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

S.A.No.1964 of 2004-05

(Arising out of the order of the learned ACST, Appellate Unit, Bhubaneswawr, in Appeal case No. AA.195/BH-II/2003-04, disposed of on 30.08.2004)

P r e s e n t: Shri A.K.Das, Chairman. Smt. S.Mishra & Judicial Member-II Shri S.M.Dash, Accounts. Member-III.

M/s.Larsen and Tourbro Ltd.,
133-Surya Nagar, Bhubaneswar. ... Appellant.

- V e r s u s –

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

For the Appellant ... Mr.A.N.Mohanty, Advocate.
For the Respondent ... Mr. D.Behura & Mr. S.K.Pradhan Learned Counsel(CT)

Date of hearing: 22.09.2021 * * * Date of Order:28.10.2021

O R D E R

The present appeal has been preferred assailing the order dated 30.08.2004 passed by the learned Asst. Commissioner of Sales Tax, Bhubaneswar (hereinafter named as First Appellate Authority), in first appeal case No.196/BH-II/03-04, whereby the assessment order of the learned Sales tax Officer, Bhubaneswar II Circle, dated 31.03.2003 has been confirmed.

2. The undisputed facts relevant for the adjudication of the second appeal are that the dealer appellant is a company registered under the Companies Act, 1956 carrying the business of manufacturing and trading of heavy machineries like earth movers, spare parts, cement, photo copiers and fax machines. It is also a

reputed works contractor carrying on business of works contract in different parts of the State. Since the dealer appellant has multiple places of business, it has been allowed by the Commissioner of Commercial Taxes to file consolidated return at Sambalpur-III Circle, Jharsuguda in respect of the transactions under Sambalpur-I Circle, Sambalpur–III Circle, Balasore Circle, Bhadrak, Ganjam-II Circle, Ganjam-III Circle, and Kalahandi Circle as per order No.31331 CT dated 19.06.1999. The dealer appellant who is a New Industrial Unit under IPR,89 has been granted benefits of exemption under Section(7) of the OST Act by Director of Industries which has remained valid up to 09.08.1999.

3. During the years in question, the assessing officer issued notices and intimations to the dealer appellant for production of books of account on 17 occasions and the last chance was given on 16.01.2003 to appear with the books of account on 27.03.2003 on which date the dealer appellant appeared before the assessing authority and produced the copy of assessment order by the assessing officer, Jharsuguda in terms of the turnover in respect of the assessment circles cited supra. So far as the turnover of Bhubaneswar-II Circle is concerned, he produced the books of account consisting of stock transfer receipt, invoices, stock statement, purchasing invoices, purchase register, sales invoice, sales statement, stock inventory, copies of works contract agreement, sub contract payment particulars, statement of tax paid purchases along with way bill account which were stated to have been thoroughly verified. During the course of assessment, the assessing authority found that the dealer is entitled for exemption on account of sale of cement beyond the period 09.09.1999 for the amount Rs.4,95,65,685.00 out of the total claim of exemption for Rs.10,92,93,523.00. Similarly, so far as the transaction on account of works contract is concerned, the appellant had claimed labour

charges at Rs.1,93,49,193.35 which includes receipt of payment of Rs.1,87,25,919.00 towards execution of works contract. Since the claim of labour charges on repairing of machineries amounting to Rs.6,23,234.00 was found to be supported with documents, the same were accepted. The deduction claimed on account of labour and service charges was not allowed for want of proper books of account, the claim of deductions on account of Form IV transactions relating to M/s. Rohit Kumar Das (P) Ltd. and M/s.Rajlaxmi Constructions (P) Ltd. to the tune of Rs.16,57,053.75 was not found by him to be eligible for concessional rate of tax in terms of Entry 48 of the OST Rate Chart. The sum total of assessment is that sales of cement to the tune of Rs.4,95,65,685.00 during the period from 01.10.1999 to 31.03.2000 which has been claimed as exemption sale under IPR, 1989 has been taxed, the claim of deductions on account of payment towards labour charges which is Rs.1,87,25,919.00 has been reduced to 52% of the claim which is calculated at Rs.97,37,478.00. Similarly, the sales against Form IV amounting to Rs.16,97,053.00 being sales to M/s. Rohit Kumar Das (P) Ltd. and M/s.Rajlaxmi Constructions (P) Ltd. has been taxed at the appropriate rate at 8%.

