BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 119 (VAT) of 2018

(Arising out of order of the learned Additional CST (Appeal), South Zone, Berhampur in Appeal Case No. AA-106221622000108/BH-IV/2016-17 disposed of on dated 25.01.2018)

Present: Shri R.K. Pattanaik,
Chairman

M/s. Vipul Ltd.,
Plot No.10P, Baramunda, Bhubaneswar ... Appellant

-Versus-

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

For the Appellant : Sri N.K. Das, Advocate
For the Respondent : Sri D. Behura, Standing Counsel (CT)

Date of hearing: 27.01.2021 ***** Date of order: 12.02.2021

O R D E R

Instant appeal under Section 78(1) of the Odisha Value Added Tax Act, 2004 (hereinafter referred to as 'the Act") is at the behest of the dealer assessee assailing the impugned order dated 25.01.2018 promulgated in Appeal Case No.AA-106221622000108/BH-IV/2016-17 by the learned Additional Commissioner of Sales Tax (Appeal), South Zone, Berhampur (in short, 'FAA') vis-a-vis order of assessment dated 16.11.2015 for the tax period from 01.10.2011 to 31.03.2014 passed under Section 42(1) of the Act by the learned Deputy Commissioner of Sales Tax, Bhubaneswar-IV Circle, Bhubaneswar (hence called,

'AA') on the grounds inter alia that conformation of assessment as well as levy of penalty which has been directed for enhancement is per se illegal and not in accordance with law and therefore, deserves to be set aside in the interest of justice.

2. The dealer assessee is engaged in construction of apartments and for the tax period, it had undertaken such construction at different places. In respect of the tax period, audit inspection was held which ultimately led to the submission of the Audit Visit Report (AVR) received from the learned STO, Bhubaneswar-IV Circle, Bhubaneswar, later to which, an action in terms of Section 42 of the Act was initiated. In response to the notice issued under Section 42 of the Act, the dealer assessee entered its appearance and caused production of the books of accounts for the purpose of examination and verification with reference to the AVR and periodical returns filed. Finally, the AA considering the books of accounts and other material documents reached at a decision that the dealer assessee is liable to pay an amount of ₹5,05,042.00 and for the tax non-compliance, penalty is to be levied in view of Section 42(5) of the Act. In total, an amount of ₹10,10,084.00 was held payable by the dealer assessee for the tax period. Thereafter, the dealer assessee approached the FAA in appeal and challenged the additional demand so raised on the ground that it is untenable in law and more particularly when the construction of apartments was not a works contract. But, the FAA reached at a decision that the dealer assessee is involved in construction of apartments which is essentially a works contract and while holding

so, the order of assessment dated 16.11.2015 was confirmed with a direction to reconsider tax liability by levying penalty twice the amount of tax due instead of one time. As the dealer assessee could not be successful, it preferred the present appeal on the self same grounds questioning the tax liability for not being engaged in any works contract. The contention of the dealer assessee on different aspects of the matter is to be examined by the Tribunal in order to find out and ascertain, whether, the impugned order dated 25.01.2018 can be sustained?

3. By way of a cross-objection, it is contended by the State that the action against the dealer assessee under Section 42 of the Act is absolutely justified, inasmuch as, law is no more res integra that the nature of engagement as was undertaken in the case at hand is nothing but a works contract so held by the Hon'ble Apex Court in the case of M/s. Larsen & Toubro Ltd. and Another Vrs. State of Karnataka and Another in Civil Appeal No.8672 of 2013 arising out of SLP (C) No.17741 of 2007. It is also contended that the authorities below rightly considered and appreciated the materials on record and determined the tax liability which is unassailable. It is lastly urged that the penalty was rightly levied vis-a-vis the dealer assessee for the assessment period for tax non-compliance which is also an inevitable consequence in view of Section 42(5) of the Act so held by the Hon'ble High Court of Orissa in the case of Jindal Stainless Ltd. Vrs. State of Odisha: (2012) 54 VST 1 (Ori.) and by the Hon'ble Apex Court in the case of Union of India & others Vs. Dharmendra Textiles Processors & others: (2008) 18 VST 180

(SC). In juxtaposition to the contention of the dealer assessee, the defence of the State is to be examined.

