

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

S.A. No. 256/08-09 & 257/08-09

(Arising out of the order of the learned ACST, Ganjam Range, Berhampur in first appeal Case No. AA 479 & 427/2004-2005 disposed of on 17.03.2008.)

**Present :- Shri A.K. Das, Shri.S.K. Rout, & Shri S. Mishra,
Chairman 2nd Judicial Member Accounts Member-II.**

Shri Murali Nayak, Railway Contractor,
Ram Nagar, Berhampur
Now at C/o- Balaram Nayak
Shila Mansion, Rath Road, Bhubaneswar-II. ... Appellant.
-Vrs.-

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

For the Appellant: : None.
For the Respondent: : Mr. S.K. Pradhan, A.S.C(C.T.).

Date of Hearing : 11.05.2022 * Date of Order : 20.05.2022**

O R D E R

Since parties are same and the question of law with facts and circumstances of the cases are almost identical in nature, the aforesaid appeals are hereby disposed of in a combined manner.

S.A. No. 256/08-09

Present appeal u/s.23(3) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act') is at the behest of the dealer-assessee challenging the impugned order dtd.17.03.2008 promulgated in appeal case No. AA 479/2004-05 by the Assistant Commissioner of Sales Tax, Ganjam

Range, Berhampur (in short, 1d. FAA) who confirmed the demand of Rs.3,01,495.00 raised by the Sales Tax Officer, Ganjam-I Circle, Berhampur (in short, LAO) in assessment order passed on 19.07.2002 framed U/s.12(5) of the OST Act for the year 1999-2000.

S.A. No. 257/08-09

Present appeal u/s.23(3) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act') is at the behest of the dealer-assessee challenging the impugned order dtd.17.03.2008 promulgated in appeal case No. AA 427/2004-05 by the Assistant Commissioner of Sales Tax, Ganjam Range, Berhampur (in short, 1d. FAA) who confirmed the demand of Rs.2,92,948.00 (after deducting tax demanded U/s.12(5) of OST Act for the self-same period) raised by the Sales Tax Officer, Ganjam-I Circle, Berhampur (in short, LAO) in assessment order passed on 04.09.2004 framed U/s.12(8) of the OST Act for the period 1999-2000.

2. Being aggrieved by the aforesaid common order of the 1d. FAA, the assessee has preferred second appeal before this Tribunal challenging the said order as bereft of consideration of material fact with the provisions of law for which the said impugned common order is illegal and bad in law.

3. The brief fact of the case is that the appellant is a works-contractor who executed works under the Railway Department for the impugned year. In order to examine the books of account of this unregistered dealer, the LAO issued statutory notice u/s.12(5) of the OST Act followed with several intimations issued from time to time. Due

to non-appearance of the appellant and since, the period of assessment was going to be barred by limitation & finding no other alternative, the LAO completed assessment on ex-parte U/s 12(5) of OST Act basing on the materials available in the record. On perusal of record, the LAO found that the appellant has executed works under SE Railway, Khurda Road and has received gross payment of Rs.42,02,791.00 as per agreement No.208 and No.203 dtd.15.03.99 and dtd.09.03.99 respectively. In the absence of any books of account, the LAO allowed labour and service charges @ 32% towards deduction and accordingly calculated tax at Rs.2,28,632.00 on which he levied 10% surcharge. Further, he imposed a penalty of Rs.50,000.00 U/s. 12(5) of the OST Act due to failure of the appellant to get himself registered under the Act in spite of accrual of tax liability. In toto, he demanded a sum of Rs.3,01,495.00 for the impugned year which was challenged by the appellant before the ld. FAA who after proper examination of the case confirmed the order of assessment with his reasoned order.

However, on receipt of AG objection bearing No.RAPNO 20(ST) 12 dtd.16.05.2003, the LAO reopened the case u/s.12(8) of the OST Act on the ground of less levy of penalty under the said section. After confronting the appellant, he confirmed the said objection and raised a further demand of Rs.5,94,443.00 from which he deducted a sum of Rs.3,01,495.00 as already assessed U/s.12(5) of the OST Act for the self-same period, thereby raising a net demand of Rs.2,92,948.00 which

was challenged by the dealer before the Ld. FAA who confirmed the order of assessment vide his reasoned order.

4. Being further aggrieved with the aforesaid common order of Ld.FAA, the appellant has filed these two appeals before this Tribunal mainly on following grounds:-

- i. For that both the LAO and the Ld. FAA have completely misdirected themselves in misinterpreting the agreement entered into between SE Railway and the appellant while allowing labour charge of only 32% instead of 62% as claimed by the appellant.
- ii. For that the forums below have grossly erred in law in not allowing deductions towards materials purchased inside the State on payment of tax and utilized in the work amounting to Rs.15,82,254.00 which should have been deducted while arriving at the taxable turnover.
- iii. For that the forums below are wholly arbitrary and illegal in not taking into account the TDS amounting to Rs.1,99,408.00 and an amount of Rs.10,800.00 paid at different check gates.
- iv. For that imposition of penalty u/s.12(5) and u/s.12(8) of the OST Act is wholly arbitrary, illegal and without jurisdiction & without the sanction of law.

5. However, when the matter was called on for hearing, non-appeared on behalf of the dealer-appellant in spite of valid service of notice. Moreover, since, the instant appeals relate to the period 1999-2000, which is more than two decades, it was taken up for ex-parte

hearing in the presence of 1d. Standing Counsel(C.T.) representing the State.