4. These are the basic issues involved in the assessment which were challenged by the dealer appellant in the first appeal. In the appeal case cited supra, the first appellate authority has observed that the dealer appellant had a divisible contract with M/s.NESCO, Balasore which is for supply of materials and for installation of the machinery. It has been noted that a supply contract is valued at Rs.34,54,92,883.00 out of which the appellant had supplied materials worth Rs.95,43,160.00 to M/s.NESCO which includes computers, furniture's, PCC coals as per the quotations. There is another contract for testing and commissioning of electric lines and sub stations of NESCO valued at Rs.22,85,48,083.00 out of which the total work certified by NESCO during 1999-2000 amounts

to Rs.1,87,25,919.00. It has been noted that the dealer appellant had been granted eligibility certificate for grant of exemption for a period of seven years from 10.09.93 to 09.09.2000 under IPR, 1989. The same notification was withdrawn by the Government of Odisha with effect from 01.08.1999. Being aggrieved by the decision of the Government, the dealer had filed a writ petition bearing OJC No.13017 whereby Hon'ble Court has directed not to take any coercive action against the dealer for collection of the dues. So far as the issue of exemption on the sales turnover of cement of Rs.10,92,83,523 is concerned, the FAO found that since the benefits under IPR, 1989 has been withdrawn w.e.f. 01.08.1999, the appellant is only entitled exemption upto 31.07.1999 and the sales turnover of Rs.3,81,95,003.00, being the turnover from 01.08.99 to 09.09.99 is clearly taxable as no tax exemption was available on the grounds stated above. He disallowed payment made to sub contractors. He found no infirmity in the percentage of labour service i.e. 52% awarded by the assessing authority. As a result, he determined the gross turnover at Rs.17,91,76,914.00 and determined the tax due for Rs.94,50,324.00 which represents an enhancement over balance due determined by the Sales Tax Officer at Rs.62,87,760.00.

5. Being aggrieved by the such decision of the first appellate authority, the dealer appellant filed the present appeal assailing the enhancement of gross turnover from Rs.14,58,04,351.00 to Rs.17,91,78,914.00. That he has produced all the relevant records like ledger, cash book, stock book, sale register etc. to the Sales Tax Officer. But the Sales Tax Officer without reference to the eligibility certificate disallowed the exempted sales of cement to the extent of Rs.4,95,65,685.00 and arbitrarily determined deduction on account of labour and services at 52% instead of 100% as claimed by the appellant. That the first appellate authority enhanced the turnover on account of exempted sales of cement by

Rs.2,15,22,835.00 on the plea that the notification granting exemption under IPR,89 had been withdrawn by the Government w.e.f. 01.08.99. Secondly, the TDS for amount of Rs.1,69,844.00 was not accepted by the FAO being the amount deducted from the payment to sub-contractors. As a result, the dealer appellant assails the extra demand of Rs.94,50,327.00 over the admitted tax paid by the appellant at Rs.91,42,315.00.

