

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

**Present: Smt. Suchismita Misra, Chairman,
Sri Subrata Mohanty, 1st Judicial Member
&
Sri R.K. Pattnaik, Accounts Member-III**

S.A. No.854 of 2006-07

(From the order of the Id. ACST (Appeal), Sundargarh Range,
Rourkela, in First Appeal Case No. AA-208 (RL I) 2005-2006,
on 08.05.2006)

For the assessment period: 2003-04

S.A. No.855 of 2006-07

(From the order of the Id. ACST (Appeal), Sundargarh Range,
Rourkela, in First Appeal Case No. AA-253 (RL I) 2005-2006,
on 08.05.2006)

For the assessment period: 2004-05

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

- V e r s u s -

M/s. Hindustan Steel Works
Construction Ltd.,
Inside R.S.P., Rourkela. ... Respondent

For the Appellant ... Mr. M.L. Agarwal, S.C.
For the Respondent ... Mr. Damodar Pati, Advocate

Date of hearing: 30.08.2019 **** Date of order: 19.09.2019

ORDER

These two appeals at the instance of Revenue as
appellant relating to assessment for two consecutive period of
assessee-respondent being arised out of order of first appellate

authority, both are taken up together and decided by this common order for sake of convenience, propriety and to avoid conflicting opinion, if any.

2. Questions framed for decision on the basis of rival contentions of the parties are as follows,

- (i) Whether the percentage of deduction allowed by the first appellate authorities in modification and enhancement of the percentage of deduction then what was allowed by assessing authority is higher in side and not just and proper?
- (ii) Whether provision under Rule 4-B of the OST Rules should be applied to the case in hand unscrupulously for determination of deduction towards labour and service charges?
- (iii) What order?

3. **Fact of the case in S.A. No.854 of 2006-07 (assessment period 2003-04)**

The instant dealer is a works contractor awarded with contract job under M/s. SAIL, R.S.P., Rourkela, M/s. MCL, IB Valley, Belpahar. In the assessment period 2003-04, the dealer had executed as many as 12 nos. of works contracts under contractees above and has received a gross amount of Rs.4,28,31,339.03. The dealer had advanced claim of deduction towards labour and service charges from 45% to 100% against different works. As per the assessing authority, since the dealer has failed to produce the details of books of account showing payment towards labour and service charges, learned assessing authority allowed deduction @ 32% for on an average basis for all kinds of work executed by the dealer.

In appeal, the first appellate authority on examination of the nature of work allowed deduction item-wise varies from 45% to 100% as per the chart appended to impugned order. Thus, in

consequence to the enhancement of deduction the tax liability became reduced and the dealer is found entitled to refund of Rs.7,23,650.00.

For this period, the appellant-Revenue has advanced a prayer through additional grounds for application of Rule 4-B of the OST Rules for calculation of labour and service charges.

4. When the matter stood thus, when the enhancement for the percentage of deduction by the first appellate authority, Revenue being aggrieved has preferred the appeal above with a contention that, the deduction allowed by the first appellate authority is higher in side and it should be restricted to 52% only.

5. **Fact of the case in S.A. No.855 of 2006-07 (assessment period 2004-05)**

In the assessment for the period 2004-05, the dealer was also found to have executed as many as 15 nos. of works contract and received 4,90,51,659.68. The assessing authority has allowed 22% at random against all kinds of contract job. In appeal, the first appellate authority on examination of the nature of work allowed deduction item-wise varies from 32% to 90% as per the chart appended to impugned order. Thus, in consequence to the enhancement of deduction the tax liability became reduced and the dealer is found entitled to refund of Rs.4,21,123.00.

6. Being aggrieved, in a similar fashion, Revenue as appellant preferred the second appeal challenging the deduction granted by the first appellate authority as higher in side with a prayer to restrict it by 52%.

Here also, the appellant-Revenue has claimed for application of Rule 4-B of the OST Rules.

7. **Dealer's contention in Cross Objection**

It is contended by the dealer that, the dealer had engaged sub-contractor to execute the work, so the ground in appeal has no merit. It is claimed that, even though the percentage of deduction

towards labour and service charges allowed by the first appellate authority is lower in side, the dealer accepted the determination of the same in the impugned order. It is contended further that, there is no scope for application of Rule 4-B of the OST Rules in the case in hand as the dealer had submitted the work orders before the authorities below.

8. **Reason and discussion**

At the outset, it is pertinent to mention here that, the cases relating to works contract and determination of deduction towards labour and service charges is very often raised before this Tribunal from time to time. It is a common experience that, the assessing authorities are found applying best judgment principle invariably almost in all cases to determine the labour and service charges. The assessing authorities are also found applied the principle in the light of ratio laid down in the case of **M/s.Gannon Dunkerley & Co. and others v. State of Rajasthan and others (1993) 88 STC 204** in some cases the assessing authorities had followed the circulars issued by the Commissioner of Sales Tax, Orissa vide letter No.VIII(I) 6/99 16.07.2016/CT dtd.30.07.1999 however, the circular was struck down by the Hon'ble Court in the case of **M/s. Jagannath Choudhury v. ACST in OJC No.7525 of 2005**. Thereafter, application of best judgment principle became the practiced invariably to all cases even where the dealer could furnish books of account, agreements and other connected documents. The authorities accepted the short-cut method to calculate the percentage of deduction avoiding exhaustive method of scrutiny of voluminous documents. On this backdrop, when Rule 4-B of the OST Rules incorporated in the textbook with retrospective effect from 30.07.1999, the provision has been applied in the assessment.

