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

S.A.No.469 of 2005-06

(Arising out of the order of the learned ACST, Puri Range, Bhubaneswawr, in Appeal case No. AA.163/BH-II/2004-05, disposed of on 15.02.2005)

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.,
559, Lewis Road, Annapurna Complex,
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 15.02.2005 passed by the learned Asst. Commissioner of Sales Tax, Puri Range, Bhubaneswar (hereinafter named as First Appellate Authority), in first appeal case No.163/BB.II/2004-05, whereby the assessment order of the learned Sales tax Officer, Bhubaneswar II Circle, dated 27.03.2004 has been partly 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.

3. In response to the notice issued under Section-12(4) of the OST Act, the dealer appellant appeared before the assessing officer and produced books of accounts consisting of stock transfer receipt, stock statement, purchase invoices, purchase registers, sale bills, sale register, copies of agreement of works contract, supply contract, statement showing payment to sub-contractors and of TDS certificates. The said books of accounts has been stated to have been thoroughly verified.

In the assessment order, it has been observed that the present dealer appellant has two basic accounts namely, manufacture and sale of earth moving equipments (2) execution of works contract in respect of several principals. From the assessment order, it is revealed that there is no dispute either by the State or by the dealer appellant regarding the sales turnover of earth moving equipments. The controversy is only relatable to turnover on accounts of works contract particularly in relation to deductions to be granted under the category of labour and service charges. In the assessment order, the dealer has claimed deduction to the tune of Rs.9,05,20,876.00 which is relatable to execution of works contract. It has been stated that the dealer has entered into agreement with NESCO, CESCO, WESCO and M/s. Infosys for the purpose of execution of works contract. He has received payment of

Rs.10,80,99,738.43 out of which he has claimed deduction of Rs.9,05,20,876.00 towards labour and service charges and payments to sub contractors. In support of the deduction, he had furnished a statement showing service charges on 95 items including consumables, small tools, spares, pol, lease rental, training expenses, medical advance, food expenses, travelling allowance etc. Purchase of goods, periodicals, entertainment charges, car lease rentals etc. After perusing the records, the GTO was computed at Rs.14,60,96,540.00 from which following deduction were allowed.

i.	Labour and services charges has been taken @42% total value of works contract executed and computed at	Rs.4,43,51,966.16
ii.	Receipt of transport charges	Rs. 24,99,819.00
iii.	1st. point tax paid steel	Rs. 3,84,698.00
iv.	Collection of service charges on machinery	Rs. 10,54,112.66
v.	O.S.T. collected	Rs. 18,69,704.26

Taxable turnover determined at Rs.9,59,36,139.79.

As a result, taxable turnover had been determined at Rs.9,59,36,139.59 and tax has been calculated at Rs.69,32,242.92. After giving credit of TDS and sales tax collected as well as set off under Entry Tax Act, the demand was raised for Rs.28,20,527.00.

4. Being aggrieved with the order of assessment, the dealer filed the first appeal (supra) before the first appellate authority under Section 23(1) of the OST Act assailing the order of the assessing officer in so far as he had granted less deduction on account of labour and service at 42% being Rs.4,43,51,966. That the assessing officer has allowed less TDS that as claimed as credit and taxing the opening balance of the cement which has already been taxed by the STO, Jharsuguda where the dealer has been permitted to file a consolidated return. The first appellate authority found that the appellant has received a gross payment of Rs.10,80,99,738.43 in

respect of works contract from different principal out of which he has claimed deductions of Rs.9,72,91,897.00 towards labour and service charges and payment to sub-contractors. As regards deduction claimed by the appellant on account of labour and services amounting to Rs.9,72,91,897.00, the first appellate authority observed that the claims of deductions are not supported by proper documents and that some of the deductions claimed are not relatable to execution of works contract but to the establishment of the dealer appellant which carries the business of manufacturing and trading. Therefore, the learned first appellate authority upheld the decision of the assessing officer who had granted deduction on account of payment of labour and service chargers a@42%.

So far as claim of the appellant for deductions on account of payment to sub-contractors, the FAO observed that the appellant could not produce any evidence to the effect that property in goods have been transferred by the sub-contractors to their respective principals. Therefore, he declined deductions on account of payment to sub- contractors on the grounds stated above. The FAO allowed deduction of Rs.5,13,221.00 under Rule-36 of the OST Rules which has been reflected in the PCR of Bhubaneswar II Circle, BBSR. As a result, the decisions of the Sales Tax Officer, so far as relatable to works contract was upheld.