4. Following are the points which are to be examined, such as, (i) whether, the dealer assessee who is a real estate developer is involved in works contract or not vis-a-vis the alleged contraction of apartments; (ii) if it is held that the real estate developmental work is basically works contract, whether, in such an event, the authorities below rightly considered the claim of deduction towards labour and service charges; (iii) if at all, the land cost at ₹26,06,27,082.00 has been correctly determined as against the claim of deduction to the tune of ₹30,26,12,520.00; (iv) likewise, whether, ITC deduction disallowed for an amount of ₹11,82,346.00 and ₹47,294.00 with reference to the materials supplied by the respective sub-contractors and suppliers was justified or not; and (v) lastly, as to the sustainability to the penalty, whether, the authorities below were justified in imposing it, while its enhancement from one time to twice the amount of tax assessed was directed. Precisely, speaking the above are only the contentious issues involved inter se parties and so far been raised by the Tribunal.

5. The learned Counsel for the dealer assessee while claiming that the nature of work which was carried out by them not works contract as the construction of apartments was not undertaken for and on behalf of prospective buyers contended that it was wrong on the part of the authorities below to demand additional tax under the Act and in that connection, referred to a ruling in the case of Assotech Realty Pvt. Ltd. Vrs. State of U.P. and Another reported in

(2007) 8 VST 738 (Allahabad). In the decision supra, it was held that since an allottee did not get any right of the apartment until sale deed was executed and registered and the assessee continued to remain its owner and for the fact that the records suggested that the allotment resulted in no transfer of any right, title and interest and in view of the fact that assessee was empowered to make variation or modification in the plan, design, etc. and possession was to be handed over to the allottee only upon payment of the entire amount, it was held not to be a works contract, rather, a contract of sale and hence, there was no tax liability. On a sincere reading of the aforesaid decision, it is made to understand that on a distinction being demarcated between a contract for sale and works contract, it was held that the assessee was not liable to pay tax and any such demand, in the facts and circumstances of the case, would be wholly without jurisdiction. In the considered view of the Tribunal, law in this regard has in the meantime been clearly spelt out by the Hon'ble Apex Court in the case of M/s. Larsen and Toubro Ltd. ibid. In the said case, it has been held and observed that the distinction between the contract for sale of goods and contract for work (or service) has almost diminished in case of composite contracts involving both contract of work/ labour and a contract for sale for the purposes of Article 366(29A)(b) of the Constitution of India, 1950; so by legal fiction, it is permissible to make such contract divisible by separating the transfer of property in goods as goods or in some other form from the contract of work and labour; a transfer of property in goods under clause (b) of Article 366 (29A) is deemed to be a sale of goods involved in the execution of

works contract by the person making the transfer and the purchase of such goods by the individual to whom such transfer is made; and for this reason, the traditional decisions which held the sway must be seem to have lost its significance and what was viewed conventionally has to be now understood in the light of the philosophy of Article 366 (29A). It has further been held that there is no reason why an activity by a promoter and developer and construction of flats and eventual purchases made by the buyers would not be covered by the term 'works contract'; after all the said expression is nothing but a contract in which one of the parties is obliged to undertake to execute the works, moreover, when it has all the characteristics or elements of works contract; when the transactions involve activity of construction, the factors, such as, the buyers of the flats shall have no control over the type and standard of the materials used in the construction of flats, or that the purchasers do not get any right to monitor or supervise the construction activity, or for having no say in the designing or lay out of the buildings are really not of much significance and in any case, such factors do not detract the contracts being works contract in so far as construction part is concerned. While enunciating the law, the Hon'ble Apex Court, in the above said case, discussed the significance of the expression 'in some other form' as appearing in Article 366(29A)(b) of the Constitution of India, 1950. Being conscious of the settled position of law, the Tribunal arrives at a logical conclusion that the authorities below did not commit any wrong or error in holding that the dealer assessee was involved in works contract and not for contract for sale simpliciter. So it has been held that the dealer

assessee considering the fact that it is engaged in construction of flats which involve transfer of property in goods and nonetheless, a works contract in the eye of law and hence, is liable and exigible to tax under the Act.