6. Upon above facts, the appellant grounds his appeal on the aspect that the exemption allowed by DIC was in force on 09.09.2000 and as such, there is no illegality committed by the appellant in not collecting tax from purchases on the sale of the cement. It has been claimed that since the appellant had been granted deferment on payment of sales tax for a period of seven years from the date of commercial production under IPR,89, the same cannot be withdrawn by the Government on the grounds of promissory estoppels as settled by the Hon'ble Supreme Court of India in case of M.P. Sugar Mill Vrs. State of Uttar Pradesh, AIR, 1979 SC, 621 and a catena of judgment which followed it. According to the appellant, withdrawal of IPR exemption by the Government on 30th July,1999 is bad in law and that Section-7 of the OST Act does not permit the State Government to withdraw the exemptions granted under that section. That the dealer appellant is entitled for 100% deductions on account of payment of labour and service charges relying on the issue of judgment of Gannon Dunkerely Vrs. State of Rajasthan and Others reported in 88 STC page 204 (SC) that the TDS certificate worth Rs.1,69,844.00 ought to have been accepted by the appellate authority and Form IV transactions relating to sale of machinery to Rohit kumar Das (P) ltd. and Rajlaxmi Construction (p) Ltd., (supra) should have been taxed under Section-5(1) of the OST Act has been improper exercise of exemption under Entry-48 of the OST Rate chart.

While the matter stood thus, on 01.08.19 the appellant filed additional grounds alleging that the assessment passed under section-12(4) of the OST for the year 1999-2000 by the learned STO, Bhubaneswar-II Circle is barred by limitation in view of the fact that the assessment order passed on 31.03.2003 has been despatched to the appellant on 30.09.2003. The appellant relies on the ratio of judgment passed by the Hon'ble High Court of Odisha in case of Chandrika Sau Vrs. Sales Tax Officer, 81 VST 86 relying on judgment of Hon'ble High Court of Gujurat in case of State of Gujurat Vrs Gandhi Cold drinks House reported in 116 STC 333 by the appellant has shown that the Tribunal has wide powers to decide question of facts as well as law while deciding the appeal filed before it.

7. In view of the above factual background, the following issues need to be decided for the adjudication of the appeal at hand.

(i) Whether, the assessment order dated 31.03.2003 despatched to the appellant on 30.09.2003 is ante-dated and needs to be quashed?

(ii) Whether, the appellant is entitled for exemption under IPR, 89 for the sale of cement after 01.08.1999?

(iii) Whether, the dealer appellant is entitled for deduction on account of payment made to the sub-contractors?

(iv) Whether, the dealer appellant is entitled for deduction at 100% of amount claimed as labour and service charges?

(v) Whether, the dealer appellant is liable for concessional tax on account of Form IV transactions with the works contractor?

Issue No.1-: As stated above, the dealer appellant, at a belated stage at the time of hearing of the appeal has moved an additional ground assailing the assessment order passed on 31.03.2003 and served on 30.09.2003 as ante-dated and liable to be quashed being on the ratio

of judgment of Hon'ble High Court in the case of Chandrika Sau (supra). The Counsel on behalf of the Revenue vehemently urged that the additional ground has been taken after lapse of sixteen years. Relying on the State of Odisha Vrs. Lakhu Bajrang 12 STC 162 Odisha High Court, the Counsel urged that the additional ground should be confined to the grounds already taken. A ground founded on same material facts is not admissible in view of judgment of Supreme Court in case of Gannon Dunkerlay 9 STC 353 SC. The Counsel on behalf of the Revenue pointed out that a threshold question like limitation should not have been taken after lapse of sixteen years. Such issue has not been taken before the first appellate authority, whereby, assessment order has been accepted as such by the appellant. Therefore, the said issue not being been taken before the first appellate authority has become a Dead Horse in law and cannot be brought to life by filing an additional appeal after lapse of sixteen years. Since the assessment order has merged with the appellate order and the appellate order has been assailed in the second appeal, the assessment order is no more available for challenge, since it has been "merged" with the appellate order. The counsel relies on in Gojer Bros. Pvt. Ltd. Vrs. Ratanlal Singh, AIR 1974 SC 1380; and Kunhayammed Vrs. State of Kerala (2000) 119 STC 505 (SC). Relying on the judgment of the High Court in case of Jagadamba Polymers Vrs. State of Odisha, WPC No. 10555 of 2008. The Counsel invites us to following observation of the Court:-

"In the instant case no factual foundation has been laid to substantiate the scandalous allegation of mala fide against the assessing authority that he passed the assessment order ante-dated. More so, the petitioner has not impleaded the officer by name. In view thereof, as the pleadings fall short of taking note of such an issue, we are not inclined to entertain such baseless pleas.