5. Being aggrieved by the decision of the first appellate authority, the present appeal has been filed on 28.05.2005 being no.469 of 2005-06, the appellant is mostly aggrieved by less deduction on account of labour and services at 42% of the gross turnover without assigning contract wise reason for arriving at such a conclusion that he has produced the contract and other details relating to assessment and appeal proceeding which were taken care of. He relies on the pronouncement of the Tribunal in S.A.No.2165 to 2170 of 1989-90 dated 27.01.1995 which held that –

"The following claims of deduction as can be evidenced through records and other evidence with reference to the contractual obligations entered into by the appellant contract or with the contractees shall be considered by the assessing officer.-

(i) Value of steel, cement and other materials supplied by the contractee/customer on cost recovery basis.
(ii) Value of steel, cement and other materials supplied by the contractees/customer as free issue.
(iii) Value of goods purchased inside the State of Orissa on payment of OST and transferred to the contractee in the execution of the contract.
(iv) Value of goods purchased inside the State of Orissa or outside the State of Orissa and used in the execution of the contract but no transferred to the contractee like shuttering materials, tool and tackles, electricity, power and fuel etc.
(v) Charges paid for transporting of construction equipments and construction materials from different places to worksite.
(vi) Charges for maintenance of construction equipments.
(vii) Deductions made by contractee from contractors bills towards electricity water etc.
(viii) Labour charges for execution of works.
(ix) Amounts paid to sub-contractor for labour and services.
(x) Service charges including site office expenses, travelling, conveyancing and administration expenses.
(xi) Overheads of Head office proportionate to this contract.
(xii) Charges incurred by contractor for planning, designing and architects fees.
(xiii) Hire charges for hiring of machinery, if any
(xiv) Depreciation on machinery used in the work.

Secondly, the appellant seeks deductions relating to payment to sub-contractor amounting to Rs.3,16,71,561.00 which

has been permitted by the ratio of the judgment in the case of Gannon Dunkelay and Co. Vrs. State of Rajasthan (1993) 88 STC 204 SC. The appellant having effected TDS against payment to the sub-contractors and having deposited with the same to the learned Sales Tax Officer has claimed to be entitled to get deductions as per judgment of Sales Tax Tribunal in the case of Tata Robin Fledger vrs. State of Odisha in S.A.No.1357 and 1358 of 1992-93. Thirdly, the appellant seeks deduction of Rs.38,46,504.00 under Section 8 of the OST Act which were tax paid goods transferred in execution of works contract. The appellant relies on BHEL Vrs. Union of India 71 STC at page 25.

6. 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 2000-01 by the learned STO, Bhubaneswar-II Circle is barred by limitation in view of the fact that the assessment order passed on 27.03.2004 has been despatched to the appellant on 23.06.2004 after a lapse of two months and 26 days and therefore, the order has not been passed on 27.03.2004 but on 23.06.2004 and the assessment is liable to be quashed being ante-dated. 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 27.03.2004 despatched to the appellant on 23.06.2004 is ante-dated and needs to be quashed?

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

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

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 27.03.2004and served on 23.06.2004 as ante-dated and liable to be quashed 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 ground 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) On reference to the records, we find that the assessment order dated 27.03.2004 has been despatched to the appellant on 23.06.2004 after a lapse of two months and 26 days which is not an inordinate delay to warrant the allegation that the impugned assessment order has been intentionally ante-dated. Further it is found that that the instant appeal has been filed on 28.05.2005 as S.A.No.469 of 2005-06, wherein apropos serial no.3, the date of order of the assessing authority has been mentioned as 27.03.2004 and has been verified by the appellant as true and correct by affidavit. Now, after lapse of sixteen years the dealer appellant has moved an additional grounds of appeal stating that the impugned order being despatched on 23.06.2004 has been made on that date and not on 27.03.2004. Therefore, the dealer appellant who has verified the date of assessment order as 27.03.2004 in the appeal memo on the date cited supra, has varied and differed from himself and stated the date of order as 23.06.2004 on the alleged ground. Therefore, on the date of hearing the appellant is speaking in two

voices regarding the date of order as 27.03.2004 and 23.06.2004. 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 and had been denying the same 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 grant 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 second question is to be decided whether claim of deductions amounting to Rs.3,16,71,561.00 on account of payment to registered sub-contractors ought to have been allowed by the 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. In view of this, we hold that the dealer appellant is entitled for deductions on account of payment, if any, 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 sub-contracts in their respective assessment circles in order to obtain deductions as will arise there from.

Issue No.3-: We have found that the dealer has received a total amount of Rs.10,80,99,738.43 towards execution of works contract out of which Rs.9,72,91,897.00 has been claimed as deductions towards labour and service charges and payment to sub-contractors. From the assessment records we have noticed that the dealer has claimed at page no.3 of the order that the appellant has claimed deductions of Rs.9,05,20,876.00 on account of labour and service charge relatable to trading account. Since, the dealer operates manufacturing, trading and works contract account , the labour and service charges should have been separately shown as relatable to works contract account to warrant deduction under it. Since, the appellant operates three activities at the same time, the amounts spend on account of labour and service charges should be proved as such before the assessing officer. We found that at no stage the dealer appellant could prove that labour and services are relatable to works contract account and not to the manufacturing and trading account. Therefore, we direct that if the appellant dealer can prove with certainty that amount claimed as deduction on labour and services are relatable to works contract and not to the manufacturing and trading activities such claim can be verified by the Sales Tax Officer with relation to original records and a decision be taken accordingly. So far as claim for deductions under Section 8 of the OST Act is concerned, same is to be made before the Sales Tax Officer

who will go through the original tax paid invoices and if found correct will allow deduction under section 8 of the OST Act.

8. In view of the above discussions, we find it appropriate to remand the matter to lower forum with direction to the dealer appellant to produce the relevant evidence relating to deductions on account of payment made to the sub-contractors, deductions on account of first point tax paid goods, and the evidence of deduction on account of labour and services relatable to works contract account within 90 days of receipt 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