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

S.A. No. 1487 of 2006-07

(Arising out of order of the learned ACST, Sambalpur Range, Sambalpur in First Appeal Case No. AA- 151 (SAI) of 2006-07, disposed of on dated 18.07.2006)

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. Nirman Construction, Govindtola, Sambalpur ... Respondent

For the Appellant : Sri S.K. Pradhan, Additional Standing Counsel (CT)
For the Respondent : Mrs. K. Roy Choudhury, Advocate

Date of hearing: 16.07.2020 ***** Date of order: 13.08.2020

O R D E R

State is in appeal in terms of Section 23(3) of the Odisha Sales Tax Act, 1947 (in short, 'the Act') questioning the legality of the impugned order dated 18.07.2006 promulgated in Appeal No. AA- 151 (SAI) of 2006-07 by the learned Assistant Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, 'FAA') for the year 2002-03 confirming the assessment order dated 30.03.2006 passed by the Sales Tax Officer, Sambalpur-I Circle, Sambalpur (in short, 'AA') on the grounds

inter alia that the deduction on the heads of road work, earth work and construction to be on higher side, especially, when the respondent dealer did not maintain accounts on labour and service charges and that apart, it is to be revised in view of Rule 4-B of the Odisha Sales Tax Rules, 1947 (in short, 'the Rules') applied retrospectively w.e.f. 30.07.1999.

2. Briefly, the respondent dealer is a works contractor and during the period under consideration, it had undertaken execution of irrigation and canal work and improvement to road and considering the nature of works, 80% deduction towards labour and service charges with respect to irrigation and canal work and 65% vis-a-vis the improvement to road was allowed. Being aggrieved, respondent dealer filed appeal under Section 23(1) of the Act, but it stood dismissed. At the present, the State is before the Tribunal challenging the deductions allowed on labour and service charges vis-a-vis different heads alleging that it is exorbitant. An additional ground dated 10.12.2019 is raised to apply the percentage of deductions permissible as per Rule 4-B of the Rules which was introduced by virtue of Odisha Sales Tax (Amendment) Rules, 2010 with retrospectivity i.e. from 30.07.1999.

3. The learned Additional Standing Counsel (CT) justified reduction in the deduction on labour and service charges in absence of books of account maintained by the respondent dealer but assailed it to be on higher side without any justifiable ground. Contrary, the learned Counsel for the respondent raised

couple of points one including the jurisdiction to entertain the appeal under Section 23(3) of the Act at the instance of the State. It is also contended that the State had only the remedy left by way of revision and even on merit, the alleged deductions are not to be reduced and in so far as Rule 4-B of the Rules is concerned, the findings of the authorities below cannot be shaken and stirred up, morefully when, considerable period has passed by, in the meantime and for the fact that by the time the impugned assessment was made, it had not come into force though made applicable with retrospective effect from 1999.

4. The above aspects are to be dealt with by the Tribunal in chronology. The point on jurisdiction is raised by the respondent dealer primarily on the following grounds, such as, a gross error of law has been committed in admitting the present appeal, particularly, for the reason that the Revenue had no grievance or objection to the assessment made which stood merged with the impugned order. It is claimed that the appeal in present form is not maintainable and the only recourse which was available was by way of revision. As understood by the Tribunal, it is contended that when there was no challenge to the decisions of the authorities below, how the State can appeal against the impugned assessment. In other words, State can be said to have no grievance or objection which could be entertained in appeal. The learned Additional Standing Counsel (CT) urged that such a contention is totally misconceived. It is contended that State has come forward in appeal against the order of Commissioner of Sales Tax and as

such, it is maintainable in law. On a cursory glance of Section 23 of the Act, it would appear that an appeal lies under sub-section (3) thereof at the behest of a dealer or the State Government, as the case may be. In so far as power of revision is concerned, it is prescribed in sub-section (4)(a) of Section 23 of the Act against which parties can appeal either to the High Court or to the Commissioner in terms of clause (c) thereof. Presently, no such jurisdiction under Section 23(4)(a) of the Act has been exercised by the Commissioner of Sales Tax. Had it been so, then appeal would have lied to the High Court and not to the Tribunal. As regards the non-maintainability of appeal, it is not sustainable simply for the fact that the State in fact has had no scope or occasion statutorily to challenge the assessment made by the authorities below. The assessment so made by the AA was subjected to challenge under Section 23(1) of the Act where the State had no real scope to file cross-objection. As a matter of fact, under sub-section (3) of Section 23 of the Act, the State Government gets the opportunity to appeal against the decision of the FAA. Regarding suo motu revision and exercise of power, as is claimed by the learned Counsel for the respondent dealer, it can only be by the Commissioner in terms of sub-section (4)(a) of Section 23 of the Act. In fact, there is no such provision of suo motu revision against an order of appeal by the Commissioner contemplated under the Act. Thus, the conclusion of the Tribunal is that appeal at the instance of the State is maintainable. In this connection, an earlier order of the Tribunal in S.A. No. 478 of 2007-08 decided on 19.12.2018 is cited from the side of