Therefore, the allegations against the assessing authority the order is ante-dated is improper in view of the order of the Hon'ble Court cited supra."

(a) After hearing of the rival contentions of the parties, we have visited the original assessment records and have found that the assessing officer have awarded sixteen adjournments to the dealer appellant to produce books of account to which the dealer appellant had not made any response. Therefore, a last chance was given to him on 16.01.2003 to produce books of account on 27.3.2003 where in books of account as stated supra had been produced by the dealer appellant. It is seen from the records a check sheet of the assessment was produced by the desk clerk on 27.03.2003. On 31.03.2003 a total calculation sheet was prepared by the desk clerk and initialled by Section Officer which was verified by the assessing officer in the sameblue ink, the order has been passed on that date in the order sheet on 31.03.2003. The TDS figures has been verified by STO in the same ink in which the order has been passed on 31.03.2003. The calculation sheet from page 185 to 193 of the assessment record gives an impression that the order has been passed on 31.03.2003, as per the draft calculation sheet placed on 31.03.2003 by the Section Officer. We have seen that there has been reference to PCR figure dated 31.03.2000, 28.03.2000 which could not have been ante-dated. Besides we found that CAG, Odisha has verified the calculation sheet and found it OK. Because of all these factual evidences, we find that the order is made bona fide in the date the order has been passed i.e. on 31.03.2003.

(b) On reference to the records, we find that the instant appeal has been filed on 29.01.2004 before the Sales Tax Tribunal, Odisha as S.A.No.1964 of 2004-05. The column-III of the appeal memo, the date of order of the assessing authority has been mentioned as 31.03.2003 which has been verified by the appellant as

'true to the best of his knowledge and belief'. Now, after lapse of sixteen years the dealer appellant has moved an additional grounds of appeal stating that the impugned order being despatched on 30.09.2003 has been made on that date and not on 31.03.2003. Therefore, the dealer appellant who has verified the dated of assessment order as 31.03.2003 in the appeal memo on the date cited supra, has varied and differed from himself and stated the date of order as 30.09.2003 on the alleged ground. Therefore, on the date of hearing the appellant is speaking in two voices regarding the date of order as 31.03.2003 and 30.09.2003. The dealer appellant has not amended the appeal memo as a result of which it is found that what he has been affirming in the affidavit in the appeal memo, had been denying the in the additional grounds of appeal. There is no discovery of new facts to warrant such conflicting state of affairs. Approbating and reprobating i.e. affirming and denying on the same fact in the same breath is not permissible in law and therefore, we do not find any merit in the allegation of the appellant that the order of the assessment passed sixteen years back is ante-dated.

(c) We have also made reference to the issue of judgment in case of Chandrika Sau Vrs. Sales Tax Officer has relied by the dealer appellant. The relevant ratio of the judgment is quoted below:

"It is true that the order of assessment has been passed within one year from 23.08.2007, i.e. the date of issuance of notice for audit assessment. However, being asked, it was fairly stated by Mr. Kar, Learned Standing Counsel for the Revenue that permission of the Commissioner for completion of the assessment proceeding within a further period of six months as provided under proviso to sub-section (6) of Section 42 of the OVAT Act was not obtained prior to or after passing of the assessment order on 18.06.2008.

In view of the above, the impugned order of assessment passed under Annexure-1 is bad in law."

