

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

S.A. No. 59 OF 2013-14

(Arising out of the order of the learned DCST(Appeal), Sambalpur Range, Sambalpur in first appeal Case No. AA 32 (SAI) of 97-98 disposed of on 29.12.2012)

**Present :- Shri A.K. Das
Chairman**

&

**Shri S. Mishra
Accounts Member-II**

M/s. Bharat Heavy Electricals Ltd,
H.P.C.L. Site, Hiraakud, Sambalpur.
-Vrs.-

..... Appellant.

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

..... Respondent.

For the Appellant:

: Mr. B Mohanti, Sr. Advocate.

: Mr. A.K. Samal, Advocate.

For the Respondent:

: Mr. M.L. Agarwal S.C.(C.T.)

Date of Hearing : 01.06.2022

Date of Order : 21.06.2022

ORDER

The present appeal of the dealer-appellant has been directed against the impugned orders of learned Deputy Commissioner of Sales Tax(Appeal), Sambalpur Range, Sambalpur (in short, ld. FAA) passed on 29.12.2012 in appeal case No. AA 32 (SAI) of 97-98 dismissing the appeal thereby confirming the order of assessment made by the ld. Sales Tax Officer, Sambalpur-I Circle, Sambalpur (in short, LAO) in his assessment orders made under section 12(5) of the Odisha Sales Tax Act (in short, OST Act) relating to the assessment periods from 01.04.1992 to 31.12.1992.

2. Being aggrieved by the aforesaid order of ld. FAA, the assessee has preferred the second appeal before this Tribunal challenging the said order as bereft of consideration of material facts with the

provisions of law for which the impugned order is illegal, arbitrary and bad in law.

3. The facts relevant for the purpose of adjudication of this appeal in brief are that the dealer-appellant is a contractor, who had executed works contract during the tax period 06/92 to 09/92 under Hirakud Power Company Ltd. (HPCL), Hirakud. It had entered into an agreement with the HPCL for supply of 1 number of 67.5 MW Turbo Generator set for a contract price of Rs.21,00,00,000.00/- with additional price of Rs.25,00,000/- for system engineering vide agreement dtd.18.09.1991. Further, the appellant contractor has also been awarded with erection etc. vide contract dtd.16.01.1992 for Rs.1.85 Lakhs including all taxes and duties. Accordingly M/s.Bharat Heavy Electrical Ltd., has started execution of work of supplying and erection of generator during 91-92. The appellant has received payment on the above score as specified in the tender specification No.1/P inclusive of followings:

1. Unloading of equipment/materials from Railway Wagons/Careers, transportation of storage yard/sheds, storage preservation etc.
2. Providing tools and plants required for executing the job.
3. Application of insulation.
4. Providing equipment, chemicals, acids etc. For chemical cleaning operation. The equipment/materials supplied for Alkaline Flushing operations shall remain the property of BHEL after use.
5. Oil for oil flushing of Turbo Generator.
6. Grouting of equipments.
7. Assistance to Customer for conducting performance guarantee test.
8. Supply and application of two coats of final paints wherever applicable.

4. A report bearing No.49 dtd.30.01.1993 was submitted by the Inspector of Sales Tax, Sambalpur-I Circle, wherein it was stated that the appellant has received gross payment of Rs.75,06,375.00/- including advance of Rs.20,25,750.00/- during the year 1992-93.

The assessment was made vide assessment order dtd.18.02.1997, wherein the LAO treated the divisible contracts between the appellant and HPCL as a composite contract after giving deduction of Rs.25,98,261/- towards labour and service charges.

The appellant being aggrieved by the said order carried the matter in appeal under Section 23 (2) of the OST Act, where the ld. FAA confirmed the assessment order by treating the divisible contracts as composite. That although the appeal was filed in the year 1997, the First Appellate Authority waited for almost 15 years and hearing of the appeal was fixed in the year 2012. The first notice was issued on 09.05.2012 after which the Accounts Officer of the company sought for time and as the case was very old and records were to be traced, requested to postpone the same. The second notice was issued on 15.09.2012, requesting for adjournment of the hearing and as the appellant could not produce books of accounts on the date of hearing the appeal was decided ex-parte vide order dtd.31.12.2012 confirming the order of the assessment.

