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

S.A. No. 397 OF 2007-08

(Arising out of order of the learned ACST, Appellate Unit,
Bhubaneswar in First Appeal Case No. AA. 318/BH-II/2006-07,
disposed of on dated 15.02.2007)

Present: Shri R.K. Pattanaik, Chairman,
Smt. S. Mishra, 2nd Judicial Member, and
Shri P.C. Pathy, Accounts Member-I

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

-Versus-

M/s Anil Agarwal, N-1/93,
IRC Village, Bhubaneswar ... Respondent

For the Appellant : Sri S.K.Pradhan, Additional Standing Counsel (CT)
For the Respondent : Sri A.N. Mohanty, Advocate

Date of hearing: 10.06.2020 ***** Date of order: 26.06.2020

O R D E R

The following are the grounds upon which the appeal stands, such as:

(i) the deduction allowed on labour and service charges vis-a-vis the works contract to be on the higher side;

(ii) the works executed included construction of sub-structure, minor bridges etc. and therefore, the deduction on labour and service charges should be limited to 32%; and

(iii) the supply and stacking of ballast vide agreement No.2024(2/9A/116 and 3/10A/233) is essentially a supply contract and thus not amenable to deduction on labour and service charges;

and on such other grounds, while questioning the legality and judicial propriety of the impugned order dated 15.02.2007 promulgated in First Appeal No.AA-318/BH-II/06-07 by the learned Assistant Commissioner of Sales Tax (Appeal), Puri Range, Bhubaneswar (in short, 'FAA'), who allowed the claim of the respondent in part modifying the assessment order dated 19.09.2006 passed by the learned Sales Tax Officer, Bhubaneswar II Circle, Bhubaneswar (in short, 'AA').

2. Basically the challenge is on the rate of percentage applied towards deduction on labour and service charges which has been enhanced to 55% of the gross receipt as against 32% allowed by the AA and according to the appellant State, considering the nature of agreements and more particularly Agreement No.2024 which is a supply contract, such a higher deduction is impermissible. In fact, on a bare perusal of the record, it is suggested that in absence of books of accounts furnished by the respondent, the AA taking into account the nature of works executed allowed deduction of 32% of the gross receipt towards labour and service charges by placing reliance on the judgment of the Hon'ble Apex Court in the case of Gannon Dunkerley and Co. Vrs. State of Rajasthan reported in 1993 (1) SCC 364, whereas, in appeal, at the instance of the respondent, the rate was enhanced and capped at 55%. According to the appellant State, such higher deduction at 55% on the gross receipt vis-a-vis the labour and service charges

cannot be sustained. Additionally, a ground is put forth which is to the effect that the deduction on such labour and service charges in works contract must be confined to the rates prescribed in Rule 4B of the Orissa Sales Tax Rules, 1947 which has its application with retrospective effect

3. In so far as Rule 4B of the Rules is concerned, it was brought into force with effect from 06.02.2010 vide Odisha Sales Tax (Amendment) Rules, 2010. Under the Rules supra vide sub-Rule 2 thereof, Rule 4B was deemed to have come into force on and from 30th July, 1999 and the remaining provisions with effect from 25th Feb, 2009. So from the above, it is clear and apparent that Rule 4B of the Rules does have its applicability retrospectively from an anterior date i.e. 03.07.1999. As earlier mentioned, the appellant State raised an additional ground to fix the deduction on labour and service charges in conformity and with reference to Rule 4B of the Rules, since it can be applied retrospectively. Such a question is to be examined, as to whether, it is indeed necessary to resort to Rule 4B of the Rules, considering the nature of works undertaken by the respondent and of course, having regard to the manner in which the jurisdiction has been exercised by the authorities below.

4. As per Rule 4B of the Rules, in case of works contract, deduction of the expenditure incurred towards labour and services as provided in Section 5(2)(AA) of the Orissa Sales Tax Act, 1947 (in short, 'the Act') shall be subject to production of evidence in support of such expenses to the satisfaction of the Assessing Authority and in cases, where the dealer executing the works contract fails to produce evidence in support of such expenses incurred, 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 not to be credible, expenses on account of labour and services shall be determined at the rates specified in the table appended thereto. Earlier no such prescribed rate was available and decision on deduction vis-a-vis the labour and service charges was based on best judgment of the Assessing Authority.

5. In fact, in Gannon Dunkerley case (ibid), the Hon'ble Apex Court held and observed that in the event of having no proper accounts maintained, State is to prescribe a formula on the basis of a fixed percentage of the value of the contract as expenses towards labour and service charges and further held that the formula should not differ appreciably from the expenses incurred on the head in the normal circumstances and as it would depend on the nature of works contract and indeed be necessary to prescribe varying scales of deduction on such account for different types of works contract. Later to the above judgment and consequent to the ruling of the Hon'ble Court in Larsen and Toubro Ltd. Vrs. State of Orissa and Others reported in 12 STC 31 (Orissa), the State Government introduced the amendment in the shape of Rule 4B of the Rules and prescribed the rates. However, as per Rule 4B, in case the expenses is not evidenced from the books of accounts, or for failing of the dealer to produce evidence in support thereof, or where such expenses are not ascertainable from the terms and conditions of the contract, or the books of account found to be not credible, under such circumstances, the prescribed rates under the table are to be invoked. As stated earlier, previously, best judgment was used to be applied. It was substituted and

