BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 1708 of 2005-06
S.A. No. 1724 of 2005-06
&
S.A. No. 280(ET) of 2005-06

(Arising out of orders of the learned ACST (Appeal), Puri Range, Bhubaneswar in First Appeal Nos. AA- 351/BH-II/04-05 & AA (ET)- 352/BH-II/04-05, disposed of on dated 15.09.2005)

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

S.A. No. 1708 of 2005-06

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

-Versus-

M/s. Tata Projects Limited, Plot No. 544, Bhubaneswar Marg, Bhubaneswar-751014 ... Respondent

S.A. No. 1724 of 2005-06
&
S.A. No. 280(ET) of 2005-06

M/s. Tata Projects Limited, Plot No. 544, Bhubaneswar Marg, Bhubaneswar-751014 ... Appellant

-Versus-

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

For the State : Sri D. Behura, S.C. (CT) & Sri S.K. Pradhan, Addl.SC (CT)
For the Dealer : Sri D.K. Mohanty, Advocate

Date of hearing: 08.06.2022 *** Date of order: 18.06.2022

O R D E R

All these three second appeals relate to same assessment period of the instant dealer-assessee involving common question of facts and law for which those are taken up together and disposed of by this composite order.

2. The State of Odisha, being represented through Commissioner of Sales Tax, Odisha, Cuttack filed S.A. No. 1708 of 2005-06 challenging the impugned order dated 15.09.2005 passed by the learned Asst. Commissioner of Sales Tax (Appeal), Puri Range, Bhubaneswar (hereinafter called as 'first appellate authority') in Appeal No. AA-351/BH-II/04-05 thereby allowing the appeal in part and reducing the demand to ₹15,18,595.00 from ₹26,67,374.00 raised by the Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar (in short, 'assessing authority') for the year 2001-02 in the assessment framed u/s. 12(4) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act').

3. The dealer-assessee preferred S.A. No. 1724 of 2005-06 challenging the order dated 15.09.2005 passed by the same first appellate authority in the same first appeal thereby reducing the tax demand to ₹15,18,595.00 from

₹26,67,374.00 raised by the same assessing authority for the year 2001-02 in the assessment framed u/s. 12(4) of the OST Act.

4. The dealer-assessee has also preferred S.A. No. 280 (ET) of 2005-06 challenging the order dated 15.09.2005 passed by the same first appellate authority in Appeal No. AA (ET)- 352/BH-II/04-05 thereby confirming the order dated 27.11.2004 passed by the same assessing authority raising an extra demand of ₹4,22,601.00 for the year 2001-02 in the assessment framed u/s. 7(3) of the Odisha Entry Tax Act, 1999 (in short, 'OET Act').

5. Shorn of unnecessary details, the relevant facts, in brief, are that the dealer-assessee is engaged in execution of works contract under different authorities. In response to the statutory notice, the dealer appeared and produced the books of account, on examination of which, the assessing authority found that the dealer received payments of ₹3,43,31,637.00 from GRIDCO and ₹5,64,48,510.00 from BHEL. The works of GRIDCO relate to construction of 132 KV and 33 KV transmission lines and construction of sub-station, structural and electrical works, supply of spares for 132 KV transmission line, 220 KV transmission lines and 33 KV transmission lines and the

works with BHEL relate to erection, testing, commissioning and completion of trial operations of boiler and its auxiliaries, supply of consumables, tools and tackles, all handling and transportation from BHEL and other incidental works during pre-assembly erection, testing and commissioning work, supply and application of final painting. The work also includes all types of handling and transportation of materials from the site store sheds storage yard to the place of erection, testing and commissioning, which are incidentals to normal erection works, construction of boiler like structures, galleries, pressure pacts, air-pre-heaters, coal piping and ducts etc. including final painting. The total work was 18,752 meters having estimated value of ₹11,96,79,998.00. The dealer-assessee claimed deduction of ₹2,17,98,347.00 towards labour and service charges in connection with works relating to GRIDCO and ₹5,64,48,570.00 in respect of works pertaining to BHEL. Learned assessing authority on examination of the record, on account of failure of the dealer-assessee to produce the labour account allowed 32% deduction towards labour and service charges in respect of GRIDCO work and 62% deduction in respect of BHEL work. It determined the GTO at ₹9,07,80,147.00 on which it allowed deduction of

₹4,59,84,200.04 towards labour and service charges and determined the TTO at ₹4,47,95,946.96. The assessing authority calculated the total OST at ₹36,53,288.07 and surcharge at ₹3,87,348.62. The dealer having paid ₹13,73,263.00 by way of TDS, balance tax payable was determined at ₹26,67,374.00.

5(a). The dealer-assessee challenging the above demand raised by the assessing authority, preferred appeal before the first appellate authority, who allowed the appeal in part reducing the demand to ₹15,18,595.00. The first appellate authority allowed deduction of 85% towards labour and service charges in respect of BHEL work as against 62% deduction allowed by the assessing authority and it computed the tax liability of the dealer-assessee.

