BEFORE THE ODISHA SALES TAX TRIBUNAL: CUTTACK
(Full Bench)

S.A. Nos. 346 (VAT) & 351 (VAT) of 2015-16

(Arising out of order of the learned JCST (Appeal), Bhubaneswar Range, Bhubaneswar, in First Appeal Case No. AA- 106221322000034/OVAT/BH-III disposed of on dated 31.08.2015)

Present: Shri R.K. Pattanaik, Chairman,
Mrs. Sweta Mishra, 2nd Judicial Member, and
Shri P.C. Pathy, Accounts Member-I

S.A. No. 346 (VAT) of 2015-16

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

-Versus-

M/s. Dream Multiple Projects Pvt. Ltd., Plot No-N-5/42, 3rd Floor, IRC Village, Nayapalli, Bhubaneswar ... Respondent

S.A. No. 351 (VAT) of 2015-16

M/s. Dream Multiple Projects Pvt. Ltd., Plot No-N-5/42, 3rd Floor, IRC Village, Nayapalli, Bhubaneswar ... Appellant

-Versus-

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

For the State : Sri M.S. Raman, Additional Standing Counsel (CT)
For the Dealer : Sri C.R.Das, Advocate

Date of hearing: 19.11.2020 ***** Date of order: 22.01.2021

O R D E R

Since the parties are same and the matter arises out of a common order of assessment, both the above appeals are clubbed together for disposal according to law.

S.A. No. 346 (VAT) of 2015-16

2. Instant appeal under Section 78(1) of the Odisha Value Added Tax Act, 2004 (in short, 'the Act) is filed by the State assailing the impugned order dated 31.08.2015 promulgated in Appeal No.AA-106221322000034/OVAT/BH-III by the learned Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (in short, 'FAA') which is directed against the order of assessment dated 15.04.2013 passed under Section 42(4) of the Act vis-a-vis the dealer assessee for the period from 17.03.2010 to 31.08.2012 for raising additional demand with penalty amounting to ₹1,05,00,054.00 which stood reduced to ₹76,58,946.00 in appeal on the grounds inter alia that the amount which was allegedly paid to the sub contractor of ₹1,23,11,625.00 and shown to have been deducted from the turnover of the dealer assessee is without proper verification of materials and therefore, to that extent it is bad in law, and thus liable to be interfered with a further direction for its determination on examination of books of accounts.

S.A. No. 351 (VAT) of 2015-16

3. The present appeal under Section 78(1) of the OVAT Act is at the instance of the dealer assessee challenging the impugned order dated 31.08.2015 in its entirety on the ground that the manner in which determination as to tax liability was carried out by the authorities below and also imposed penalty is not sustainable in law and therefore, deserves to be set aside in the interest of justice.

4. From the record, it is revealed that the dealer assessee is a private limited company engaged in execution of construction and sale of apartments on

receipt of payments from its customers and has been registered under the Act w.e.f. 17.03.2010. It is also revealed that tax audit visit was held vis-a-vis the dealer assessee for the impugned period which led to submission of a report in Form VAT-303 being received from the STO, Tax Audit Unit, Bhubaneswar Range, Bhubaneswar with the allegation of incorrect tax compliance. Later to the above, the AA issued a statutory notice in Form VAT-306 with a direction to the dealer assessee to appear, explain and meet the objections in the Audit Visit Report (in short, 'AVR') whether to be justified or not by producing the books of accounts. On the participation of the dealer assessee, the assessment was completed and additional tax was raised amounting to ₹1,05,00,054.00 which included penalty of ₹70,00,036.00 payable as per the terms and conditions of the notice in Form VAT-313. Against the additional tax demand, the dealer assessee approached the FAA in appeal under Section 77 of the Act. The FAA under the impugned order dated 31.08.2015 partly allowed the appeal and reduced the assessment to ₹76,58,946.00 inclusive of penalty levied under Section 42(5) of the Act. In fact, before the FAA, the dealer assessee raised a question, as to if, it can be said to have been involved in works contract. The FAA answered it against the dealer assessee and held that the construction and sale of flats does fall within the ambit and purview of works contract. The FAA, besides the admitted deduction, further allowed ₹1,13,56,437.00 @20% towards labour and service expenses and arrived at a taxable turnover of ₹4,54,25,752.00, as a result of which, the total tax due stood reduced to ₹25,52,982.00.