The First Appellate Authority has stated that it was revealed from the order of assessment that the dealer could not produce books of accounts and hence he concluded that the appellant does not have any books of accounts and therefore, he observed that the appellant-company is no more interested in the appeal and the same was decided expartee.

5. Being aggrieved with the said order, the present appeal has been filed.

6. During the course of hearing, the Ld. Sr. Advocate appearing for the appellant, submitted that the inspection report was neither

confronted nor the copy of the same was served on the dealer-appellant during hearing of the assessment proceeding as well as during the course of hearing of the appeal but the contents of the inspection report were used by the LAO as well as the Id. FAA while dealing with the assessment as well as the first appeal. The Ld. Counsel for the appellant also submitted that the order of appeal is vulnerable on the face of the order itself in view of the fact that even though the said authority has noted down the grounds of appeal taken vis-a-vis contentions raised by the dealer-appellant, he ignored to address the said issue while jumping to the conclusion that the LAO was justified in allowing the amount of Rs.25,98,261/- towards labour and service charges. The Id. FAA ignored to take into account the order of the Odisha Sales Tax Tribunal dtd.12.08.1996 passed in Bharat Heavy Electricals ltd. Vrs. State of Odisha, Second appeal No.986 of 1989-90. It is humbly urged that when the Id. FAA records the grounds taken the appellant-dealer and decides the matter on merits, and does not dwell on the same on merits by independently deciding the same, the consequential order incurs blame of being perverse and the finding is rendered infirm in law.

When the Id. FAA has noted down the ground particularly ground No.4 in his order, he should have made an enquiry about the veracity of the statement of the appellant contained in the said ground. It is humbly submitted that composite contract by virtue of the Constitution of India (46 Amendment Act), 1982 is permissible to be made vivisected and the component of supply could be made possible to be exigible to tax separately from that of erection, installation and commissioning etc. When the appellant has asserted the fact that HPCL-contractee-purchaser has issued C forms, the appellate authority being extended forum of assessment [vide Tel Utpadak Kendra Vrs. Deputy Commissioner of Sales Tax, 1981 48 STC 248 SC] is not powerless to examine such fact and conduct further enquiry from the concerned

circle which is within his own range jurisdiction. Therefore, the Ld. FAA by affirming the view of the LAO has consciously disregarded the law laid down by the Hon'ble Supreme Court in Gannon Dunkerley Ltd. Vrs. State of Rajasthan, 1993 88 STC 204 SC.

As the same is outcome of error in procedure touching the very sustainability and validity of the order the ld. FAA acted in deliberate defiance of law by not addressing the ground which is specifically raised. The ld. FAA without considering as to whether the order of the highest appellate authority of the State of Odisha being order of the Odisha Sales Tax Tribunal dated 12.08.1996 passed in Bharat Heavy Electricals Ltd. Vrs. State of Odisha in Second Appeal No. 986 of 1989-90 is applicable to the facts and circumstances of the case at hand he could not have delved into merits of the matter. It is humbly submitted that the agreements and nature of works executed by the appellant in the present case is akin to those which was subject-matter for consideration by the Odisha Sales Tax Tribunal in Bharat heavy Electricals Ltd. Vrs. State of Odisha in Second Appeal No. 986 of 1989-90.

7. The Ld. Sr. Advocate submitted that when grounds are enumerated in the memorandum of appeal, the same cannot be treated to be empty formality and the ld. FAA while taking up appeal for final disposal ought to decide each ground on its merits. The appellant relied on the order dated 30.04.2012 passed by the Hon'ble Supreme Court in the matter of Paradeep Phosphate Ltd. Vrs. State of Odisha, Civil Appeal No. 883 of 2007 wherein it was observed that:

"... Needless to add that it is always open to an appellate authority to treat any of the grounds urged in support of the appeal(s) as a preliminary issue and adjudicate thereon accordingly..."

and therefore, the ld. FAA was obligated to touch each and every ground taken by the appellant in the memorandum of appeal and decide the same on its own merits. In absence of such exercise by the

ld. FAA, his order is liable to be attacked with a ground that it is void, invalid and inoperative.