6. When it is held that the dealer assessee's transactions fell in the category of works contract and thus, liable to pay VAT, the next consideration would be, whether, the authorities below allowed statutory deductions on labour and service charges, which according to the contention advanced, has not been done so. There is no denial to the fact that under the Act, duty is payable on the taxable turnover defined in Section 2(56) as the gross turnover less deductions and in relation to a transfer of property in goods involved in execution of the works contract, the taxable turnover shall be less the amount on labour and other service charges incurred subject to production of the records evidencing payment of such charges and where no proper accounts are available or not ascertainable from the books of accounts, it has to be determined at the rates specified in the Appendix in view of Rule 6(e) proviso to the Odisha Value Added Tax Rules, 2005 (in short, 'the Rules'). According to the learned Counsel for the dealer assessee, it maintained the books of accounts properly which received statutory audits under Section 44AB of the Income Tax Act, 1961 and furthermore, it has also been referred to during and in course of the audit for determination of gross turnover, a deduction on the head of the labour and service charges was required to be allowed, which the authorities below did not engage. The Tribunal is of the humble opinion that deduction on labour and service charges vis-a-vis the dealer assessee for the alleged period is

needed to be ascertained and allowed on verification of the books of accounts and in case, there is no evidence in support of such expenses or such expenses are unable to be ascertained even from the terms and conditions of the contracts, then the determination is to be held as per the Appendix.

7. On the land cost, it was allowed at ₹26,06,27,082.00 based on the AVR. However, as per the learned Counsel for the dealer assessee, the land cost for an amount of ₹11,58,21,898.00 vis-a-vis 80 flats only was allowed instead of 109 units and if a calculation @18% is proportionately applied, it would stand at ₹14,48,05,184.00 as against ₹11,58,21,898.00. But, then, it appears that in the AVR, the agreements were shown to have been executed for sale of 80 flats against a claim of 109 units remained uncorroborated by any documentary evidence. At present, the Tribunal does not have the records of contracts in order to find out, whether, the bookings related to 80 or 109 flats, as is alleged by the dealer assessee. If at all, it was in respect of 109 units, then in that case, the Tribunal is of the humble opinion that an opportunity should be provided to the dealer assessee to substantiate it by referring to all the agreements at its disposal in contradistinction to the observation in the AVR in respect thereof.

8. Another ground is raised which is with regard to disallowance in deduction for ₹11,82,346.00 and ₹47,294.00 as ITC for the materials supplied by the sub-contractors and suppliers respectively. It has been disallowed morefully on the ground that no return was filed in the case of M/s. Suman Constructions and RC had been cancelled with respect to four other dealers, as is evident from the

impugned order dated 25.01.2018. To this, the learned counsel for the dealer assessee would contend that ITC claimed as per Section 20 of the Act could not have been disallowed on such a ground as the law is well settled in Shree Vinayaga Agencies Vrs. Assistant Commissioner (CT), Vadapalani-I, Chennai and Another reported in 60 VST 283, wherein, the Hon'ble Apex Court held and observed that the selling dealer, if has not paid the collected tax, then the liability has to be fastened on it but cannot be mulcted on the purchasing dealer which had a proof of payment of tax on the purchases made. It is also contended that in a similar case, the Hon'ble Madras High Court in Infinity Wholesale Ltd. Vrs. Assistant Commissioner (CT) reported in 2010 VIL (Mad.), it has been held that the ITC availed by the purchasing dealer could not have purposed to be reversed, or reversed on the ground that the selling dealer has not filed return, or not paid taxes, or unregistered dealers or registration of dealers retrospectively cancelled and any such exercise of jurisdiction would be ex facie arbitrary, unreasonable and beyond jurisdiction. The learned Counsel for the dealer assessee cited a couple of more decisions while demanding such deduction on ITC vis-a-vis the sub-contractors and suppliers which includes a ruling of the Hon'ble Apex Court in the case of State of A.P. & others Vrs. Larsen & Toubro Ltd. reported in (2008) 17 VST 1 (SC). On an overall appreciation, the Tribunal is again inclined to hold that on such a ground the claim on ITC deduction from taxable turnover could not have been disallowed by the authorities below which again demands a fresh consideration by referring to the materials on record.

