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

S.A. No. 189 (VAT) OF 2014-15

(Arising out of order of the learned JCST, Puri Range,
Puri in First Appeal Case No. AA- 01/VAT/Puri/2014-15,
disposed of on dated 31.05.2014)

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. Jintendra Biswal,
Gokulpur, Kakatpur, Puri ... Respondent

For the Appellant : Sri M.S. Raman, ASC (CT)
For the Respondent : Sri B.B. Panda, Advocate

Date of hearing: 06.08.2020 ***** Date of order: 01.09.2020

O R D E R

Instant appeal under Section 78(1) of the Odisha Value Added Tax Act, 2004 (in short, 'the Act') at the instance of the State is directed against the impugned order dated 31.05.2014 promulgated in Appeal No. AA– 01/VAT/ Puri/2014-15 by the learned Joint Commissioner of Sales Tax, Puri Range, Puri (in short, 'FAA'), who set aside the order of assessment dated 30.08.2013 in part passed by the learned Sales Tax Officer, Puri Circle, Puri (in short, 'AA') under Section 42 of the Act for the assessment period 01.04.2008 to 31.03.2012 on the grounds inter alia that the decision vis-a-vis rates of tax and its proportionality is

completely erroneous and arbitrary in juxtaposition to the materials on record and therefore, it deserves to be interfered with to the extent aforesaid.

2. As revealed from the record, assessment under Section 42 of the Act was made by the AA with respect to the respondent dealer for the period under assessment. The respondent dealer is a works contractor. In fact, during the year under audit, the respondent dealer was found to have executed road works under PMGSY. The AVR was confronted to the respondent dealer by the AA. Having regard to the materials on record read with the AVR, the AA passed the order of assessment dated 30.08.2013, later to which, the respondent dealer being dissatisfied preferred appeal under Section 77(1) of the Act on the grounds, such as, the amount deducted towards labour and service charges as abysmally low considering the nature of works executed; ITC of ₹2,64,989.14 was not allowed even if valid invoices were produced in support thereof; and disproportionate distribution of rates of tax to the taxable turnover resulting in financial loss. The FAA reappreciated the materials on record and then, partly allowed the appeal. In fact, the deduction on labour and service charges which was @ 48% was capped at 38% of gross receipt on the ground of composite nature of the road works undertaken by the respondent dealer, but disturbed the proportionate distribution of rates of tax at 4%, 12.5% and 13.5% vis-a-vis the taxable turnover, inasmuch as, more share was earmarked and included under 4% tax having regard to the fact that such distribution would be reasonable on the satisfaction that most of the materials used for the work fell in the category of 4%, since there was limited construction of concrete roads and culverts. The finding of the FAA with respect to

the distribution of rates of tax vis-a-vis the taxable turnover has apparently forced the appellant State to prefer the present appeal by claiming that it is erroneous and arbitrary. The respondent dealer justified the decision of the FAA with regard to the applicability of rates of tax as against the taxable turnover, which, in fact, modified the finding of the AA in respect thereof. The question is, whether, the rates of tax as having been applied to the taxable turnover and so determined by the FAA is sustainable or not?

3. The respondent dealer, however, questioned the deduction on labour and service charges with respect to the construction of roads and as such, it raised a cross-objection in terms of Section 78(2) of the Act by contending that the FAA failed to consider it as per and in accordance with Rule 6 of the OVAT Rules, 2005 (in short, 'the Rules') which prescribes a deduction of 50% as per the Appendix thereof. It is alleged that the FAA completely lost sight of the provisions of Rule 6 of the Rules and the conditions thereunder, while applying the rate of deduction with respect to labour and service charges vis-a-vis construction of roads. In fact, the AA allowed 48% deduction which was reduced to 38% of gross receipt by the FAA referring to the composite nature of work which included construction of concrete roads and culverts. According to the respondent dealer, there is no uniformity applied while invoking Rule 6 of the Rules read with the Appendix and that apart, no ground really existed for a further reduction @ 38% deduction from gross receipt on such labour and service component vis-a-vis the construction of road works which ought to have been 50%, instead. The aforesaid aspect is also to be looked into by the Tribunal and to render a decision thereon.