8. The State has filed cross objection supporting observation of the ld. FAA and stating that the ground of the dealer i.e. The sales tax officer has wrongly treated the works contract as composite contract rather it was a divisible contract I.e. one for supply of equipment and other for rendering service for erecting the equipments is not acceptable in absence of any supporting documents/records and that without proper of accounts, the views of the 1st appellate authority that LAO has framed the order of assessment in a just and equitable manner and does not warrant any interference is justified.

The LAO failed to take cognizance of law laid down in Larsen & Toubro Ltd. Vrs. State of Orissa, (2008) 12 VST 31 (Ori) The Hon'ble High Court of Orissa in the said reported case at paragraph 23 observed as follows:

"23. It is a well-settled principle that in matters of taxation either the statute or the Rules framed under the statute must cover the entire field. Taxation by way of administrative instructions which are not backed by any authority of law is unreasonable and is contrary to Article 265 of the Constitution of India. Therefore, the impugned circulars are set aside as also the impugned orders of assessment. The assessee's liability to pay tax remains but in order to assess that the State has to act in accordance with the statutory prescription by framing rules under its rule-making power under Section 29 of the Act and the assessing authority can pass fresh orders of assessment on the basis of such statutory rules."

During the course of hearing on 18.05.2022, the Ld. Standing Counsel for the revenue filed an application praying for a direction to the appellant to cause production of entire book of accounts for the assessment year 1992-93 although the assessment was for the quarter ending 06/92 to 12/92. In the said hearing, the Ld. Sr. Counsel for the

appellant submitted that as the LAO and Id. FAA had gone through the contracts in details and contracts are part of the assessment record, the assessment records should be produced first before the Hon'ble Tribunal and thereafter, the Hon'ble Tribunal can go through the said contracts and it can find that the supply contract and execution contract are divisible in nature then the entire matter can be remanded back to the LAO to do the assessment afresh. The Hon'ble Tribunal directed the standing Counsel to produce the assessment records on the next date of hearing i.e. on 01.06.2022.

That on 01.06.2022, the Ld. Standing Counsel could not produce the assessment record. The Ld. Sr. Counsel for the appellant submitted that prima facie both the LAO as well as the Ld. FAA have observed in their respective order that there were two contracts, one for supply of Turbo Generator and another for erection of Turbo Generator and in the order of the assessment detailed break up of the erection contract was stated and while taking the Tribunal into break up, he submitted that in none of the same there would be any transfer of property of goods in execution of the contract from the appellant to HPCL which could be the subject matter of assessment.

After going through the facts on record, and in view of non availability of the assessment record before this Tribunal, we hereby observe that there were two contracts one for supply of equipments/Turbo Generator and another for erection, testing and commissioning of the Turbo Generator. That after the 46th Constitutional Amendment, the contracts between the parties are to be treated as divisible contract and deemed to be such and therefore both the authorities below by treating the divisible contract as composite contract and taxing them as such was against the provisions of the Constitution and is against the provisions of the law laid down by the Hon'ble Supreme Court in Gannon Dunkerley Ltd. Vrs. State of Rajasthan, (1993) 88 STC 204 (SC) and Larsen & Toubro Ltd. Vrs.

State of Orissa, (2008) 12 VST 31 (Ori) and is liable to be struck down as invalid, inoperative and illegal.

Although contents of the Inspection report has been used against the appellant for making the assessment, there has been no mention in the assessment order that the same were either confronted to the appellant or a copy of the same was served on the appellant. Neither do we have the assessment records with us to verify the aforesaid facts.

9. We therefore, set aside the impugned orders of the forums below and remit the matter back to the LAO to take up the assessment afresh by taking into account the aforesaid judgments of the Hon'ble Supreme Court of India and observation made by this Tribunal in order dtd.12.08.1996 in SA No.986 of 1989-90 (BHEL Vrs. State of Orissa) and while making the assessment, it should confront the contents of the Inspection report to the assessee. The assessment should be completed preferably within three months from the date of receipt of copy of this order, giving a reasonable opportunity to the assessee of being heard.

The cross objection filed by the State is disposed of accordingly.

Dictated & corrected by me,

Sd/-
(Srichandan Mishra)
Accounts Member-II

Sd/-
(Srichandan Mishra)
Accounts Member-II

I agree,

Sd/-
(A.K. Das)
Chairman