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

S.A. No. 113 of 2010-11
&
S.A. No. 233 of 2010-11

(Arising out of order of the learned JCST, Bhubaneswar Range, Bhubaneswar, in First Appeal Case No. AA-172/BHII/07-08, disposed of on dt. 06.03.2010)

Present : **Smt. Suchismita Misra**, **Chairman**
Shri Subrat Mohanty, 1st Judicial Member
&
Shri Rabindra Ku. Pattnaik, Accounts Member-III

S.A. No. 113 of 2010-11

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

- V e r s u s –

M/s. Orissa Industrial Infrastructure Development Corporation (IDCO), IDCO Towers, Janapath, Bhubaneswar. . . . Dealer

S.A. No. 233 of 2010-11

M/s. Orissa Industrial Infrastructure Development Corporation (IDCO), IDCO Towers, Janapath, Bhubaneswar. . . . Dealer

- V e r s u s –

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

For the Dealer … Mr. Amaresh Mishra, Advocate
For the State … Mr. M.L. Agarwal, S.C. (CT)

Date of hearing: 04.06.2019 **** Date of order: 24.06.2019

O R D E R

These second appeals i.e. S.A. No. 113 of 2010-11 preferred by the State and S.A. No. 233 of 2010-11 preferred by the dealer are directed against the order dated 06.03.2010 passed by the Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar (in short, "first appellate authority") in First Appeal Case No. AA-172/BHII/07-08 allowing the appeal preferred by the dealer in part while reducing the amount demanded by the Sales Tax Officer, Bhubaneswar-IV Circle, Bhubaneswar (in short, 'assessing officer) vide order of assessment dated 19.02.2008 passed u/S. 12(4) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act') in respect of the period 2004-05. Both the appeals are being disposed of together by this common order as those have been filed challenging the same order of the first appellate authority.

2. The facts, in brief, are as follows :

The dealer-assessee – M/s. Orissa Industrial Infrastructure Development Corporation (to be referred hereinafter as 'IDCO'), being a State Government undertaking is engaged in execution of works contract. The Head Office of this Corporation is located at IDCO

Tower, Janapath, Bhubaneswar and it executes works contract through its 13 (thirteen) divisions located in different parts of the State. In response to the statutory notice the authorized officer alongwith their Advocate appeared before the assessing officer and produced books of account consisting of material purchase register, billwise statement of materials purchased, consolidated statement of sub-contractors indicating gross bill, deduction etc. statement showing value of works executed by different divisions, statement showing GTO, TTO and tax liability for the year 2004-05. The authorized officer on behalf of the dealer-assessee also furnished a list of sub-contractors indicating name of the sub-contractors, name of the work, Sales Tax Registration number (in some cases), gross bill received towards contractual obligation, net bill, sales tax deducted etc. and also furnished a statement in respect their claim against purchase of goods utilized in the execution of works contract on payment of taxes. The assessing officer on verification of these documents and then taking into account nature of works executed by the dealer-assessee as well as considering the fact that the dealer-Corporation had not maintained any books of account in respect of expenses towards labour and service charges completed the assessment applying the principle of best judgment and then allowed the expenses towards labour and service charges to the extent of 32% of the payment received from various principals towards

works executed which he found as just and reasonable. Accordingly he determined the GTO of the dealer-Corporation at `27,78,87,258.32 and then allowed certain deductions therefrom and ultimately required the dealer to pay the balance amount of tax amounting to `22,60,641.00 as per terms and conditions of the demand notice issued by him.

Being aggrieved with this order the dealer-assessee preferred an appeal before the first appellate authority advancing several grounds in support of its assertions. The dealer-assessee's main contention was that being a nodal agency of the State Government to oversee execution of works this Corporation i.e. the dealer-assessee functions as a contractee of works but not works contractor. Therefore, the amounts for which money was received as deposit towards works the assessing officer should not have added that amount to the GTO of the dealer-assessee. That apart the assessing officer had allowed deduction towards payments disbursed to registered contractors in respect of TDS which were deducted and deposited in Government accounts and disallowed the amount disbursed in favour of unregistered contractors. This sort of disallowance was illegal as there is no distinction between the registered dealer and unregistered dealer so far as liability of this dealer-assessee is concerned. If at all unregistered dealers are liable in any manner then they should have been assessed

individually and separately but not at the hands of the dealer-assessee. Further, if at all, those unregistered dealers were assessed at the hands of the dealer-assessee then the TDS deposited on their behalf should have given credit while determining their liability on the dealer-assessee. It was also submitted on behalf of the dealer-assessee that though the materials worth `37,45,549.41 purchased as tax paid materials were wrongly disallowed to be deducted even though the said amount is deductible from the turnover of the dealer-assessee. Further the estimation of labour and service charges were made without taking into consideration the nature of contract.