4. As it appears from record, the cross-objection by the respondent dealer has been filed with some amount of delay. According to the respondent dealer, notice for filing it was served upon him on 16.03.2016 and it was to be filed on or before 14.05.2016 and as such, a delay of 18 days occasioned, which, in the interest of justice is required to be condoned. In support of such delay, the respondent dealer produced a copy of medical certificate covering a period from 10.05.2016 to 03.06.2016. A formal objection is raised as to condonation of delay from the side of the appellant State. The Tribunal considering the medical certificate dated 03.06.2016 which indicates that the respondent dealer was sick and under treatment for Enteric Fever from 10.05.2016 to 03.06.2016 and without doubting its authenticity and genuineness and in absence of any serious objection from the appellant State and having regard to the settled principles of law to the effect that delay should normally be condoned, unless and until, party applying for it is found to be culpably negligent affecting the interest of the adversary, the Tribunal is of the humble opinion that such delay of 18 days ought to be condoned in order to advance the cause of justice. Accordingly, it is ordered.

5. As to the contention of the appellant State, let us examine as to whether, there is any serious discrepancy or error or infirmity with regard to the distribution of rates of tax to the taxable turnover, as has been alleged. The learned ASC (CT) contended that the FAA did commit an error and included a big share under 4% tax rate dismantling the ratio which was applied by AA having regard to the composite nature of the road work executed by the respondent dealer. it is rather alleged that the authorities below have applied a lesser rate of tax i.e. 4% in

far excess of the volume of corresponding purchases made, as much of the turnover taxed at 4% ought to have been at 12.5% or 13.5%. Thus, the challenge is as to the disproportionate application of rates of tax. As per the learned Counsel for the respondent dealer, the FAA did approach correctly and apportioned more share of the taxable turnover at 4%, inasmuch as, the AA, for no apparent reason, applied 45% of the taxable turnover under 4% as well as 12.5% rates of tax with 10% thereof under 13.5% tax, which was grossly inappropriate. It is also contended that the FAA assigned specific reason while apportioning the taxable turnover vis-a-vis the tax rates and therefore, it is not to be disturbed by the Tribunal. It is, however, contended that the extent of materials in respect of which tax invoices could not be made available but deduction on royalty for its procurement submitted were not added by the both the authorities below to the tax group @ 4%. Nonetheless, as per the respondent dealer, the proportionality in tax rates distribution, as has been directed by the FAA, is justified in contrast to the claim of the appellant State.

6. On a bare perusal of the order of assessment, it seems that the AA, though, considered the materials on record and the nature of work, almost equally distributed amongst gross receipt in 4% and 12.5% rates of tax, which has been held as disproportionate by the FAA on the ground that the road works involved utilization of materials, which are in majority falls in 4% tax rate group. The learned Counsel for the respondent dealer produced a copy of agreement and work schedule nomenclatured as Standard Bidding Document for construction and maintenance of rural roads under PMGSY and the same is perused by the Tribunal.

Having regard to the nature of work executed by the respondent dealer, which is evident from the aforesaid document, the Tribunal is of the considered view that more percentage of materials vis-a-vis the taxable turnover falls in the category of 4% tax rate and less in 12.5% and 13.5%. In fact, the road works required materials like earth, sand, morum, chips etc. and in the instant case, there has been limited use of cement in construction of concrete roads and culverts and aforesaid aspect has been duly taken cognizance of by the FAA. The AA can, therefore, be said to have erred in applying the rates of tax which has been rectified by the FAA with more percentage of taxable turnover being earmarked @ 4% taking into account the nature of work executed by the respondent dealer. In other words, the Tribunal does not find any compelling reason to revisit the aforesaid finding of the FAA.

7. As regards cross-objection of the respondent dealer, it is in relation to deduction of labour and service charges vis-a-vis construction of road works executed. The learned Counsel for the respondent dealer contends that as per Rule 6(e) of the Rules and Appendix thereof, a deduction of 50% for construction of roads was to be applied, but unfortunately, it was capped at 38% of the gross receipt on being further reduced from 48%, as originally directed by the AA. While contending so, said Standard Bidding Document is strongly relied upon. It is urged that the description of works, as revealed from the agreement, transpires that larger share of labour and service component was required. According to the learned Counsel for the respondent dealer, even 100% or 90% of labour and service charges is to be deducted in such construction work, but the FAA, without any reasonable basis reduced it to 38% from 48%, which is even less than 50% as