5. The calculation applied by the FAA in order to determine the tax due has been disputed by the dealer assessee while claiming that the duty is payable only upon the taxable turnover vis-a-vis the goods utilised in execution of works contract at the rates specified on such goods. That apart, the dealer assessee claimed that the authorities below fell into gross error by imposing penalty without properly appreciating the peculiar facts and circumstances of the case. The State, on the other hand, justified the impugned decision but with an exception to the deduction vis-a-vis the payment made to the sub-contractor without verification of the records and by not examining such other particulars corresponding to the turnover of the concerned sub-contractor and if at all, any other sub-contractors engaged and paid. As regards the penalty, the State contended that it is the mandate of law and an inevitable consequence as the authorities below did not have any discretion to exercise and could not have exempted it. The rival contentions of the parties are to be examined by the Tribunal in order to determine, whether, the impugned order dated 31.08.2015 can really be sustained or not.

6. While considering the nature of engagement of the dealer assessee, the FAA appears to have perused and gone through the relevant materials, like agreements etc. which amply suggested that it has entered into contracts with different buyers to construct residential apartments for them and in that connection, received payments in a phase wise manner with 5% of the total cost payable by the buyers at the time of delivery of possession. Before the FAA, the contention of the dealer assessee was that development agreements inter se

parties for the purpose of construction of apartments cannot be treated as works contract under the Act. However, the said contention was rejected by the FAA and according to the Tribunal, it is rightly so. It is also correctly concluded by the FAA that agreements which are enforceable by law are contracts, as in the present case, the dealer assessee apparently been a party to such agreements to construct apartments with flats for being sold to the buyers. The parties indeed executed indenture of agreements, which according to the FAA, are primarily contracts enforceable by law. In fact, the Hon'ble Apex Court in the case of Larsen and Toubro Ltd. Vrs. State of Karnataka and another reported in (2013) 65 VST 1 (SC) held and observed that construction and sale of flats to prospective buyers pursuant to agreements executed between the parties is nothing but works contract and the value of goods involved in execution of such contracts shall be taxable. Thus, having regard to the law as enunciated in the decision supra, there is no escape from the conclusion that the engagements of the dealer assessee in the construction and sale of flats to its customers on receiving payments to be a works contract and clearly taxable under law.

7. With respect to the taxable turnover, considering the audited balance sheet for the year ending 31st March, 2011, the dealer assessee is said to have incurred expenses on total construction to the tune of ₹3,04,04,464.00 as against the total income at ₹4,28,05,111.00. It is rightly noticed by the FAA that even after the payment made to the sub-contractor on the head of labour and service charges till 26.03.2011 is taken into account and an amount of ₹1,23,11,624.00 is deducted, still the cost of the goods incorporated in construction activities by 31st

March, 2011 stands at ₹1,80,92,840.00 which goes to reveal that the total turnover of purchases by the end of such period was not correctly disclosed. The FAA appreciated the fact that deduction towards labour and service charges vis-a-vis the sub-contractor, namely, M/s Sky Scrapers Project Private Ltd. excluded certain items of works on account of which a further deduction @20% with an amount of ₹1,13,56,437.00 was to be allowed. The mode and method which has been adopted by the FAA in calculating the taxable turnover and allowing deductions on account of payment made to the sub-contractor, besides 20% further deduction, in the considered view of the Tribunal, is quite reasonable and justified, inasmuch as, the additional deduction on different items of works were rightly added. Therefore, the contention of the dealer assessee that the method of calculation on tax liability as not properly accomplished cannot, thus, be entertained.

8. In so far as the claim of the State with regard to deductions allowed is concerned, it is alleged that the FAA despite an observation of to the effect that the purchase turnover has not been properly disclosed, allowed it and arrived at a taxable turnover of ₹4,54,25,752.00 which is unacceptable. It is further alleged that such deductions of ₹1,23,11,625.00 and ₹1,13,56,437.00 paid to the sub-contractor to be without any basis, especially when, the said turnover qua sub-contractor was not verified and examined. There is no material on record to suggest that the payment which was said to have been made to the alleged sub-contractor was ever disputed or suspected in any manner. In audit, it was also not revealed, if at all, any other sub-contractor besides M/s Sky Scrapers Project Private Ltd. were engaged by the dealer assessee. Nevertheless, the Tribunal does not find any

