

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

S.A. No. 94/2010-11

(Arising out of the order of the learned JCST, Bhubaneswar Range,
Bhubaneswar in first appeal Case No. AA2/BHII/09-10 disposed of on
14.10.2009)

Present :- Shri A.K. Dalbehera, Smt. Sweta Mishra, & Shri S. Mishra,
1st Judicial Member 2nd Judicial Member Accounts Member-II.

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

..... Appellant.

-Vrs.-

M/s Padma Charan Patra,
A/97, Saheednagar, Bhubaneswar.

..... Respondent.

For the Appellant:

: Mr. D. Behura, S.C.(C.T.)

For the Respondent:

: None.

Date of Hearing : 12.04.2021

Date of Order : 16.04.2021

ORDER

The present appeal of the State-appellant has been directed against the impugned appeal order of the learned Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar (herein after referred to as ld. FAA) passed on 14.10.2009 in Sales Tax Appeal No.AA2/BH-II/2009-10 who reduced the refundable amount of Rs.16,49,510.00 raised by learned Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar (herein after referred to as LAO) in his assessment order passed on 31.03.2008 u/s. 12(4) of OST Act for the assessment year 2004-05 to Rs.13,58,540.00.

2. Being aggrieved by the impugned order of the ld. FAA, the State has preferred second appeal before the Tribunal contending that the first appeal order is illegal, arbitrary and bad in law. The State has challenged the aforesaid order on the following grounds:-

“i. That the orders of Ld. 1st Appellate Authority is erroneous, arbitrary and bad in law.

ii. That, Ld. 1st Appellate forum is not justified in allowing deduction towards L & S @ 52% on road work which should have been restricted to 45%.

iii. That, Ld. 1st Appellate forum is not justified in allowing credit on Xerox copy of TDS Certificate furnished.

iv. That, deduction towards L & S should be limited to 45% on road work as per the notification of govt. in finance deptt. Issued vide SRO No.40/2010 Dt. 8th Feb 2010.”

3. The brief fact of the case is as follows:-

i. That, in the instant case the dealer-respondent is a works contractor executing works under different divisional authorities.

ii That, at the assessment stage, the LAO, after examining books of account along with other documents produced, observed as follows:-

(a) That, during the impugned period, the dealer has executed works under different divisions and has maintained purchase account, TDS Certificates obtained, copy of work orders etc,. Since, he has not maintained any account towards labour and service charges etc., he completed the assessment to the best of his judgment.

(b) That, he observed that the dealer could be able to produce TDS Certificates for Rs.97,46,690.00 against work value of Rs.29,91,81,746.00 but failed to produce such certificate for Rs.2,98,705.00 against work value of Rs.75,09,183.00. Accordingly, he determined the gross value received at Rs.30,66,90,929.00 in execution of earth work, road work and bridge work under different Govt. Divisions. However, against the claim of deductions towards labour and service charges at 100%, 60% and 40% towards execution of earth work for Rs.2,96,49,162.00, road work for Rs.20,02,92,442.00 and bridge work for Rs.7,67,49,325.00 respectively, the LAO allowed such deductions at 88%, 52%

and 35% respectively taking into consideration the nature of work executed. He further observed that the dealer has made taxable purchase of bitumen, LDO, Cement worth of Rs.2,51,31,461.00 from outside the State and tax paid goods of Rs.6,32,46,971.00 from within the State towards execution of works contract. Accordingly, after allowing deductions towards labour and service charges and purchase tax paid goods, he determined the TTO at Rs.8,63,38,361.81 which he taxed at different rates as per different materials used and work charge value resulting in a total demand of Rs.80,91,179.95 including surcharge against which he allowed TDS of Rs.97,40,690.00 u/r. 37 of OST Rules resulting in a refund of Rs.16,49,510.00.

4. That, being aggrieved by the order of assessment, the dealer-appellant preferred first appeal before the Id. FAA who after due examination of the case, observed as follows:-

(a) That, he accepted the gross receipt filed by the dealer at assessment at Rs.30,66,90,929.00. However, since the dealer filed two more TDS Certificates he allowed these with total credit towards TDS which he determined at Rs.1,00,39,401.00.