prescribed in the Appendix. If the Appendix is perused, it shows that for construction of roads, a deduction of 50% is to be applied towards labour and service charges. If Rule 6(e) of the Rules as it stood prior to 19.07.2012 is gone through, it reveals that in case of works contract expenditure incurred towards labour and service is to be deducted subject to a condition that evidence in support thereof is submitted, but where a dealer executing works contract fails to produce any such evidence on the aforesaid head or such expenses are not ascertainable from the terms and conditions of the contract, or the books of account maintained for the purpose, in such an event, expenses on that count shall be determined at the rates specified in the Appendix. Admittedly, in the present case, the respondent dealer did not produce any books of account with respect to the labour and service charges incurred by him. However, the authorities below scrutinized the terms and conditions of the contract and the nature of work undertaken by the respondent dealer and then, determined the rate of deduction by best judgment. The learned ASC (CT) contended that there is no logical basis to apply 50% deduction as per the Appendix, morefully, when the nature of work and the terms and conditions of the contract vis-a-vis the respondent dealer have been considered threadbare. According to the State, 38% of gross receipt to be reasonable to allow deduction towards labour and service charges in respect of the road works keeping in view its composite nature. The learned Counsel for the respondent dealer besides the bid document, produced copies of RA bills for perusal of the Tribunal to suggest that in respect of some materials royalty has been deducted as if it were procured from the Government and that apart, valiantly

made an attempt to suggest that uniformity should be applied in allowing deduction by referring to an order of assessment dated 19.07.2017 with respect to M/s. Rout Infrastructure Pvt. Ltd., wherein, the audit determined the ratio of raw material consumption at 95% in the category to fall @ 5%. What ought to be the percentage of deduction on labour and service charges depends on the nature of work executed by a dealer. It may vary from case to case and dependent on the nature of construction work and the extent of materials purchased and utilized. The learned Counsel for the respondent dealer contends that good amount of materials like earth, sand, morum etc. were purchased and utilized in construction of roads and its maintenance and therefore, the authorities below should have allowed 50% deduction as per the Appendix. It is to be borne in mind that Appendix and its rates of deduction are not be straight away applied, as according to Rule 6(e), it shall only be employed subject to following conditions, such as, the dealer fails to produce evidence in support of the expenses towards labour and service, or such expenses are not ascertainable from the terms and conditions of the contract, or the books of account maintained for that purpose. As earlier discussed, no books of account could be produced by the respondent dealer. In fact, the respondent dealer did not maintain or produce details of books of account stating the expenditure towards labour and service charges. Under such circumstances, the authorities below considered the terms and conditions of the contract vis-a-vis the nature of work and the extent of materials purchased and utilized and then, proceeded to allow the deduction. As per the AA, it was 48%, but the FAA reduced it to 38% by taking note of the fact that there is admission as to

utilization of bulk quantity of cement purchased to the tune of ₹2,00,99,545.36 (net value excluding VAT). Such quantity of cement claimed to have been purchased by the respondent dealer, in the considered opinion of the Tribunal, needs an examination, while determining the deduction on labour and service charges. Of course, the learned Counsel for the respondent dealer made the Tribunal to go through the Standard Bidding Document and highlighted the nature of work executed by them. As previously stated, deduction on labour and service charges depends on the extent of purchases made as against the men and materials used and utilized in executing a construction work. In the instant case, 50% deduction was not needed to be applied, when the terms and conditions of the contract was considered by the authorities below applying best judgment. Had it been otherwise that the nature of construction work to be such that it was difficult to separate or identify the expenditure incurred on labour and service charges, under such circumstances, the authorities below would have had to invoke the Appendix. The case of the respondent dealer in absence of books of account has been considered by the authorities below by looking at the terms and conditions of the contract and the nature of the construction work and therefore, there remained no need to apply the deduction as per the Appendix. But, in the facts and circumstances of the case, the Tribunal is of the considered view that the respondent dealer is required to elicit and offer an explanation with regard to the quantity of cement alleged to have been purchased and used in the construction of road work, which, in fact, prevailed upon the FAA to reduce the deduction towards labour and service charges from 48% to 38%. Having regard to the above facts, the Tribunal reaches

at a conclusion that the aforesaid aspect needs to be considered afresh and while examining it, the terms and conditions of the contract and the nature of work undertaken by the respondent dealer with the contention that more labour and service charges to have been incurred is to be dealt with.

8. Hence, it is ordered.

9. In the result, the appeal stands dismissed. As a logical sequitur, the impugned order dated 31.05.2014 promulgated in Appeal No. AA- 01/VAT/ Puri/2014-15 is hereby affirmed to the extent indicated. However, the cross-objection is disposed of with a direction to the AA to reconsider and examine all the materials on record by providing an opportunity of hearing to the respondent dealer with respect to the deduction claimed towards labour and service charges vis-a-vis the nature of works executed with reference to the purchase of cement and other items and then, to recompute the tax liability as per law preferably within a period of three months from the date of receipt of the above order.

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