9. According to the dealer assessee, the levy of penalty by the authorities below has been a mechanical exercise and gross non-application of judicial mind as against the fact that there was no suppression in turnover and more particularly when, the rule of law as encapsulated by the Hon'ble Apex Court in the case of Hindustan Steel Ltd. Vrs. State of Odisha: (1970) 25 STC 211 (SC) is that penalty not to be imposed merely because law authorizes to do so unless there is a contumacious conduct and wilful disobedience as to the provisions of law. It is also claimed that the quantum of penalty was enhanced in derogation of the Finance Department Notification No.28080-FIN-CTI-TAX-0017-2013-F(SRO No.490/2015). In fact, penalty is to be imposed under sub-section 5 of Section 42 of the Act subject to fulfilment of one or more of the conditions of sub-section (1) thereof which are as to the suppression of purchases or sales or both, erroneous claims of deductions including ITC, evasion of tax, or contravention of any provision of the Act affecting the tax liability of the dealer. In the instant case, as per the dealer assessee, there was no suppression at all in so far as tax compliance is concerned, inasmuch as, it was avoided on the ground that the engagement was basically a developmental work instead of works contract, a stand which has been taken since the stage of assessment. Indeed, in Hindustan Steel Ltd. ibid, the Hon'ble Apex Court advised not to levy penalty for the sake of imposing it in absence of any contumacious conduct and wilful or deliberate disobedience or infraction of law. It is reiterated that if there is no suppression as to turnover and on a just ground and good faith or by harbouring an honest impression that a portion

of the turnover is not taxable and under such circumstances, a dealer defaulted in paying the tax, no penalty should be imposed. It depends on the conduct of the dealer assessee even though mens rea plays no part for the fact that such is a case of civil liability as has been held by the Hon'ble Apex Court in Dharmendra Textile's case. That apart, the dealer assessee also challenged the quantum of penalty which has been enhanced to twice the tax assessed. Since as per the claim of the dealer assessee, there has been no suppression of turnover and only on account of an impression that it was not involved in works contract, the payment of tax was avoided and as such, there was no culpable conduct, in the considered view of the Tribunal, it ought to have been duly taken cognisance of and when already the matter has suffered a remand, it can be reconsidered. At the end, it is recapitulated that merely for a default, penalty is not to be straightaway levied which depends on conduct and such other factors as discussed hereinabove and therefore, the said aspect vis-a-vis the dealer assessee deserves an attention afresh.

10. Hence, it is ordered.

11. In the result, the appeal stands partly allowed. As a logical sequitur, the impugned order dated 25.01.2018 passed in Appeal Case No. AA-106221622000108/BH-IV/2016-17 is hereby set aside in part. Consequently, the matter is remitted back to the AA with a direction to undertake recomputation as to the tax liability vis-a-vis the tax period from 01.10.2011 5o 31.03.2014 keeping in view and in the light of the observations of the Tribunal on the issues involved by providing a reasonable opportunity of hearing and considering all the materials on

record and then to pass appropriate order as per and according to law and to complete the entire exercise, preferably, within a period of three months from the date of receipt of the above order. The cross-objection at the instance of the State is accordingly disposed of.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman