,92,040.00. Against the same, the learned assessing officer determined the GTO at Rs.40,38,74,009.00, TTO at Rs.27,20,73,892.00 and determined output tax to be Rs.1,87,99,282.00. Apart from the same, the learned assessing officer has levied interest under Section 34 amounting to Rs.2,38,351.00 for withholding the admitted tax and for late filing of returns. Thus, the total demand was calculated at Rs.1,44,77,149.00. The appellant having paid an amount of Rs.18,74,401.00 by way of challans and TDS of Rs.1,25,65,729.75 totalling to Rs.1,44,40,130.75 balance amount of Rs.37,018.00 was determined and penalty of twice amount at Rs.74,036.00 was imposed. Thus, total demand of Rs.1,11,054.00 was raised.

3. As against the said order of assessment, the dealer appellant preferred the first appeal before the learned Joint Commissioner of Sales Tax, Territorial Range, Jajpur, Jajpur Road in which the learned First Appellate Authority deleted the demand and granted a refund of Rs.65,64,697.00 by re-determining the turnovers i.e. by reducing the GTO granting more exemptions, ITC and deleting the penalty etc.

4. Further, being dis-satisfied with the order of the learned First Appellate Authority, the dealer assessee preferred the present second appeal as per the grounds stated in the appeal memo.

5. Cross objection is filed on behalf of the Revenue.

6. Heard the contentions and submissions of both the parties in this regard. Perused the orders of both the fora below,

grounds of appeal and the materials available on the record. The learned Advocate for the appellant dealer submitted that the present second appeal may be remanded back to the learned Assessing Authority for fresh consideration on the grounds that (i) cost of establishment expenses of Rs,1,91,69,576.00 relating to labour and services may be allowed for deduction towards labour and services as per pronouncement of Hon'ble Supreme Court of India decided in the case of Gannon Dunkerley and Co Vrs. State of Rajasthan and Others (1993) 88 STC 204(SC) and Rule 6(e) of the OVAT Rules, 2005. (ii) Consumables other than fuel of Rs.12,04,034.46 is allowable deduction under the head of consumables such as water, electricity, fuel etc. which are consumed in the process of execution of works contract and no input tax credit is claimed by the appellant. The same may be considered for deduction towards labour and services. (iii) That the total labour and services allowed by the assessing authority and first appellate authority in the appeal order is Rs.14,71,80,662.00 but wrongly mentioned in the order as Rs.13,97,07,061.34 which needs necessary correction at the time of fresh assessment.

7. Per contra, the learned Standing Counsel (CT), Mr. M.L.Agarwal vehemently contended that in col. No.11 of memorandum of second appeal, the appellant mentions the disputed amount as Rs.1,11,054.00 which is the original demand raised in order of assessment. The figures claimed by the appellant against col.3 of Sl. 10 states "as determined" (which means as to be determined by the Tribunal) as against the determined figures of the forums below. The claim is not certain and clear. There is no specific dispute which exists to be adjudicated by this Tribunal as per the appellant's own admission. That however in course of hearing of the second appeal, learned Counsel prayed that the deduction has not been allowed properly by the forums below and the same is to be recalculated in accordance with the ratio of the judgement rendered in Gannon Dunkerely's case. But, on the other hand, the revenue submits that

