BEFORE THE ODISHA SALES TAX TRIBUNAL: CUTTACK
(Full Bench)

S.A. No. 389 (VAT) of 2015-16

(Arising out of order of the learned JCST (Appeal), Bhubaneswar Range, Bhubaneswar in First Appeal Case No. AA- 106221522000166/OVAT/BH-I disposed of on dated 30.12.2015)

Present: Shri R.K. Pattanaik, Chairman,
Shri A.K. Dalbehera, 1st Judicial Member, and
Shri R.K. Pattnaik, Accounts Member-III

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

-Versus-

M/s. CMM Infra Project Ltd.,
Plot No. 1127(P), Jayadurga Nagar,
Bomikhal, Bhubaneswar ... Respondent

For the Appellant : Sri S.K. Pradhan, ASC (CT)
For the Respondent : Sri B.K. Patnaik, Advocate

Date of hearing: 18.08.2020 ***** Date of order: 15.09.2020

O R D E R

. Instant appeal under Section 78(1) of the Odisha Value Added Tax Act, 2004 (in short, 'the Act') is preferred by the State questioning the legality and judicial propriety of the impugned order dated 30.12.2015 in Appeal No. AA-106221522000166/OVAT/BH-I promulgated by the learned Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (in short, 'FAA') for the

period of assessment 01.07.2011 to 31.03.2014 vis-a-vis the dealer assessee confirming the order of assessment dated 31.07.2015 passed by the learned Sales Tax Officer, Bhubaneswar-I Circle, Bhubaneswar (in short, 'AA') under Section 42 ibid, precisely, on the grounds, such as, there is contravention of Section 8(3)(b) of the Central Sales Tax Act, 1956 (in short, 'CST Act'); deduction for being availed against the entire materials purchased by the dealer assessee when it ought to have been only on the materials used in the works contract without submission of utilization certificate; and deduction of 30% on the head of labour and service charges instead of 20% by referring to Rule 6(e) of the Odisha Value Added Tax Rules, 2005 (in short, 'OVAT Rules'). A cross-objection is filed by the dealer assessee justifying the impugned order dated 30.12.2015 and also questioning disallowance of ITC to the tune of ₹1,14,683.00.

2. In fact, the dealer assessee is engaged in execution of works contract within the State by effecting purchases of goods from outside and inside the State of Odisha. It was subjected to audit inspection to ascertain the correctness of tax compliance and in that respect, the audit team furnished the Audit Visit Report (in short, 'AVR'), subsequent to which, dealer assessee was summoned for examination and verification of books of account and other documents. The dealer assessee initially self assessed under Section 39 of the Act and as some deficiencies were noticed during the audit, consequent upon which, the assessment was set in motion and the AA finally passed the order of assessment dated 31.07.2015 with a

direction for refund of ₹33,71,741.00 to the dealer assessee after adjustment of TDS. Being dissatisfied, the dealer assessee preferred appeal under Section 77 of the Act which ultimately resulted in the passing of the impugned order dated 30.12.2015.

3. Principally, the subject matter in dispute is concerning the following contentious issues: (i) the authorities below without any reasonable basis allowed deduction of 30% relying on the Appendix to Rule 6(e) of the OVAT Rules without exerting to a detailed discussion as to the nature of work, whereas, the dealer assessee is only eligible @ 20% as it related to all other works as per item 23 of the Appendix; and (ii) whether, disallowance of ITC to the tune of ₹1,14,683.00 to be tenable in law. The learned ASC (CT) for the State contended that the deduction of 30% towards labour and service charges with respect to the nature of contract work undertaken was unjustified as it should have been @ 20% which is seriously objected to by the learned Counsel for the dealer assessee. As per Rule 6(e) of the OVAT Rules, on different heads mentioned therein in respect of the works contact, the expenditures incurred therefor are to be deducted from the gross turnover but where a dealer executing such works, fails to produce evidence in support thereof, or such expenses are not ascertainable from the terms and conditions of the contract, or the books of account maintained for the purpose, a lump sum amount on account of labour, service and like charges in lieu of such expenses is to be determined at the rates specified in the Appendix. As per the Appendix under item 3, on the head of civil works, construction of buildings shall bear 30% deduction

towards labour and service charges, which can only be applied, in case no books of account is maintained, or no any evidence is produced, or such expenses are not ascertainable from the terms and conditions of the contract. In the instant case, admittedly, the dealer assessee did not maintain books of account vis-a-vis the labour and service charges. According to the State, there is no detailed examination as to the nature of work and under such circumstances, deduction ought to have been @ 20% as per item 23 of the Appendix. The nature of work, as is made to appear from the record, is construction of buildings at different places inside the State, which means, it, prima facie, falls in the category of item 3(a) of the Appendix. The AVR suggested deduction @ 30% having regard to the nature of contract work and the same was accepted by the AA in assessment for the reason that the dealer assessee did not have proper books of account. It is a subjective satisfaction on the part of the AA and considering the materials on record and being conscious of the nature of the contractual work i.e. construction of buildings, deduction @ 30% was applied as per the Appendix. When no evidence could be produced by the dealer assessee in support of such expenses, or books of account failed to be maintained in respect thereof and where expenses are not easily ascertainable from the terms and conditions of the contract, the rates as specified in the Appendix are invoked. Having regard to the above facts and looking at the nature of contract work, which is basically a civil work, the Tribunal is of the considered view that a deduction of 30% as per the Appendix cannot be said to be

in any way unjustified. The State could not refer to any material so as to prove and establish a deduction @ 20% vis-a-vis the contract work. In such view of the matter, the conclusion is inevitable to the effect that there is no compelling reasons apparent on the face of record to interfere with the findings of the authorities below, in this regard.