the respondent dealer while raising the question of jurisdiction. The order supra is on distinguishable facts, inasmuch as, the Tribunal while dealing with the point of jurisdiction held that when deduction towards labour and service charges was never an issue before the forums below, it could not have been agitated by the State in appeal since the settled position of law is that a party cannot be put to a position where he was not before preferring the appeal. In the present case, such is not the fact situation, rather, the question of deduction on labour and service charges has been the bone of contention between the parties from the very inception. So, the ultimate conclusion of the Tribunal on the jurisdiction point is that the appeal is entertainable in law.

5. Now, the next consideration is, whether, the deductions towards labour and service charges have been rightly allowed by the authorities below as against the different works undertaken by the respondent dealer. In so far as Rule 4-B of the Rules is concerned, it was brought into force on 06.02.2010 but with retrospective effect on and from 30.07.1999 vide Odisha Sales Tax (Amendment) Rules, 2010. Under sub-rule (2), Rule 4-B was deemed to have come into force retrospectively, whereas, the remaining provision w.e.f. 25.02.2009. As earlier discussed, an additional ground to fix the reduction on labour and service charges in accordance with Rule 4-B of the Rules has been raised by the State. On a perusal of Rule 4-B, specified percentage lower than the deductions allowed to the respondent dealer is prescribed thereunder. As per Rule 4-B of the Rules, in case of

works contract, deduction towards labour and service charges as provided in Section 5(2)(AA) of the Act shall be subject to production of evidence in support of such expenses to the satisfaction of the assessing authority and failing to produce evidence in support thereof, or if such expenses are not ascertainable from the terms and conditions of the contract or the books of account maintained for the purpose are found not to be credible, then, it shall be determined at the rates specified in the table appended thereto. Earlier no such prescribed rate was available and decision on deductions vis-a-vis labour and service charges was based on best judgment of the assessing authority. The present subject matter regarding the percentage of deduction and its application had in fact its origin later to the decision of the Hon'ble Apex Court in the case Gannon Dunkerley & Co. and others Vs. State of Rajasthan and others reported in (1993) 88 STC 204 (SC) and introduction of Rule 4-B in the Act pursuant to the ruling of the Hon'ble Court in Larson & Toubro Vs. State of Orissa and others: 12 VST 31 (Orissa).

6. Admittedly, in the case at hand, there was no accounts furnished by the respondent dealer on the head of labour and service charges and thus, impugned assessment was made to the best of judgment of the AA which was subsequently confirmed by the FAA. The best judgment assessment is to be considered taking into account the nature of the works contract. The AA, as it seems, had the occasion to look at the nature of the contractual work being undertaken by the respondent dealer and having regard to it applied the

deductions at the rate of 80% and 65% towards labour and service charges in relation to irrigation and canal works and work of improvement to road respectively. The FAA has also considered the fact that the execution of works involved materials which was only about 2% of the receipt and balance to be the margin of profit and towards labour and service charges. The FAA on the subjective satisfaction being arrived at that the case was carefully examined by the AA with payment particulars finally arrived at a conclusion that the deductions to have been rightly allowed. It is well known that best judgment is nothing but a guess work by referring to the nature of works executed and considering the attending factors. If it is not borne out of such consideration, definitely, it can be susceptible to challenge. At the relevant point of time, the authorities below have had the access to the facts and circumstance of the case and referring to the materials on record and looking at the nature of the works contract and after its careful examination having arrived at a decision on deductions towards labour and service charges, the Tribunal does not find any justifiable ground to interfere with it. There is no ground for that matter to apply Rule 4-B when the exercise of jurisdiction by the assessing authority does not suffer from any legal infirmity. A decision based on best judgment is not to be carelessly rejected without any reasonable basis and logic. No doubt, Rule 4-B of the Rules prescribes lower percentage of deductions, but then, in absence of any illegality in the jurisdiction being exercised by the authorities below, the Tribunal arrives at an inescapable

conclusion that it is not a fit case to disturb the impugned order dated 18.07.2006 confirming the assessment. It is apt to mention here that on couple of earlier occasions, the Tribunal in S.A. Nos. 550 & 551 of 2003-04, S.A. No. 1490 of 2006-07 and S.A. No. 397 of 2007-08 expressed similar view and declined to interfere with the findings on deductions towards labour and service charges. Thus, the end result is that the appeal at the behest of the State must have to fail.

7. Hence, it is ordered.

8. In the result, the appeal stands dismissed. Consequently, the impugned order dated 18.07.2006 promulgated in Appeal No. AA- 151 (SAI) of 2006-07 is hereby affirmed.

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