BEFORE THE ODISHA SALES TAX TRIBUNAL (FULL BENCH), CUTTACK

S.A.No. 1190/2006-07

P R E S E N T :

Smt. S. Misra	Sri S. Mohanty	&	Sri R.K. Pattnaik
Chairman	2nd Judicial Member		Accounts Member-III

(From the order of the ld.ACST, Sambalpur Range, Sambalpur, in Appeal No. AA-152 (SA-I) of 2006-2007, dtd.22.07.2006, confirming the assessment order of the Assessing Officer)

State of Orissa, represented by the
Commissioner of Sales Tax,
Orissa, Cuttack. ... Appellant

-Versus -

M/s. Nirman Construction Pvt.Ltd.,
At- Govindtola, Dhanupali,
Dist. Sambalpur. ... Respondent

(Assessment Year : 2002-04)

Appearance :
For the Appellant ... Mr. M.S. Raman, A.S.C. (C.T.)
For the Respondent ... None

Date of Hearing: 12.12.2018 *** Date of Order: 12.12.2018

ORDER

Felt aggrieved by the concurrent finding of both the fora below relating to the percentage of deduction allowed against the job undertaken by the dealer under works contract, the Revenue has called the impugned order of learned First Appellate Authority/Asst. Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, FAA/ACST) in question in this appeal claiming thereby the percentage of deduction as allowed as quite higher in side and as such the fora below should be asked to assess the dealer afresh. Admittedly, the

instant dealer was a works contractor, who had undertaken job work broadly classified as irrigation and canal work and improvement/renovation of the road work. The job work was undertaken under different works contracts under four different Government Departments like, (i) Executive Engineer, Hariharjore Irrigation Division, Birmaharajpur, (ii) Executive Engineer, Canal Division, Bargarh, (iii) Hirakud NWMP Division, Bargarh, (iv) R.W. Division, Deogarh etc. The dealer-contractor had received gross payment of Rs.1,20,12,950/- against the work like irrigation and canal work and had also received a sum of Rs.1,85,71,310/- against the job of improvement to road. The learned Assessing Authority/Sales Tax Officer, Sambalpur-I Circle, Sambalpur, Ward (E) (in short, AA/STO) had allowed 80% deduction towards labour and service charges for the irrigation and canal work and had allowed 65% deduction under the said head against road improvement work. With a hope to get more percentage of deduction towards labour and service charges, the dealer had knocked the door of FAA. But the FAA, in turn, upheld the assessment of AA and thereby the percentage of deduction remained the same as allowed by the AA.

2. When the matters stood thus, Revenue has preferred this appeal challenging the order of FAA impugned as not sustainable on the contentions like, the dealer been undertaken road work, bridge work and canal work, the deduction towards labour and service charges as granted exceeds the limit allowed by the Works Department notification. It is prayed for assessment afresh. In course of the argument, Revenue has taken an additional ground such as the deduction towards labour and service charges should be calculated on application of Rule 4-B of OST Amendment Rules, 2010, which came into effect from dt.30.07.1999.

3. The appeal is heard and decided in absence of the dealer-respondent, since the dealer did not prefer to contest the appeal in spite of receipt of notice of hearing.

4. The questions struck for decision in this appeal are,(i) if the deduction towards labour and service charges allowed on application of best judgment principle by the fora below is just and appropriate and (ii) if there should be fresh assessment giving deduction on application of Rule 4-B of OST Rules as amended on 2010.

5. At the outset, it is pertinent to mention here that, the learned Addl. Standing Counsel, Mr. Raman while presenting their application of Rule 4-B of OST Rule as mentioned above has preferred to not press the plea of the Revenue for application of notification of the Works Department. Needless to mention here that, in **M/s. Jagannath Choudhury Vrs. ACST in OJC No.7525 of 2000**, the Hon'ble Court has struck down such notification by the Commissioner and thereby the principle was set to rest that the standard deduction as per the circular is not applicable.

7. Law is no more *res-integra* in view of the authority in **M/s. Gannon and Dunkely and Co. Vrs. State of Rajasthan and Others (1993) 88 STC page 204 (SC)** wherein the Hon'ble Apex Court held as follows:

> "47. Normally, the contractor will be in a position to furnish the necessary material to establish the expenses that were incurred under the aforesaid heads of deduction for labour and services. But there may be cases where the contractor has not maintained proper accounts or the accounts maintained by him are not found to be worthy of credence by the assessing authority. In that event, a question would arise as to how the deduction towards the aforesaid heads may be made. On behalf of the States, it has been urged that it would be permissible for the State to prescribe a formula on the basis of a fixed percentage of the value of

> the contract as expenses towards labour and services and the same may be deducted from the value of the works contract and that the said formula need not be uniform for all works contracts and may depend on the nature of the works contract. We find merit in this submission. In cases where the contractor does not maintain proper accounts or the accounts maintained by him arc not found worthy of credence it would, in our view, be permissible for the State legislation to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under. The formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying, scales for deduction on account of cost of labour and services for various types of works contracts."

8. In the present case the AA has applied the principle of best judgment to determine the labour and service charges. This view as adopted by the AA was not questioned by the dealer, but the dealer only claimed more percentage of deduction in his appeal before the FAA. The FAA has also applied the principle of best judgment but in conclusion, he concurred with the percentage of deduction allowed by the AA. So to sum up, it can safely be said that, application of the principle of best judgment assessment was never being questioned by the dealer and accordingly, it is remain undisturbed that the books of account and connected documents whatever placed before the taxing authorities are

not sufficient to calculate the exact amount of deduction towards labour and service charges.

9. Now it is to be seen, whether percentage of deduction as allowed by the FAA can withstand keeping view the fact that, the Rule 4-B has came into force with retrospective effect from dt.30.07.1999 or otherwise it is to be seen that, the best judgment assessment by the authorities below is reasonable and fair or not ?

10. It is pertinent to mention here that Rule 4B is notified on November, 7,2009 and as per the notification the provision shall be deemed to have come into force on 13th July, 1999. While making the provision to have its retrospective effect from 30th July,1999 it has notified percentage of labour, service and like charges in case of works contract and the mandate of provision is not obligatory but compulsory in nature. Next question arises here is if, where the nature of work under consideration in the case in hand are specified in Rule 4-B and the tax period is 2003-04 then in that case if Rule 4-B can be applied to the case in hand or not? No doubt, by the time the assessing authority had done the assessment the rule had not come into force and in that case it never can be said that the authority was wrong in application of the best judgment principle but when the provision has come into force and it has got retrospective effect that too when the nature of work is specified under the Rule then, Rule 4-B can safely be applied to the case in hand with the explanation that the appeal is continuation of the proceeding. When an amendment to the provision has got retrospective effect and has not specifically debarred its application to pending cases in expressed terms then it has got application to the pending cases either in lower forum or before the higher appellate forum,

11. Thus, from the above discussion, it is held that, this is a fit case where the matter should be remitted back to the Assessing

Authority by setting aside the impugned orders with a direction to make assessment afresh on application of Rule 4-B of OST rules and raise demand of due tax on the dealer accordingly. Resultantly, it is hereby ordered.

The appeal is allowed. The impugned order of the First Appellate Authority is hereby set-aside. The matter is remanded back to the Assessing Authority with a direction to apply to assess the dealer afresh for the tax period in question and thereupon tax due be calculated/demanded or returned if excess payment is made. The whole exercise should be completed within a couple of months from the date of receipt of this order.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

Sd/-
(S. Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Smt. S. Misra)
Chairman

I agree,

Sd/-
(R.K. Pattnaik)
Accounts Member-III