excess and ineligible deductions and exemptions has been allowed in favour of the appellant which is erroneous and not permissible. Further, submission on behalf of the revenue is that after the 46th Amendment, all the composite contracts have been made divisible and is subject to sales tax. The works contract is nothing but consists of composition of sale of goods till the incorporation, plus the services rendered therein. The sales tax is levied by the State Government and service part is charged by the Central Government. Thus, from the works contract on deduction of services the balance is sales of goods which is taxable under the sales tax act and reverse is for service tax. The works contract has been interpreted by the Hon'ble Supreme Court from time to time and has indicated the measure of taxation by bifurcating the sales and service thereon. The Hon'ble Supreme Court after rendering the judgment in Builders Association case 73 STC 370 has explained the measure of taxation in Gannon Dunkerley's case. Thereafter, the Hon'ble Court has further enumerated and had set limitations towards the deductions. The ratio of all the judgements till date has to be taken into consideration in allowing and disallowing the exemption. That the forum below has mis-read and mis-applied the ratio of the judgment rendered in Gannon Dunkerley's case. The law laid down by the Hon'ble Court specifically states "Since the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works and not the cost of acquisition of the goods by the contractor. The position of a contractor in relation to a transfer of property in goods in the execution of a works contract is not different from that of a dealer in goods who is liable to pay sales tax on the sale price charged by him from the customer for the goods sold. The said price includes the cost of bringing the goods to the place of sale. Similarly, for the purpose of ascertaining the value of goods which are

involved in the execution of a works contract for the purpose of imposition of tax, the cost of transportation of the goods to the place of works has to be taken as part of the value of the said goods. The charges mentioned in item no. (vii) relate to the various expenses which form part of the cost of establishment of the contractor. Ordinarily the cost of establishment is included in the sale price charged by a dealer from the customer for the goods sold. Since a composite works contract involves supply of materials as well as supply of labour and services, the cost of establishment of the contractor would have to be apportioned between the part of the contract involving supply of materials and the part involving supply of labour and services. The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover (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, electricity, fuel etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract (f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services (g) other similar expenses relatable to supply of labour and services (h) profit earned by the contractor to the extent it is relatable to supply of labour and services

The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor.

That the judgement of Gannon Dunkerley's case has prescribed a formula of percentage for deduction towards labour and services vide Appendix appended to Rule 6(e) of the OVAT Rules.

Therefore, the minimum deduction which is to be granted under the OVAT Act is as per the appendix. That the forums below have allowed the sub-contract works without ascertaining as to whether the said sub-contractor is assessed to tax under the Act, the amount of taxable turnover assessed is only to be deducted and not otherwise. That the profits to the extent of the works of services is to be deducted and the balance is to be added on transfer of property which is to be taxed and not other expenses or profits coming outside the purview. This apart the dealer appellant having admitted payment of tax, had deposited by way of challans. Further, no deduction certificate has been obtained from the competent authorities towards less deductions of TDS. Moreover, a gross error has been committed by the learned first appellate authority wherein the GTO has been reduced from the disclosed return turnover by the appellant at Rs.35,55,17,667.00 to Rs.35,08,07,137.00 thereby scaling down the turnover by Rs.47,10,530.00 which is not permissible in law. That the disallowance of ITC made by the learned assessing officer has wrongly been allowed by the learned first appellate authority without proper verification. It is pertinent to mention that the grant of ITC is subject to conditions and restrictions. In the instant case, the selling dealer has not disclosed the sales to the present appellant by not showing the transactions in Annexure appended to serial no.57 of return VAT 201 and have not paid the tax and some dealers during the relevant time had cancelled their registration certificate. Therefore, ITC cannot be availed by the dealer appellant on these grounds. That the amount of set off is only from the payment of output tax by the selling dealer and there is no independent right to grant set off. It is also found from the VATIS that the dealer has purchased goods from cancelled dealers on the date of purchase effected and also from dealers who have failed to disclose the sales effected to the appellant in their returns. In view of the above analysis, it is a fit case to be remanded to the learned assessing authority for de novo assessment.

8. In the result, the appeal filed by the dealer is allowed in part. The impugned orders of the forums below are hereby set aside and the matter is remitted back to the learned assessing authority for de novo assessment keeping in view of the observations made hereinabove within a period of three months from the date of receipt of this order after giving an opportunity to the dealer of being heard. The cross objection is disposed of accordingly.

Dictated and Corrected by me,

Sd/-
(Shri S.K.Rout)
Judicial Member-II

Sd/-
(Shri S.K.Rout)
Judicial Member-II