4. With respect to ITC deduction in terms of cross-objection, the learned Counsel for the dealer assessee urged that it was denied unreasonably. From the record, it is revealed that an amount of ₹1,14,683.00 as ITC was held inadmissible on the ground of no return being filed or nil output tax to have been shown by the selling dealer. The learned ASC (CT) contended that there is no justification to allow such ITC adjustment when is clearly inadmissible, since it was not shown in the return by the selling dealer. The learned Counsel for the dealer assessee contended that if no return is filed or output tax is shown as nil by the selling dealer, it is not their fault, morefully when, payment of tax at the time of purchases is substantiated by material evidence, the fact which was not duly appreciated by the authorities below. In this connection, it is profitable to quote the decision of the Hon'ble Delhi High Court in the case of Commissioner, Department of Trade and Taxes, Government of NCT Vs. S.K. Steel Traders:(2017) 101 VST 172 (Delhi) which referred one of its earlier judgment delivered in the case of Shanti Kiran India Pvt. Ltd. Vs. Commissioner, Trade and Tax Department:(2013) 57 VST 405 (Delhi), wherein, the ratio as laid down is that the statutory authority granting

ITC only to the extent tax deposited by the selling dealer with a statutory interpretation is unsound and contrary to law; and it is also iniquitous, since an onerous burden is placed on purchasing dealer-in absence of a clear intendment in the statute- to keep a vigil over the amounts deposited by the selling dealer; in the event a selling dealer has failed to deposit the tax collected from the purchasing dealer, the remedy would be to proceed against him for the alleged default, rather, not to reject the ITC otherwise legitimately claimed by the purchasing dealer. In the case at hand, if the selling dealer did not file a return or showed a nil output tax, such could not have been an obstacle for the authorities below in allowing the ITC in favour of the dealer assessee. As per Section 95 of the Act, burden of proof lies on the dealer, who claims ITC. The dealer assessee seems to have produced the materials in support of ITC for having purchases made, but the same was disallowed for the selling dealer's default in paying tax. In so far as Section 20(3a) of the Act is concerned, it is in relation to ITC that shall not be allowed to a registered dealer on any purchase of goods in excess of amount of such tax actually paid under the Act, which has come into force w.e.f. 01.10.2015. In such an event, the rigor of law as contained in Section 20(3a) of the Act as to ITC claim and adjustment cannot be applied to the case in hand, which is apparently in respect of an audit for a period of assessment prior to 01.10.2015. In fact, the cardinal principle of law is that a statutory obligation introduced by way of an amendment carrying a disability shall have to be applied prospectively and not from an anterior date.

Therefore, the Tribunal is of the considered view that for any such alleged default of the selling dealer in filing return or showing nil output tax, the dealer assessee cannot be penalised and denied ITC adjustment to the tune of ₹1,14,683.00 and to that extent, it can be fairly said that the authorities below fell into error, which is, therefore, deserves to be interfered with.

5. Besides the above, on other issues raised by the State which is with respect to contravention of Section 8(3)(b) of the CST Act, the Tribunal is of the humble opinion that the same deserves no attention, since, as is made to appear from the record, all the material documents including books of account vis-a-vis inter-State purchases found to have been duly verified and only the inadmissible ITC stood disallowed, as a result and such a conclusion of the audit clearly found favour with the authorities below. Under such circumstances, the Tribunal considers it not to indulge in any such exercise to ascertain, whether, the goods purchased against 'C' forms to have been utilized or not in the works contract and consequentially, it resulted in violation of Section 8(3)(b) of the CST Act. Regarding the utilization certificate to qualify for deduction, as is claimed by the State, having regard to the fact that no physical stock was found available and all the materials purchased to have been utilized in the execution of works contract, it equally requires no interference.

6. Hence, it is ordered.

7. In the result, the appeal is dismissed. The cross-objection is, however, allowed. As a necessary corollary, the impugned order dated 30.12.2015 promulgated in Appeal No. AA- 106221522000166/OVAT/BH-I is hereby modified to the extent indicated above. As a consequence, the AA is directed to recompute the tax liability vis-a-vis the dealer assessee for the period under assessment in the light of the observations of the Tribunal, as aforesaid, preferably within a period of three months from the date of receipt of the present order.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(A.K.Dalbehera)
1st Judicial Member

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