compelling reason to not allow the deduction to the tune of ₹1,23,11,625.00, an amount so claimed by dealer assessee. Likewise, the Tribunal does not find any serious error or illegality committed by the FAA to allow a further deduction of ₹1,13,56,436.00 at an average 20% vis-a-vis the labour and service charges for the works left out of the scope of the work of the sub-contractor. Having said that, the Tribunal, thus, reaches at a conclusion that the calculation so arrived at by the FAA in respect of the taxable turnover at ₹4,54,25,752.00 is reasonably correct and acceptable.

9. A decision of the Hon'ble Apex Court in the case of Larsen and Toubro Ltd. Vrs. Additional Deputy Commissioner of Commercial Taxes reported in (2016) 9 SCC 780 is specifically referred to by the learned Additional Standing Counsel for the State contending that the FAA should have examined the turnover of the sub-contractor vis-a-vis return and ought not to have notionally added further deduction of ₹1,13,56,436.00. In the decision supra, the Hon'ble Apex Court held and observed that if the assessee assigned some parts of the construction work to the sub-contractors, the former ceases to execute the works contract in the sense contemplated by Article 366 (29-A)(b) of the Constitution of India because property passes by accretion. It is also held therein that, while answering a question whether the turnover of the sub-contractors is to be added to that of assessee, the Hon'ble Apex Court further observed that the value of work entrusted to the sub-contractors or payments made to them shall not be taken into consideration while computing total turnover. The above decision was with reference to and for the purposes of Section 6-B of the Karnataka Act. The learned Additional Standing

Counsel for the State also cited a decision of the Hon'ble Supreme Court delivered in the case of State of A.P Vrs. Larsen and Toubro Ltd. reported in (2008) 17 VST 1(SC), wherein, while considering the aspect of transfer of property in goods as a result of deemed sale, in absence of privity of contract between the contractee and the sub-contractors, discussed as in what manner, a works contract turnover should be determined and lastly, observed that for individual contract(s), it would be expected that all the material particulars to be examined before adding the turnover of the sub-contractors to that of its own. The above decisions are in connection with goods incorporated in works contract by the sub-contractors and its examination and demand of its proof in order to ascertain the tax compliance vis-a-vis computation of total turnover. While placing reliance on the aforesaid rulings, it is contended that the FAA has not taken into consideration the terms of agreements with sub-contractors which was very essential. As earlier mentioned, during and in course of audit, no any discrepancy was noticed with regard to deduction as to the payment made to the sub-contractor towards labour and service charges. It was also not detected as to if the contractor really engaged any other sub-contractors. There is no any trace of evidence to suggest that the dealer assessee ever engaged any other sub-contractors and such engagements contributed transfer of property in goods used in the construction of the apartments. However, in absence of any strong basis and foundation, the addition of deductions by the FAA cannot be said to be wrongfully allowed for want of examination and verification of agreements.

10. The learned Counsel for the dealer assessee contended that the authorities below miserably fell to consider the ground realities and the circumstances under which tax due vis-a-vis the works contract could not be disclosed in the sales turnover as there was no intention to evade its payment and when it was on account of uncertainty that prevailed vis-a-vis the taxability of the transactions. In other words, the dealer assessee would contend that the authorities below could not have levied penalty on admitted tax. Further claimed that, the predicament of the dealer assessee in failing to disclose the sales turnover in the return was not properly appreciated by the authorities below. The learned Additional Standing Counsel for the State, on the contrary, cited a number of rulings, which are mentioned in the written note of argument and it is contended that levy of penalty is mandatory and cannot be avoided in view of the expression and the word 'shall' finds place in Section 42(5) of the Act. As is understood by the Tribunal, in case of civil ability even though intention plays no part, conduct of an assessee may be gone into in order to ascertain truthfulness of its claim and the reason behind the default in tax compliance. Of course, in a liability of a civil nature, wilful concealment is not an essential ingredient. But, it has been the consistent view of the Tribunal, at least, until recently that in case of a bonafide mistake or error or an impression on a just ground that subjects are beyond taxability or on account of any doubt or dilemma, whether, duty is leviable, under such circumstances, certain amount of discretion remains and may be exercised while considering imposition of penalty. As to Section 42(5) of the Act, in the considered opinion of the Tribunal, the word 'shall' which is appearing therein does