6. During the course of hearing, the 1d. SC(C.T.) vehemently argued in favour of the common appeal order passed by the 1d. FAA claiming it as just and proper and in accordance with the provisions of the statute that doesn't require any further interference by this Tribunal.

7. We, now, felt necessitated to address the main grounds taken by the dealer-appellant as appended in appeal memorandum while filing before the Tribunal taking into consideration the information available in this record including records of forums below.

It is revealed from the assessment order/appeal order that the appellant has entered into agreements with South Eastern Railway, Khurda vide no.208 dtd.15.03.1999 and No.203 dtd.09.03.1999 to execute repairs to rain water pipe by providing PVC pipes in place of broken AC pipes inside the workshop. For execution of above works, it is observed from the assessment record that the dealer has purchased materials worth of Rs.15,82,254.00 submitting 42 numbers of vouchers. However, the forum below didn't accept the aforesaid vouchers towards deduction from its GTO on the ground that the contractee has not certified regarding utilization of the same in works contract. We reasonably observe that the appellant was awarded the work of replacing broken AC pipes with new PVC pipes for which it has purchased goods towards replacement and fitting with repair work.

Both the forums have erred in enquiring about the utilization of the goods for the said work. The LAO is to look into the utilization of such goods purchased in the said work in order to reasonably determine as to whether deductions should be allowed towards materials purchased from within the state and claimed to have been utilized in the said work.

Secondly, it is observed that in the grounds of appeal the appellant has claimed TDS amounting to Rs.1,99,408.00 and an amount of Rs.10,800.00 paid at different check gates. On verification of assessment record/appeal record, it is revealed that the appellant has submitted five numbers of copies of TDS certificates obtained from SE Railway, Khurda Road amounting to Rs.1,46,199.00 in toto and claimed deductions u/s. 13AA(2) of OST Act which were not been allowed by the forums below in gross violation of provisions of the Act. As such, the LAO is to take into consideration the claim of TDS and payment made at different check gates by examining such certificates and original money receipts.

Thirdly, we observe that the LAO has imposed penalty of Rs.50,000.00 in his assessment order passed U/s.12(5) of the OST Act on the ground of failure of the assessee being registered under the Act in spite of accrual of tax liability. However, based on AG objection, the said LAO has imposed penalty at one and half times of the tax assessed as provided in Section 12(8) of the Act. It will now be profitable to refer

to necessary provisions of the Act towards imposition of penalty.

Section 12(5)

“If upon information which was come to is his possession, the Commissioner is satisfied that any dealer has been liable to pay tax under this Act in respect of any period and has nevertheless, without sufficient cause, failed to get himself registered, the Commissioner may, at any time within from the expiry of the year to which that period relates, call for return under sub-section (1) of section 11, and after giving the dealer a reasonable opportunity of being heard assess, to the best of his judgment, the amount of tax, if any due from the dealer in respect of such period and all subsequent periods n may also direct that the dealer shall pay, **by way of penalty, in addition to the amount so assessed, a sum not exceeding one and half times that amount:**

Provided that no penalty shall be levied for the quarter during which the dealer first or again becomes liable to pay tax under this Act and for the period between the date of application for registration and the date of registration.”

Section 12(8)

“If for any reason the turnover of a dealer for any period to which this Act applies has escaped assessment or has been under-assessed or where tax has been compounded when composition is not permissible under this Act and the rules made there-under the Commissioner may at any time within five years from the expiry of the year to which that

period relates call for return under sub-section (1) of section 11 and may proceed to assess the amount of tax due from the dealer in the manner laid down in sub-section (5) of this section and may also direct, in cases where such escapement or under-assessment or composition is due to the dealer having concealed particulars of his turnover or having without sufficient cause has furnished incorrect particulars thereof, that the dealer shall pay, **by way of penalty, in addition to the tax assessed under this sub-section, a sum not exceeding one and a half time of the said tax so assessed.”**

As per above sub-sections, we observe that the penalty to be imposed is a sum not exceeding one and half times of the tax assessed i.e. penalty can be imposed maximum upto one and half times provided there is reason to belief that the dealer has knowingly and intentionally avoided in getting himself registered under the Act in spite of accrual of tax liability. However, sub-section (5) and (8) of Section 12 was amended vide Law Department Notification No.12283/Legis dtd.30.09.2000, assented to by the Governor on 25.09.2000 vide Orissa Gazette Extraordinary dtd.03.10.2000 by which **penalty was made as a sum equal to one and a half times of the tax so assessed.** When the statute provides to do a work in a particular way, it has to be done in that way. There is no discretion on anyone's part to deviate from the provisions of the statute. Accordingly, the LAO is to determine the mens rea before imposing any penalty as per prevailing provisions of the Statute during the impugned year.

Lastly, the appellant has claimed 62% deductions towards labour and service charges as per his appeal memorandum taking into consideration the nature of work executed. The LAO is to examine both the agreements and schedule of rates entered between the appellant and SE Railway, Khurda Road in order to correctly ascertain the nature of work and to determine both the material and labour components involved in the said work for allowing deductions from gross turnover.

8. Hence, it is ordered.

The common order passed by the 1d. FAA for the impugned year is set aside. The cases are remanded back to the LAO to re-assess the appellant in the light of our above observations and complete such re-assessment preferably within three months from the date of receipt of this order after giving the assessee a reasonable opportunity of being heard.

The cases are disposed of accordingly in this common order.

Dictated & corrected by me.

Sd/-
(Srichandan Mishra)
 Accounts Member-II

Sd/-
(Srichandan Mishra)
 Accounts Member-II

I agree,

Sd/-
(A.K. Das)
 Chairman

I agree,

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