BEFORE THE ODISHA SALES TAX TRIBUNAL (FULL BENCH), CUTTACK

S.A.No. 357(V)/2013-14

P R E S E N T :

Smt. S. Misra	Sri S. Mohanty	&	Sri R.K. Rout
Chairman	2nd Judicial Member		Accounts Member-II

(From the order of the ld.JCST, Bhubaneswar Range, Bhubaneswar, in Appeal No. AA.106111311000051/BH-I/2012-13, dtd.17.12.2013, modifying the assessment order of the Assessing Officer)

M/s. Jagannath Crackers (P) Ltd.,
Plot No.397, Lewis Road, Sarangi Bhawan,
Old Town, Bhubaneswar. ... Appellant

-Versus –

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

(Assessment Period : 01/02/2010 to 31/01/2012)

Appearance :
For the Appellant ... Mr. N.K. Das, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C. (CT)

Date of Hearing: 26.11.2018 Date of Order: 29.11.2018

ORDER

The assessee-dealer as appellant has challenged the sustainability of a confirming order of the First Appellate Authority/Joint-Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar (in short, FAA/JCST) passed in First Appeal Case No. AA.106111311000051/BH-I/2012-13 here in this appeal on the plea that, both the fora below have wrongly disallowed service tax to the tune of Rs.4,23,546.61, wrongly disallowed the labour and service charges, which was actually spent by the dealer to the tune of

Rs.1,31,70,505/- and wrongly imposed tax on hire charges received by the dealer treating the same as transfer of right to use.

2. The facts in brief giving rise to this appeal are : The instant dealer is a works contractor engaged and performed works contract under JSPL, Chhendipada, Angul during the tax period 01.02.2010 to 31.01.2012. The dealer had undertaken job of fabrication and structural work, conversion of boulders of different sizes of stone chips and manufacturing and sale of stone chips. For the assessment period 01.02.2010 to 31.01.2012 audit assessment u/s.42(4) was taken up by learned STO, Bhubaneswar-I Circle, Bhubaneswar (in short, AA). During assessment, ld.STO disallowed the service tax claimed by the dealer to the tune of Rs.4,23,546.61 as it was not deposited by the dealer during the audit period. Similarly, the AA rejected the books of account and on application of best judgment principle and appendix to Rule 6(e) of the OVAT Rules calculated the labour and service charges. Further, the AA treated the hire charges received by the dealer from one M/s. Biswakarma Mines and Minerals against the machine given on rent. Thus, on calculation of the GTO and TTO, the additional tax due and penalty to the tune of Rs.18,19,519/- and Rs.36,39,038/- respectively were imposed, thereby the total demand raised to Rs.54,58,557/-.

3. Being aggrieved with such assessment, the dealer preferred first appeal, whereby learned JCST as FAA vide impugned order did not interfere with the findings and calculation of the AA. But on re-determination of the tax due, the demand became modified and reduced to Rs.3,34,685/-as tax and Rs.6,69,370/-as penalty. Thus, total tax due became Rs.10,07,055/-.

4. Still not satisfied, the dealer has preferred this appeal. The main contentions of the dealer in this appeal are :- the dealer had maintained books of account and registers properly which are duly audited time to time. The authorities below have verified all these

documents and registers but without working on it, they applied the best judgment principle and the appendix to Rule 6(e) for calculation of labour and service charges. It is further contended that, the State-authority has no jurisdiction to receive the service tax. Even though the principle has been accepted but the authority below has mechanically disallowed service tax of an amount of Rs.4,23,546.61 on hypothetical assertion that, by the time of assessment it was not deposited by the dealer. The further contention of the dealer is, the hiring charges of Rs.1 lakh, received by the dealer was against the rent of the machine given to one M/s. Biswakarma Mines and Minerals and since it was covered under the insurance of the dealer, there was no transfer of right to use and as such the dealer was not liable to pay tax on it.

5. The appeal is heard without cross objection from the side of the Revenue.

6. Three questions are raised by the dealer in this appeal such as (i) Whether the percentage of labour and service charges as deducted/allowed by the fora below is sustainable ? (ii) Whether dis-allowance of service tax to be paid by the dealer is illegal ? and (iii) Whether the FAA is wrong in imposing tax on the hiring charges received by the dealer as against the rent of the machinery given to a different dealer.