9. Reverting to the appeals in hand, it is noticed that, Revenue has urged for deduction towards labour and service charges

@ 52%. The appeals were filed in the year 2006-07 i.e. prior to the incorporation of the provision u/r.4-B of the OST Rules into the textbook. Once the provision is incorporated, that too when its applicability has got retrospective from 30.07.1999, Revenue has added additional prayer for application of the provision to the pending appeal with the plea that, the appeal is a continuation of the proceeding.

10. Learned Counsel for the dealer harped of the constitutional validity of the provision u/r.4-B of the OST Rules which is incorporated in the textbook in the year 2010 i.e. after repeal of the original act with retrospective effect from 30.07.1999. It is also argued that, looking at the rationality and reasonability and the principle of parity in law, the application with retrospective effect will be unjust and unfair as the dealers who are already assessed and the dealers who are before the appellate forum will be treated with discrimination on application of the new provision with retrospective effect. Further, in the event of appeal at the instance of dealer, it is necessarily against the principle of *reformation inpeius* – a person should not be placed in a worse position as a result of fling appeal.

11. While advancing quite conceivable argument above, learned Counsel at the same time conceded fairly to the jurisdictional limit of this Tribunal to look into the constitutional validity of the provision. Hence, there is no escape from the conclusion that, Rule 4-B is to be applied in each case of assessment pending at any stage including the appellate stage which is nothing but a continuation of the proceeding. It is also not out of place to mention here that, different benches of this Tribunal has adopted and applied the provision invariably while disposing the appeals involving the same questions which became a precedent before us.

12. Another aspect on this context to be discussed here is, confusion arises on many occasions in the interpretation and application of the Rule and the same may be discussed below:-

12-a. The provision u/r.4-B of the OST Rules reads as follows:-

“4-B Deduction of Labour and Service Charge by Works Contractors:

In case of works contract, deduction of the expenditure incurred towards labour and service as provided in Section – 5(2) AA of the Act shall be subject to production of evidence in support of such expenses to the satisfaction of the Assessing Authority. In the cases where a dealer executing works contract, fails to produce evidence in support of expenses incurred towards labour and service as referred to above, or such expenses are not ascertainable from the terms and conditions of the contract, or the books of accounts maintained for the purpose are found to be not credible, expenses on account of labour and service shall be determined at the rate specified in the table below:

Sl. No. of works	Nature of the Works contract	Percentage of labour, service and like charges of the total value of the works
(1)	(2)	(3)
1	Structural Works	35%
2	Earth Work, Canal Work, Embankment Work etc.	65%
3	Bridge Work	35%
4	Building Work	35%
5	Road Work	45%

The other relevant provision u/s.5(2)AA of the OST Act reads as follows:-

“(AA) Notwithstanding anything contained in sub-section (2)(A) “Taxable turnover” in respect of,-

- (i) 'works contract' shall be deemed to be the gross value received or receivable by a dealer for carrying out such contract, less the amount of labour charges and service charges incurred for the execution of this contract.
- (ii) 'delivery of goods on hire-purchase or any system of payment by installments' shall be deemed to be the hire-purchase price or total sum payable by person for the purpose of goods, irrespective of the payment of the price in periodical installments."

The provision u/s.5(2)(AA) above being the charging section states about what should be the taxable turnover in case of a works contract, whereas the provision u/r.4-B above speaks of the modes to be adopted for calculation of such deduction. Both the provisions are mutually inclusive.

12-b. The provision u/r.4-B has four parts, while applying it, the assessing authority is required to adopt the method of calculation of the deduction towards labour and service charges as per sec.5(2)AA of the Act is to be determined from the evidence on the production to the satisfaction of authority. The second part says, in case of failure to produce the evidence to the satisfaction of authority, the same can be ascertained from the terms and conditions of the contract or thirdly, from the books of account maintained for the purpose and when the evidences are not credible or not sufficient, the rate chart appended to the provision is to be applied. Thus, the provision has prescribed separate modes and the liberty is given to the assessing authority to reject the documents only when found not genuine to the satisfaction of the authority then, to apply the chart. Each part of the provision cannot be adopted simultaneously as each part is independent of one and another.

13. Again, it is not out of place to mention here that, the provision above is not exhaustive. There may be a situation where the provision may not be applicable. When the dealer failed to produce

any documentary evidence and the nature of work does not falls under the category mentioned in the chart, there the assessing authority will have no option but to adopt the best judgment principle. Thus, it can be said that, application of best judgment principle is not redundant even after Rule 4-B of the OST Rules enacted. However, it is made clear that, application of the principle is the last resort in the hands of assessing authority.

With the observation hereinabove, reverting to the case in hand, it is held that, since the periods under assessment covered under the retrospective applicability of the Rule 4-B of the provision of the OST Rules, here the irresistible conclusion is, the matters need to be remitted back to the assessing authority for assessment afresh with a direction to apply the provision above and with further direction to apply best judgment principle, where it is found necessary as per the decision hereinabove.

Accordingly, it is ordered.

The appeals are allowed on contest. The impugned orders are set aside. The matters are remitted back to the assessing authority for assessment afresh.

Dictated & corrected by me,

Sd/-
(Subrata Mohanty)
1st Judicial Member

Sd/-
(Subrata Mohanty)
1st Judicial Member

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

Sd/-
(R.K. Pattnaik)
Accounts Member-III