

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

S.A.No. 2158/2004-05

(Arising out of order of the ld. ACST, Balangir Range,
Balangir, in First Appeal Case No. AA-54 (BPII) 2004-05,
disposed of on dtd.15.09.2004)

P R E S E N T :

Sri A.K. Das Sri S. K. Rout & Sri S. Mishra
Chairman Judicial Member-II Accounts Member-II

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

-Versus-

M/s. Manoj Kumar Agrawal,
Titilagarh, Dist. Balangir. Respondent

For the Appellant : Mr. M.L. Agarwal, S.C. (C.T.)
For the Respondent : None

(Assessment Period : 2003-04)

Date of Hearing: 02.02.2022 *** Date of Order: 08.02.2022

ORDER

This appeal is preferred against the Order dtd.15.09.2004 passed by the learned First Appellate Authority/Asst. Commissioner of Sales Tax, Balangir Range, Balangir (in short, FAA/ACST) in First Appeal Case No.AA-54(BPII)/2004-05 wherein the order of assessment u/s.12(5) of the Odisha Sales Tax Act, 1947 (in short, OST Act) passed by the learned Sales Tax Officer/ Assessing Authority, Assessment Unit, Titlagarh (in short, STO/AA) for the assessment year 2003-04 was confirmed.

2. The case at hand is that : the dealer-assessee being a works contractor had executed contract works under the deducting authorities, i.e. Executive Engineer, R.W.D., Balangir, the E.E., Kantabanjhi (NH) Division, E.E., M.I. Division, Balangir during the year 2003-04. The dealer-contractor had received total gross receipt of Rs.62,95,934/- during the year under assessment from the above deducting authorities. The nature of works were earthworks, road repairing works in remote villages and canal digging works. Accordingly, the learned STO allowed 80% deduction towards labour and service charges. The GTO was determined at Rs.62,95,934/- and after allowing deduction of Rs.50,36,751.20 and Rs.9,23,217/- towards labour and service charges and tax paid materials supplied by the Departments respectively, TTO was determined at Rs.3,35,968.80 which was taxed @8% calculated at Rs.26,877.50 and surcharge was calculated at Rs.2,687.75. Further a penalty of Rs.5,000/- u/s.12(5) of the OST Act was also imposed by the learned STO. Thus, the tax, surcharge and penalty in toto, became Rs.34,565.25 against which the dealer-contractor paid Rs.2,13,744.00 in shape of TDS and an excess amount of Rs.1,79,182.00 was refundable to the dealer under OST Act.

3. Being aggrieved with such demand, the dealer-contractor filed first appeal which was disallowed and the order of assessment passed by the learned STO was confirmed.

4. Being dis-satisfied with the order of the learned FAA/ACST, Balangir Range, Balangir, State has preferred this present apepal.

5. Cross objection is filed by the dealer-respondent in this case.

6. Despite due service of notice on the dealer, he neither engaged a counsel nor anybody on his behalf remained present before this Tribunal to defend him against the grounds of appeal. So, this Tribunal having no other alternative, proceeded to dispose of the matter on ex-parte basis on merit. Heard the argument of Mr. M.L. Agarwal, learned Standing Counsel appearing for the Revenue.

7. Learned Standing Counsel (CT) representing the State challenged the impugned orders of the fora below mainly on the ground that the deduction granted towards labour and service charges is in violation of Rule 4B of the Orissa Sales Tax (Amendment) Rules, 2010 (in short, 'OST Rules'). Further contention of the learned Standing Counsel is that, the penalty of Rs.5,000/- imposed by the learned STO is nominal which should be one and half time of the tax due.

8. Heard the submissions of the learned Standing Counsel (CT) for the State, perused the impugned orders of the forums below, grounds of appeal vis-à-vis the materials on record. Learned Counsel for the State challenged the impugned orders of the fora below mainly on two grounds that the deduction of 80% towards labour and service charges in view of the nature of works executed by the dealer-assessee is in violation of Rule 4B of the Odisha Sales Tax (Amendment) Rules, 2010 and imposition of penalty of Rs.5,000/- is not in accordance with the provisions contained in Section 12(5) of the OST Act. So far as imposition of penalty u/s.12(5) of the OST

Act is concerned, the provision contained therein clearly lays down if upon the information in the possession of the Commissioner, it is satisfied that the dealer is liable to pay tax without sufficient cause failed to get himself registered, the Commissioner may, at any time within five years from the expiry of the year to which the period relates, call for return under sub-section (1) of Section 11, and after giving the dealer a reasonable opportunity of being heard, 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 and may also direct that the dealer shall pay by way of penalty a sum equal to one and half times of that amount. In the instant case, the assessing authority while raising tax demand of Rs.26,877/-, imposed surcharge of Rs.2,687.75 and penalty of Rs.5,000/-. The provisions contained u/s.12(5) of the OST Act do not authorize or give discretion to the assessing authority to reduce the penalty provided therein. The only discretion available with the assessing authority is he may impose penalty or may not, but if it chooses to impose penalty, that shall be one and half times of the tax assessed. The imposition of penalty of Rs.5,000/- by the assessing authority and subsequently confirmed by the first appellate authority being in contravention of provision u/s.12(5) of the OST Act, the same is unsustainable in the eye of law.

9. Here in view of Rule 4B of OST Rules inserted vide Finance Department Notification dtd.06.02.2010 bearing SRO No.40/2010 effective from dtd.30.07.1999 and introduced by the State Government pursuant to judgment of Hon'ble High Court

of Orissa in Larsen & Toubro, 12 STC 31 (Ori) case, we are of the view that, the contention raised by the learned Standing Counsel for the State is legal and sustainable in the eye of law and this is a fit case, where the matter should be remanded back to the learned STO to make re-computation of tax in the light of Rule-4B of the OST Rules. Accordingly, it is ordered.

10. The appeal filed by the State is partly allowed and the order of the learned FAA is hereby set-aside to the extent indicated above. The matter is remanded to the learned Assessing Authority to make re-computation of tax in the light of above provision of the statute and pass reasonable order accordingly after giving the dealer a reasonable opportunity of being heard preferably within a period of three months from the date of receipt of this order. The cross objection is disposed of accordingly.

Dictated and Corrected by me,

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

I agree,

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

Sd/-
(A.K. Das)
Chairman
I agree,

Sd/-
(S. Mishra)
Accounts Member-II