7. The fair lengthy, confusing and self-contradictory order of both the fora below reveal, the authorities have not taken consideration of the details of the books of account and connected documents produced by the dealer during assessment. Needless to say that, FAA being an extended forum of assessment also did not bother to verify or scrutinize the documents to ascertain the exact amount of labour and service charges.

8. It is argued that, the dealer is a contractor under JSPL. It has undertaken job contract of fabrication or erection. For the purpose the contractee JSPL had supplied all the materials. Whatever goods

purchased by the dealer is duly entered in the books of account and registers supported by bills. When all the documents were duly audited and were produced before the authority, then there was no reason for the AA or the FAA not to go into the details for calculation of labour and service charges but to apply the slip-shod method i.e. best judgment principle and application of Rule Appendix to Rule 6(e) of the OVAT Act for calculation of labour and service charges. It is also argued that, service tax is payable to the Centre, State authority has no role to disallow any part of it. Further, it is not lawful to add the disallowed amount of service tax of Rs.4,23,546.61 to the GTO of the dealer for the purpose of VAT. Though it was not paid but it was payable and it was evident from the documents produced by the dealer. Because, it was not deposited, so it was added to the GTO under VAT is a wrong notion of law. There is considerable force in the argument advanced by the learned Counsel for the dealer. Bare perusal of the impugned order it is found that, the dealer had produced the details of the books of account and connected documents. The dealers also intends to do so. On the other hand, it is not clear that why the authority below has applied the Appendix to Rule 6(e) when the labour and service charges are duly ascertainable.

9. At this juncture, learned Addl. Standing Counsel, Mr. Raman argued that, Rule 4-B of OST Rule has inserted in the taxt book as per the direction by the Apex Court in **Gannon Dunkerley & Co. Vrs. State of Rajasthan & others (1993) 88 STC 204** and in accordance to that, the dealer's labour and service charges should be assessed. The Rule 4-B has got retrospective effect from 30.07.1999. In many of the decisions by this Tribunal it has been held that where the amount spent towards labour and service charges is not ascertainable form the contract, documents or books of account etc. produced by the dealer in that case Rule 4-B should be applied. From the rival submission and for the impugned order here it is found that,

the authority below has not gone into details to calculate the labour and service charges. Moreover, the order is not explicit why best judgment principle was applied, particularly when it is the claim of the dealer that, the documents of the dealer contains details of the contract, the amount received, the amount spent towards labour and service charges. Resultantly, we are of the view that, this is a fit case where the matter should be remitted back to the AA for assessment afresh. So far as the dis-allowance of service tax, it is again said that, once the matter is remanded back for assessment afresh, in that case the AA would be in a position to verify the exact amount deposited against the service tax covered under Central Tax Act.

10. The next point raised by the dealer is, the rent received against hire charges of the machine given by the dealer to a different dealer for a particular period in the case in hand if exigible to VAT or not ? Argument of the dealer is, the dealer had effective control over the machine during the period it was given on rent. Since the dealer had insurance certificate covering that period and as there was no transfer of right of use, the dealer is not liable to pay tax on the amount received on hire charges. We do not agree with the argument advanced by the learned Counsel for the dealer. Because, the dealer's insurance policy covers the period in which it was given on rent, so the dealer had effective control and the person who had taken the machine on rent had no control over the machine is not conceivable.

Here the dealer has given the machine on rent to a different dealer and received hire charges as against that transfer of use of the machine by the said dealer M/s. Biswakarma Mines and Minerals who used the machine for his purpose. So it is a transfer of right to use of the machine for any purpose by the Biswakarma Mines. In that case it is held that, the hire charges received from Biswakarma Mines falls under the category of Sec.2(46) clause (6) of the OVAT Act and the

amount accordingly received is taxable as determined by the fora below.

In the discussion above, we have held that, the determination of labour and service charges and disallowance of service tax by the fora below need a fresh appraisal on scrutiny of the documents, books of account and registers of the dealer and for the reason the matter should be remitted back to the FAA for assessment afresh. Hence, it is ordered.

The appeal is allowed in part on contest. The impugned order is set-aside to the extent that, the matter is remitted to the FAA for assessment afresh in the light of observation made above. The FAA is requested to complete the assessment within four months from the date of receipt of the order. On the other hand, the dealer is directed to appear before the FAA without waiting for the notice of hearing from the FAA.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

Sd/-
(S. Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Smt. S. Misra)
Chairman

I agree,

Sd/-
(R.K. Rout)
Accounts Member-II