(b) That, on examination of claim towards earth work valued Rs.2,96,49,162.00, he observed that the respective work orders relate to improvement of road and CD work relating to PMGSY under Rural Work Divisions of Ganjam-I, Ganjam-II and Kendrapara that involves materials and accordingly allowed 52% deductions towards labour and service charges from gross receipt against 88% as determined by the LAO in his order.

(c) That, apart from allowing deductions towards labour and service charges, first point tax paid goods purchases, he further allowed the taxable goods purchases from the gross receipt and determined the TTO at Rs.7,71,28,509.30 which he taxed @8% the rate applicable to works contract alongwith surcharge, resulting in a refund of Rs.13,58,540.00.

5. Now, being aggrieved by the order of Id. FAA, the State has come up before the Tribunal assailing the said order as unjust, improper and bad in law.

The only factual dispute involved in this case warranting proper adjudication is :

“whether in the facts and circumstances of the case, the Id. FAA is justified in determining refund of Rs.13,58,540.00 for the material period against the contention of the State-appellant that such order is illegal, arbitrary and bad in law as per grounds of appeal and additional grounds of appeal filed?”

6. That, in spite of sufficient opportunities availed by the dealer-respondent, he failed to appear in appeal proceeding without any reasonable cause. Accordingly, in the absence of the dealer-appellant with no cross objection filed, the case was heard and disposed of on ex-parte basing on the material available in the record and hearing from the learned Standing Counsel for Revenue-appellant.

7. In course of hearing, Mr. D. Behura, Id. Standing Counsel for Revenue vehemently argued against the order of Id. FAA towards excess deductions allowed for labour and service charges from the gross receipt which was against Rule 4B of OST Rules inserted vide FD notification dtd.06.02.2010 bearing SRO NO.40/2010 effective from 30.07.1999 and introduced by the State Govt. pursuant to judgment of Hon'ble High Court of Orissa in Larsen & Toubro, 12 STC 31 (Ori.). Accordingly, he submitted the said notification.

8. It is now pertinent to quote the relevant provision of the Statute to determine the taxable turnover in case or works contract.

Section 5(2)(AA)

“Notwithstanding anything contained in sub-section (2)(A) “Taxable turnover” in respect of,-

- (i) 'works contract' shall be deemed to be the gross value received or receivable by a dealer for carrying out such contract, less the amount of labour charges and service charges incurred for the execution of this contract.....”

However, in case of Gannon Dunkerley & Co. and Others Vrs. State of Rajasthan reported in (1993) 88 STC 204 (SC), the Hon'ble Apex Court held that the value of goods which are not taxable in view of sec 3, 4 and 5 of CST Act and goods covered by Sec. 14 and 15 of CST Act, as well as goods which are exempted from tax under the Sales Tax Legislation of the State are to be excluded from the amount received by the works contractor from levy of sales tax. Accordingly, the Id. FAA has rightly allowed deductions towards purchase of materials used in works contract towards determining the taxable turnover.

- (b) That, however both the fora below have erred in allowing deductions towards labour and service charges from the gross bill in the light of insertion of Rule 4B of OST Rules Vide notification dtd.06.02.2010 effective from 30.07.1999. In the said Rule, the following percentage of labour and service charges have been allowed in absence of books of account or non-credible books of account maintained.

Sl. No.	Nature of the Works contract	Percentage of labour, service and like charges of the total value of the works
(1)	(2)	(3)
1	Structural Works	35%
2	Earth Work, Canal Work Embankment Work etc.	65%
3	Bridge Work	35%
4	Building Work	35%
5	Road Work	45%

As such, it now requires re-computation of tax in the light of Rule 4B of OST Rules.

9. In the result, the appeal order passed by ld. FAA is set-aside and the case is remanded to the LAO to make re-computation of tax in the light of above provision of the Statute and pass reasonable order accordingly after giving the dealer a reasonable opportunity of being heard. He may take into consideration other relevant facts submitted by the dealer at the time of hearing. He may complete the reassessment preferably within 3 months of receipt of this order.

The case is disposed of accordingly.

Dictated & Corrected by me.

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

I agree,

I agree,

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

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

Sd/-
(Sweta Mishra)
2nd Judicial Member.