5(b). The State being aggrieved with the order of the first appellate authority reducing the tax demand, preferred S.A. No. 1708 of 2005-06, whereas the dealer-assessee being aggrieved with the order of the first appellate authority allowing the appeal in part filed S.A. No. 1724 of 2005-06.

6. As regards S.A. No. 280(ET) of 2005-06 is concerned, the facts leading to filing of the second appeal are that the dealer-Company brought the goods like

electrical goods, tools, tackles and construction materials to the tune of ₹3,47,04,726.00 from outside the State of Odisha into the local area for utilization in execution of works contract. The assessing authority on the failure of the dealer-assessee to disclose the quantum of freight charges for transportation of such scheduled goods into the local area, estimated such transportation charges @ 3% on the value of the goods transported. Accordingly, the assessing authority determined the GTO including freight charges at ₹3,57,45,867.78 on which it determined entry tax at ₹7,14,917.35. The dealer having paid ₹2,92,316.00 while furnishing the return, balance tax payable was determined at ₹4,22,601.00.

6(a). The dealer-assessee challenging such demand raised by the assessing authority, filed appeal before the first appellate authority, who confirmed the order of assessment and dismissed the appeal. The dealer-assessee being further dissatisfied with the extra demand of entry tax raised by the assessing authority and confirmed by the first appellate authority, preferred the present second appeal.

7. Learned Counsel for the dealer-assessee challenging the impugned orders of the forums below

vehemently urged that the nature of works executed by it being only involved of labour component, the forums below should have allowed the entire claim of deduction towards labour and service charges. The deduction of 32% allowed by the assessing authority in respect of GRIDCO works and 62% in respect of BHEL works, which was subsequently enhanced to 85% by the first appellate authority, is contrary to the materials on record on account of which the impugned orders of the forums below are legally unsustainable. He submitted that this Tribunal in similar nature of case has granted 33% deduction towards labour and service charges in respect of GRIDO works, whereas the assessing authority in the present case allowed only 32% without taking note of order of this Tribunal on account of which the orders of the forums below are illegal, perverse and against sanction of law. So also, the estimation of freight charges @ 3% is whimsical, arbitrary and contrary to the materials on record. Therefore, the impugned orders of the forums below are liable to be quashed and reassessment should be done allowing deduction as claimed by the dealer-assessee.

8. Per contra, learned Standing Counsel (CT) for the revenue in terms of grounds raised in the

memorandum of appeal (S.A. No. 1708 of 2004-05) and the cross-objections filed in S.A. No. 1724 of 2005-06 and S.A. No. 280 (ET) of 2005-06 vehemently urged that on account of dealer's failure to produce the books of account relating to labour and service charges, the assessing authority resorted to best judgment assessment and accordingly, granted deduction @ 32% in respect of GRIDCO works and 62% in respect of BHEL works. The first appellate authority on the self-same material substituted the finding of the assessing authority without giving any justified reason on account of which the impugned order of the first appellate authority is unsustainable in the eyes of law. He vehemently urged that when the best judgment assessment passed by the assessing authority is reasonable, legal and justified, the same should not have been substituted by another best judgment assessment. The first appellate authority in whimsical and arbitrary manner has substituted its own finding granting deduction of 85% towards labour and service charges in respect of BHEL works as against 62% deduction granted by the assessing authority. He further argued that the order of the first appellate authority granting exorbitant deduction towards labour and service charges being contrary to materials on record, the same

should be set aside and the order of the assessing authority should be restored. He also argued that when the dealer failed to produce detailed account relating to transportation charges incurred in bringing the goods into the local area, the estimation made by the assessing authority @ 3% cannot be faulted with warranting interference of this forum. The estimation of transportation charges made by the assessing authority is reasonable and based on the materials on record. Therefore, the impugned demand raised by the assessing authority under the OET Act, which was confirmed by the first appellate authority needs no interference. He submitted to dismiss the appeals bearing S.A. No. 1724 of 2005-06 and S.A. No. 280(ET) of 2005-06 filed by the dealer-assessee and to allow the appeal bearing S.A. No. 1708 of 2005-06 filed by the State.

9. We have heard rival submissions of the parties, gone through the grounds of appeal in all the three second appeals vis-a-vis the impugned orders of the forums below and the materials on record. The dealer-assessee has filed S.A. No. 1724 of 2005-06 claiming deduction towards labour and service charges as per the return filed by it, whereas the State argued to allow deduction as per the deduction granted by the assessing authority. So, under

these circumstances, we feel it expedient to examine the nature of works executed by the dealer-assessee in order to ascertain whether the assessing authority was correct in its approach in granting deduction @ 32% in respect of GRIDCO works and 62% in respect of BHEL works or the first appellate authority was correct in granting 85% deduction towards labour and service charges in respect of BHEL works.