The ratio of Chandrika Sau cited supra, is founded on provisions of Section 42 of the OVAT Act which had prescribed two types of limitations i.e. inner limitations of six months and outer limitations of further six months upon the permission to be obtained from the Commissioner of Commercial Taxes. In case case of Chandrika Sau, though the order has been passed within the outer limit of one year, it has breached the inner limit of six months by not taking the permission of the Commissioner of Commercial Taxes as provided under the law. However Section-12 of the OST Act, 1947 is not worded similarly to Section-42 of the OVAT Act. There is no power of the Commissioner under Odisha Saes Tax Act,1947 to award limitations. Therefore, the ratio of Chandrika Sau cannot be applied to be facts of the present case. We find that the sweeping charges on the malafide of the officer after lapse of sixteen years particularly when those officers might have retired or have expired long since, is not proper in law as they cannot be made to appear to explain delay. As such, we find no merit in the allegations that the impugned order is ante-dated.

Issue No.2:-The undisputed fact of the case is that the appellant dealer was a new industrial unit under IPR,89 and had been granted the benefits of exemption from payments of sales tax by virtue of the eligibility certificated granted by the DIC authorities. However, the notification granting exemption under IPR, 89 was withdrawn by the Government on 31.08.1999 as a result of which the present appellant along with many others had approached the Hon'ble High Court of Odisha in writ petitions challenging the decision of the Government on the ground of promissory estoppels as propounded by the Hon'ble Supreme Court in M.P. Sugar Mill case(supra). The Hon'ble Court in the batch case in the case of Jagannath Packers Vrs. State and batch

of others (2005) 141 STC 26 had dismissed all these writ petitions, against which the aggrieved parties have approached the Hon'ble Supreme Court of India wherein the Hon'ble Apex Court had upheld the decision of the High Court in case of Jagannath Packers Vrs. State of Orissa (2005) 141 STC 26 supra. In view of this, the issue is no more Res-integra and has been settled by virtue of the order of the Supreme Court of India. The dealer appellant is liable for payment of tax on his entire turnover of the cement from 01.08.1999 as decided by the learned first appellate authority and we do not find good ground to interfere with the decisions of the learned authority.

Issue No.3:-The third question is to be decided whether payment made by the dealer appellant to sub-contractors is eligible for deductions which has been relied by the learned first appellate authority. It is stated that by virtue of forty sixth amendment to the Constitution of Amendment, sale includes transfer of property in goods (whether as good or in some other form) involved in the execution of the works contract. The works contractor may assign part of his contract to sub-contractor who may transfer property to the contractee independently. What is important in case of execution of transfer of property is that sub contractors are to be registered and to be assessable under the law. It is settled by the Supreme Court in the case of Union of India Vrs.Builders Association 73 STC has that the sub contractors are to be entitled from deduction from the turnover of the main contractor as same contract is not be taxed more than once. In view of this we do not agree with the findings of the learned first appellate authority who has viewed that the payments made to the sub-contractors are not entitled for deduction. From records it is found that the dealer appellant has provided a list of sub contractors who are registered entity and tax has been deducted by the deducting authorities and the certificates thereof has been provided by the dealer appellant. In view of this, we hold that

the dealer appellant is entitled for deductions on account of payment made to the sub contractors subject to the condition that those sub contractors are to be registered entities and are to be assessed by their respective authorities in their respective assessment circles. Therefore, we direct that the appellant dealer will appear before the assessing authority within two months from receipt of this order and produce before him all the relevant evidences regarding the actual assessment of the entities in their respective assessment circles.

Issue No.IV-: We have found that the dealer has claimed entire turnover of Rs.1,87,000/- as deduction being the amount spent on labour and service charges, On reference to the agreement of the dealer appellant with NESCO. Balasore, we find that the appellant has entered into a divisible contract with the NESCO, Balasore comprising of (a) supply of goods (b) installation of machinery. So far as sale of goods in item no(a) is concerned, we find neither the state nor the appellant had any dispute on it. The dispute is only in respect of item no.(b) which is civil works relating to installation of machinery. The dealer claims 100% of its turnover as deduction on account of labour and service charges which is accepted at 52% by the assessing officer and upheld as such by the first appellate authority.