done away with by the prescribed rates under Rule 4B of the Rules. However, the rider remains, such as, in case the books of accounts are not accepted or not maintained or such expenses failed to be ascertained from the terms and conditions of the contract, then only the specified rates under Rule 4B of the Rules are to be applied. As a matter of fact, in the present case, by the time the decisions were rendered by the authorities below, no such prescribed rate was available, which means, best judgment was obviously applied. Now turning to the point in issue, as per the AA, 32% was held proper but according to the FAA, it should be at 55% instead on the deduction from gross receipt towards labour and service charges. The question is, whether, the Tribunal need to overrule the best judgment of the FAA and to direct the deduction to be made in accordance with Rule 4B of the Rules?

6. It is not that straight away the prescribed rates as per Rule 4B of the Rules are to be applied which still depends on the subjective satisfaction of the Assessing Authority in ascertaining the expenses borne on labour and services in works contract considering its terms and conditions. In the case at hand, the FAA, as it appears, to a reasonable extent, has gone through or examined all the agreements and appreciated the nature of works taken up thereunder. The extent of labour engagement in executing the works was brought to the notice of the authorities below by the respondent. Of course, the respondent stated the labour components vis-a-vis the agreements and claimed higher percentage than the rates allowed by the AA, for which, it was challenged and stood enhanced to 55% from 32%. The FAA considered the evidence one by one and finally arrived a

logical conclusion that the deduction should be at 55% of the gross receipt amounting to ₹1,21,29,929/-. According to the Tribunal, if in case best judgment is applied and it is found to be reasonably correct, then it should not be disturbed or tampered with. In any case, a judgment still lies with the AA to ascertain the cost components on labour and services from the terms and conditions of the contract as per Rule 4B of the Rules before proceeding to apply the prescribed rates provided thereunder. A best judgement of an Assessing Authority, if to be overruled, then it has to be on sound principles supported by a logic or reasoning. It is not that such a determination by the best judgment dehors responsibility in making a reasonable assessment considering all the broad probabilities and attended factors involved in works contract. In the instant case, if the prescribed rates are simply applied, it would certainly be less than what has been allowed by the FAA. But, in view of the above discussions, the Tribunal is of the humble opinion that the prescribed rates of Rule 4B of the Rules are not to be applied ignoring the general assessment made by the FAA which is per se justifiable. If the assessment so made by the FAA is found to be not in consonance with the broad principles of law, then in that case, either it should be remitted back or instead the prescribed rates of Rule 4B of the Rules to be extended, while determining the deduction on labour and service charges. As previously mentioned, the entire of the agreements have been looked at and gone through by the FAA and ultimately, having regard to the nature of the works, 55% deduction was allowed from the gross receipt and in the considered opinion of the Tribunal, it does not appear to be exorbitant or grossly on the higher side. In fact the FAA appeared to have made

a sincere attempt to understand the nature of works taken up under the agreements and the cost components on labour and services and finally, on a subjective satisfaction being arrived at and of course after taking into account the fact that the certain materials had been supplied by the contractee free of cost allowed a deduction of 55%. Admittedly, the authorities below found that the respondent had no books of accounts to show the expenses incurred on labour and services. The basis upon which 32% deduction was allowed is not ascertainable from the assessment order dated 19.09.2006 which stands explicitly indicated in the impugned order dated 15.02.2007, in a sense, by enhancing the deduction to 55%, it is made to realise that the nature of works and the extent of labour engagement have been taken cognizance of. In other words, the FAA attempted and to a great extent managed to ascertain the expenses which have apparently been incurred in execution of the works with reference to the terms and conditions of the contract. Though the amount of expenditure by such assessment has not been stated but the extent of cost components vis-a-vis the labour and services which have probably been incurred or expended by the respondent has been ascertained by the FAA. Having regard to the assessment made by the FAA, which is found to be just and reasonable, the Tribunal is of further conclusion that there is no need of applying the prescribed rates provided in Rule 4B of the Rules. As regards the claim of the appellant State that one of the agreements (No.2024) to be a supply contract, the Tribunal is also of the definite conclusion that the type of works undertaken by the respondent was not merely to supply materials but also to engage labour in order to accomplish it. So it can be fairly said that the FAA did

not commit any serious wrong or illegality, in that behalf. Thus, the irresistible conclusion of the Tribunal is that the enhancement @55% from the gross receipt towards labour and service charges is absolutely justified and in accordance with law.

7. Hence, it is ordered.

8. In the result, the appeal stands dismissed, for the reasons indicated herein above. As a logical sequitur, the impugned order dated 15.02.2007 promulgated in Appeal No. 318/BH-II/06-07 is hereby confirmed.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(Smt. S. Mishra)
2nd Judicial Member

I agree, Sd/-
(P.C. Pathy)
Accounts Member-I