9(a). It transpires from the impugned order of the first appellate authority that it on examination of the work order entered into between the dealer-assessee and the principal, found that the dealer-assessee was entrusted with the works of construction of 132 KV and 33 KV transmission lines and construction of sub-station for 132 KV and 33 KV connections, structural and electrical works in connection with transmission lines, supply of spares for 132 KV transmission line, 220 KV transmission lines and 33 KV transmission lines in respect of GRIDCO Works. So far as works executed under BHEL is concerned, the dealer-assessee was entrusted with the works of handling at site store/storage yard, transportation to site of work, erection, testing and commissioning of structures, pressure parts, non-pressure parts, air pre-heaters, ducts, supply and

application of final painting of boiler for stage II Unit-IV of 4 X 500 MW sets at Talcher Super Thermal Power Projects for NTPC. The first appellate authority also found that the agreement specifies the jobs to be undertaken by the dealer like erection, testing, commissioning and completion of trial operation of boiler and its auxiliary including supply of consumables, tools and tackles, all handling and transportation from BHEL store. The first appellate authority considering the agreement and work order opined that the works executed under GRIDO was certainly material oriented jobs. Therefore, 32% deduction towards labour and service charges allowed by the assessing authority was proper, which does not require any interference. As regards the works executed under BHEL is concerned, the first appellate authority was of the view that the dealer-assessee while executing the works has utilized minor materials such as MS plates, channels, pipe handles, screws and paints etc. and Clause 17.0 of the agreement provided that the contract was only an erection and service contract not involved any transfer of materials whatsoever. So, the works entrusted to the dealer-assessee to be executed was primarily labour oriented job, therefore, 62% deduction granted by the assessing authority towards labour

and service charges was at lower side. The first appellate authority considering the nature of works and involvement of minor materials in the job, enhanced the deduction towards labour and service charges to 85% as against 62% granted by the assessing authority. On going through the impugned orders of the forums below and the materials on record, we also concur with the finding of the first appellate authority that minor materials were involved in the execution of the contract and it was labour oriented works. Therefore, the first appellate authority did not commit any illegality in enhancing the deduction from 62% to 85%. As regards the contention raised by the learned Standing Counsel (CT) for the revenue that the first appellate authority could not have substituted its own best judgment assessment with the best judgment assessment of the assessing authority, we are of the unanimous view that the deduction granted by the assessing authority being at lower side, considering the nature of works and involvement of labour component in execution of such contract, the first appellate authority was correct in its approach in enhancing the deduction towards labour and service charges to 85% from 62% as granted by the assessing authority. There is no illegality or impropriety in such finding of the learned first

appellate authority. But, so far as deduction of 32% towards labour and service charges in respect of the works executed under GRIDCO is concerned, keeping in view of the order of this Tribunal passed in **S.A. No. 2133 of 2002-03 in case of M/s. Tata Projects Ltd. Vs. State of Odisha, disposed of on 19.02.2022**, we are of the considered view that the deduction should have been granted @ 33% in order to maintain consistency. This Tribunal in similar nature of works executed by the dealer-assessee confirmed the orders of the forums below granting 33% deduction towards labour and service charges. Taking note of the above order of this Tribunal, in the present case also the dealer-assessee is entitled to deduction of 33% towards labour and service charges instead of 32% as granted by the assessing authority.

10. So far as the estimation of freight charges is concerned, learned Counsel for the dealer-assessee filed Orissa Way Bill Register showing movement of different goods for ₹9,69,23,973.00. This document filed by the dealer-assessee is xerox copy of original, which has not been certified and no pleading was made before the forums below with regard to the Orissa Way Bill Register for the year ending 2000-01 on which the dealer-assessee placed

reliance before this forum. Moreover, there is no mention of freight charges in the statement filed regarding goods brought into the local area. There being no pleading about such document before the forums below and no specific ground on this score in the memorandum of appeal, we are not inclined to accept the document filed by the dealer-assessee to calculate the freight charges incurred for bringing the goods into the local area. The assessing authority considering the entire facts and circumstances of the case has rightly calculated the freight charges @ 3% for the goods received and accordingly, levied ET on the same. We do not find any unreasonableness in such estimation made by the assessing authority warranting interference of this Tribunal. The assessing authority rightly in absence of documentary evidence calculated freight charges @ 3%. The first appellate authority also considering the materials on record and the facts and circumstances of the case, rightly concurred with the finding of the assessing authority with regard to estimation of freight charges @ 3% and there is also no illegality or impropriety in the finding of the first appellate authority warranting interference of this Tribunal.

11. For the discussions made above, S.A. No. 1708 of 2005-06 filed by the State and S.A. No. 280 (ET) of

2005-06 filed by the dealer-assessee being devoid of any merit stand dismissed and the order impugned in S.A. No. 280 (ET) of 2005-06 is hereby confirmed. So far as S.A. No. 1724 of 2005-06 filed by the dealer-assessee is concerned, the same is allowed in part and the impugned order of the first appellate authority is hereby set aside to the extent indicated above. The matter is remitted back to the assessing authority to recompute the tax liability of the dealer-asessee keeping in view the observations made herein above within three months from the date of receipt of this order. Cross-objections are disposed of accordingly.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

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

I agree,

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