On reference to the records, we find that the dealer appellant has not produced the labour payment register before the learned Sales Tax Officer, learned First Appellate Authority or before this forum. And therefore, the claim of 100% deduction on account of labour and service charges is found to be without any basis. The Hon'ble Supreme Court in case of Gannon Dunkerely Vrs. State of Tamil Nadu 88 STC page 204 SC while permitting seven deductions to the works contractor having books of account have authorised the states to formulate a 'tax' rate for works contractor who are not having complete set of books of account. So far as State of Odisha is

concerned, a circular by the Works department formulating the various rates for works contractor held the field till it was adopted in the notification dated 6th Feb, 2010 in SRO No.40/2010. We find that at no point of time and in relation to any work contract, 52% was allowed as deduction on account of labour and service charges. The kind of civil works being undertaken by the dealer appellant comes under item no.2 i.e. earth work, canal work, embankment work etc. which has been assigned as deduction @65%. The word "etc" being an inclusive work will contain the work of the petitioner and therefore, we find it appropriate that the deductions on account of labour services should be at 65% of the value of the turnover instead of 52%. For this reason, to remand the matter to the assessing authority who will compute the deduction @65% on account of labour service and amend the demand notice accordingly.

Issue No.V:- We find that the dealer has made two Form IV transactions with M/s. Rohit Ku. Das (P) Ltd. and M/s. Rajlaxmi Construction (P) Ltd., which is a concessional rate of tax as provided under serial 48 of the taxable list under OST Rules. Serial No.48 and the declarations form IV in the OST Rules is :

"Goods of the class or classes specified in the certificate of registration of the registered dealer purchasing the goods as being intended for use by him in the manufacture or processing or packing of goods for sale or in mining or in the generation or distribution of electricity or any other form of power subject to the production of true declaration by the purchasing registered dealer or his authorised against in Form IV.

Declaration Form IV

(See serial 48)

I/we ___ hereby declare that the goods purchase by me/us in Cash Memo / Bill No.___ dated the ____ from, ___ shall

be used in the manufacture/ processing or packing of goods for sale/ in mining/ generation or distribution of electricity or any other form or power

Dealer/ Authorised Agent

8. A bare reading of the provision will reveal that entry no.48 is meant for manufacturers or processors or miners or for people engaged in generation or distribution of electricity. It is not meant for sellers, traders or works contractor. On reference to the form IV submitted by M/s. Rohit Ku. Das and Rajlaxmi Constructions (P) Ltd. reveals that they have modified the terms of declarations in Form IV by including the terms 'works contract' which is not there in Form IV. Therefore, the Form-IV has been accepted by the dealer appellant is defective on the face of it. The entry 48 requires that the declarations has to be "true". On the contrary, the dealer appellant has accepted an 'untrue' declaration for which somebody else will not be liable for it. The Section 5(1) of the OST Act requires that whenever a registered dealer purchasing goods on declaration misuses the same will be liable for differential tax. In the present case, there is no abuse of declarations by the purchasers as the dealer appellant very well knew that the purchasers are not entitled for concessional rate of tax under Entry 48. Therefore, fifth proviso to sub-section-1 of section-5 of the OST Act cannot be invoked and appellant is liable for balanced tax as he has accepted and untrue declaration from two entities named supra. In this respect, we find no good ground to interfere with the decision of the learned first appellate authority.

9. In view of the above discussions, the appeal is accepted in parts to the extent discussed above and is remanded to the learned assessing authority (i) to examine evidences regarding registration and assessment status of the sub contractors claimed by the present

appellant from his turnover for the relevant period (ii) to enhance the deductions on account of labour and services to 65% from 52% allowed by the learned first appellate authorities and to recompute the tax liability of dealer appellant within a period of three months from the date of receipt of copy of this order.

Dictated and Corrected by me,

Sd/-
(Shri S.M.Dash)
Accounts Member-III.

Sd/-
(Shri S.M.Dash)
Accounts Member-III.

I agree,

Sd/-
(Shri A.K.Das)
Chairman.

I agree,

Sd/-
(Smt. S.Mishra)
Judicial Member-II