The first appellate authority having gone through the assessment records and also on hearing the Advocate appearing on behalf of the dealer-assessee determined the nature of works executed by the dealer-assessee while verifying the contracts pertaining to those works. He then came to a conclusion that the dealer-assessee was certainly liable to pay tax as a works contractor in the instant case and as such he also following the guidelines of Hon'ble Apex Court and Hon'ble High Court rendered in the case of M/s. Gannon Dunkerley, reported in 88 STC 204 (SC) and in the case of Daclim Industrial Co. Vs. State of Assam, [2003] 130 STC 53 (Guahati), respectively concluded that the calculation of labour and service charges on the payment received, as made by the assessing officer, had not been supported with

any reasoning or provisions of law. So he (the first appellate authority) made a recalculation and then redetermined the TTO of the dealer-assessee and reduced the tax liability determined by the assessing officer by a margin of `7,89,150.00. As a result of his recalculation the net payable remained at `14,71,491.00 for which he also made it clear that if any excess amount than this had been paid by the dealer-assessee then the same be refunded to him as per provisions of law.

3. Being aggrieved with this impugned order State preferred appeal inter alia on the ground that both the fora below were not justified in allowing deduction towards supervision charges. Further work done by Sunabeda Division being separately assessed and value of works assigned to the sub-contractors was predetermined the labour and service charges should have been calculated @ 32% from gross receipt without allowing such deduction.

4. In course of hearing the appeal learned Counsel for the dealer-assessee reiterated the grounds as mentioned in the memorandum of appeal furnished by the dealer and also filed xerox copies of orders passed by the Full Bench of this Tribunal in S.A. No. 1313/2003-04, S.A. No. 1005/2001-02 and S.A. No. 411/2001-02 and urged before this Tribunal to go through the decisions rendered by this Tribunal in some other cases fought between the dealer-assessee and

the State on similar issues. Learned Standing Counsel (CT) for the State also submitted that in all the decisions rendered by this Tribunal in second appeals preferred by this dealer against the State on similar issues are still binding because the State has not challenged those orders before its higher forum. Then again they submitted that the order of assessment passed in the present case needs to be set aside because of wrong calculation made towards deduction of labour and service charges by works contractor and as such this case has to be remitted back to the assessing officer for fresh assessment on the basis of statutory rules.

5. Admittedly in case of works contractor deduction of the expenditure incurred towards labour and service as provided u/S. 5(2)(AA) of the OST Act shall be subject to production of evidence in support of such expenses to the satisfaction of the assessing authority. When the dealer executing works contract fails to produce evidence in support of expenses incurred towards labour and service as referred to above or such expenses are not ascertainable from the terms and conditions of the contract or the books of account maintained for the purpose are found to be not credible then expenses on account of labour and service shall be determined at the rate specified as per Rule 4-B of the OST Rules. For better appreciation the said Rule 4-B is quoted here:-

Quote :

"4-B Deduction of Labour and Service Charge by Works Contractors :

In case of works contract, deduction of the expenditure incurred towards labour and service 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. In the Cases where a dealer executing works contract, fails to produce evidence in support of expenses incurred towards labour and service as referred to above, 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 to be not credible, expenses on account of labour and service shall be determined at the rate specified in the table below:

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%

"

Unquote.

6. Admittedly in this case it can be gathered from the order passed by the assessing officer as well as from the impugned order that the dealer-assessee had not maintained any books of account in respect of expenses towards labour and service charges for which the

first appellate authority also held that the piecemeal statements which are consolidated figures cannot be treated as proper books of account. Under such circumstances it is not understood as to how the assessing officer completed the assessment applying best judgment policy and then allowed the expenses towards labour and service charges to the extent of 32% of the payments received from various principals towards works executed by it. Somewhere some mistakes appear to have occurred in the entire assessment in respect of establishment of the dealer-assessee pertaining to the period 2004-05. The first appellate authority upheld the decision of the assessing officer regarding the percentage of the expenses allowed towards labour and service charges and came to his conclusion to the effect that the calculation made by the assessing officer was not done in accordance with Section 5(2)(AA) for which he recalculated the tax liability of the dealer-assessee. However, it is found that by virtue of applicability of Rule 4-B of the OST Rules for determination of deduction towards labour and service charges in works contract which made applicable retrospectively w.e.f. 30.07.1999 by operation of this law, this matter needs a fresh calculation of tax liability and as such has to be remitted back to the assessing officer for determination of the tax liability of the dealer-assessee afresh keeping in view the aforesaid provisions of law.

7. In the result, the appeal preferred by the State is dismissed and the appeal prefered by the delaeer-assessee is allowed in part. The impugned order dated 06.03.2010 passed by the first appellate authority as well as the relevant order of assessment are set aside. The matter is remitted back to the assessing officer for fresh assessment keeping in view the observations made above after giving an opportunity of hearing to the dealer-assessee in the matter. The dealer-assessee is directed to appear before the assessing officer to take further instruction within two months from the date of receipt of this order.

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

Sd/-
(Sri Subrat Mohanty)
1st Judicial Member

I agree,

Sd/-
(Rabindra Ku. Pattnaik)
Accounts Member-III