relate to the quantum of penalty and it is nothing to do with the discretion of the assessing authority in exercising it. If, the assessing authority feels that the discretion should not be exercised in favour of the dealer assessee, who apparently found to have evaded the tax liability, in view of sub-section 5 of Section 42 of the Act, it shall levy penalty which in no circumstances shall be less than twice the amount of tax assessed. The learned Counsel for the dealer assessee cited a decision of the Hon'ble Supreme Court in the case of Cement Marketing Company of India Ltd. Vrs. Asst. Commissioner of Sales Tax reported in 1980 (6) ELT 295 SC, wherein, it is held and observed that penalty shall not be imposed when assessee raises a bonafide contention. It is also held in the case of Hindustan Steel Ltd. Vrs. State of Odisha reported in 1970 (25) STC 211 SC that the discretion to levy penalty must be exercised judiciously; a penalty shall ordinarily be imposed in case, where an assessee acts deliberately in defiance of law but not in cases where, there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that it is not liable under law to pay the tax; an order imposing penalty is a statutory obligation and shall not be imposed unless the assessee is found to be guilty of contumacious conduct or acted in utter disregard to its tax obligation. The learned Counsel for the dealer assessee contended that the Hon'ble Supreme Court in the case of L & T Ltd. and Another Vrs. State of Karnataka and another reported in 2018 (17) VST 460 SC doubted the ratio laid down in the case of K. Reheja Development Corporation Vrs. State of Karnataka reported in 2005 141 STC 298 SC but went on to hold that if that decision is to be accepted, then there would be no difference between the works contract and a

contract for sale of chattel as a chattel and consequently, opined that it needs reconsideration by a larger bench. It is, hence, contended that in the aforesaid background and for the fact that the dealer assessee maintains books of accounts, submits returns under Section 33 of the Act and also deducts tax from the labour contractors and deposits it in the State Exchequer but due to bonafide belief or doubt, whether amounts received from the prospective buyers do qualify as a works contract or not, it did not disclose the turnover, the uncertainty which was finally put to rest by the Hon'ble Supreme Court in its judgment in Larsen and Toubro case ibid, the fact which was also realized by the FAA, the Tribunal holds that it is not a fit case where discretion is not to be exercised in favour of the dealer assessee. If no any discretion is exercised on the ground that Section 42(5) of the Act speaks of the mandatory nature of the provision to impose penalty, then in no case, it would be exercised notwithstanding with the fact that there lies a just ground either on account of an error or mistake or bonafide belief on the part of the dealer assessee. In fact, in Hindustan Steel Ltd. case supra, the Hon'ble Apex Court in categorical and unequivocal terms observed that if the view canvassed by the Revenue were accepted, the result would be that even if the assessee raises a bonafide contention against the tax liability, it would have to show it in the return and pay tax thereon in order to avoid the risk of being liable for penalty, in case the contention so raised is ultimately found to be unacceptable, which surely could never be the real intention of the legislature. In view of the discussions held hereinabove, the Tribunal is of the ultimate conclusion that no penalty should be imposed against the dealer assessee for having not included the receipts collected

from the buyers under a bonafide impression that it falls beyond the purview of works contract. However, in the humble opinion of the Tribunal, the dealer assessee should be directed at least to bear the interest in order to compensate the State to some extent when penalty is deleted and accordingly, it is directed.

11. Hence, it is ordered.

12. In the result, S.A. No. 346 (VAT) of 2015-16 stands dismissed. However, S.A. No. 351 (VAT) of 2015-16 is allowed in part to the extent indicated above. The cross-objection in S.A. No. 346 (VAT) of 2015-16 is disposed of. As a logical sequitur, the impugned order dated 31.08.2015 in Appeal No. AA-106221322000034/OVAT/BH-III for the period of assessment 17.03.2010 to 31.08.2012 vis-a-vis the dealer assessee is hereby partly set aside only to the extent of penalty. As a consequence, the AA is directed to recompute the tax liability of the dealer assessee as per the observations of the Tribunal, preferably, within a period of three months from the date of receipt of a copy of the above order.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(S.Mishra)
2nd Judicial Member

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