

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

S.A. No. 423/ 09-10

(Arising out of the order of the learned DCST (Appeal),
Bhubaneswar Range, Bhubaneswar in first appeal Case No.
AA-39/BH-II/08-09 disposed of on 20.11.2009.)

Present :- Shri A.K. Das, Shri R.K. Rout, & Shri S. Mishra,
Chairman 2nd Judicial Member Accounts Member-II.

M/s. Elmech Engineers, Plot No.8,
Kharvel Nagar, Bhubaneswar.

..... Appellant.

-Vrs.-

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

..... Respondent.

For the Appellant:

: None.

For the Respondent:

: Mr. D. Behura, S.C.(C.T.)

: Mr. S.K. Pradhan, ASC (C.T.).

Date of Hearing : 13.06.2022

Date of Order : 21.06.2022

ORDER

This present appeal has been filed by the dealer-assessee against the impugned order of learned Deputy Commissioner of Sales Tax(Appeal), Bhubaneswar Range, Bhubaneswar (in short, ld. FAA) passed on 20.11.2009 in Appeal Case No. AA-39/BH-II/08-09 dismissing the appeal thereby confirming the assessment order of learned Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar, Ward-D (in short, LAO) who raised a demand of Rs.7,02,196.00 including surcharge U/s.12(8) of Odisha Sales Tax Act (in short, OST Act) relating to the assessment year 2001-02.

2. Being aggrieved by the impugned order of the Id. FAA, the dealer-appellant has preferred second appeal before this Tribunal assailing the order of the forum below as unjust, illegal, arbitrary and not maintainable. The main contentions in the grounds appended to the memorandum of appeal are as follows:

“i. That, there is no legal base to re-open the case and to complete the arbitrary assessment U/s. 12(8) of the OST Act.

ii. That, the learned Dy. CST has confirmed the appeal in a routine manner without appreciating the basic facts of the case. Although, the appellant has appeared on different dates, ex-parte order passed is illegal.

iii. That, in the original 12(4) assessment, the Id. STO has completed the assessment with the observation:

“The dealer-contractor in the instant case deals in execution of works contract mainly in the telecommunication Department by supplying Genset, installation, erection, testing and commissioning thereof and other civil works.”

iv. That, the allegation of the AG audit is baseless and without any merit.

v. That, the works contract clearly includes:- installation, filling of improvement, modification, repair. Section 2(jj) says:

“Works contract” includes any agreement for carrying out for cash or deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection,

installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property.”

3. The brief fact of the case is that the instant dealer-appellant deals in execution of works contract mainly in telecommunication department by supplying Gen-set, installation, erection, testing and commissioning thereof and other civil works. The appellant was originally assessed U/s.12(4) of the OST Act for the self-same period in which the LAO observed that the assessee has received a total gross payment of Rs.1,99,48,745.00 from TED, Sambalpur (Rs.57,24,692.00) and from TED, Bhubaneswar (Rs.1,42,24,053.00). After allowing 40% deduction from the gross value received towards labour and service charges, he raised an extra demand of Rs.2,58,155.00. However, consequent upon receipt of an objection from the AG Audit party, the LAO reopened the case U/s.12(8) of the OST Act and issued notice followed by subsequent intimations for reassessment. It is alleged in the AG Audit report that considering the type of execution of contracts, the dealer involves in supply contract rather than works contract and accordingly attract levy of tax as a supply contract, contemplating the above provision of the statute. Since, the main consideration is of supply of Genset for telecommunication department, mere physical placement of different full-fledged machineries in one place doesn't satisfy the conditions as contemplated in the above section. These resulted in an extra demand of Rs.7,02,196.00 by the LAO in his reassessment order passed U/s.12(8) of the OST Act for the year 2001-

02 which was challenged by the assessee in first appeal before the Id. FAA who confirmed the order of assessment by his reasoned order.

4. However, when the matter was called on for hearing, non-appeared on behalf of the dealer-assessee in spite of valid service of notice. Moreover, since, the instant appeal relates to the year 2001-02, which is more than 21 years, it was taken up for ex-parte hearing in the presence of learned Standing Counsel (C.T.) representing the State.

5. During the course of hearing, the Id. SC(C.T.) vehemently argued in favour of the appeal order passed ex-parte by the Id. FAA claiming it as just and in accordance with the provisions of the statute that doesn't warrant any further interference by this Tribunal. Since, the predominant object is of supply, hence, it is to be taxed as a supply contract, chattel qua chattel, he argued.

6. We, now, feel necessitated to address the grounds taken by the assessee as appended in the appeal memorandum taking into consideration the information available in this record including record of forum below.

It is profitable to quote the relevant provision of the statute in order to ascertain as to whether the work/supply made by the assessee falls under supply contract or works contract?

Section 2(jj)

“Works contract” includes any agreement for carrying out, for cash or deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection,

installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property.” It is observed from the original assessment order passed U/s.12(4) of the OST Act that the assessee has dealt in execution of works contract mainly in the telecommunication department by supply of Genset, installation, erection, testing and commissioning thereof and other civil works. As such, it is a composite contract involving both supply and works contract which cannot be segregated into two parts- one for supply & the other for work. Assessment orders available in the lower forum record reveal the fact that for the assessment year 1995-96 and 1996-97, the assessee was allowed deductions of 20% of gross value towards labour and service charges. Moreover, for the assessment year 1997-98 and 2001-02, the assessee was allowed deductions 40% of gross receipt towards labour and service charges. This is the only case at hand wherein based on AG audit objection, the dealer was assessed as a supply contractor. To our considered view, it is simply a mere change of opinion by the LAO without forming an independent opinion to reopen the case U/s.12(8) of the OST Act which is not permissible under the Statute. Moreover, as deduction in case of electrical contractor towards labour and service charges had not been notified by Govt. of Odisha, the LAO, for the year 1995-96 and 1996-97, allowed such deduction as fixed by Bihar Finance Sales Tax Act, 1981. As per provision of the Statute and based on previous years’ orders, we reasonably deduce that the assessee has executed supply of Genset and installation, erection,

testing and commissioning thereof and other civil works. Hence, we conclude that the work executed by the assessee falls U/s.2(jj) of OST Act and the nature of work is works contract wherein deduction of 20% of the gross value received towards labour and service charges is to be allowed.

7. Accordingly, it is ordered.

The appeal filed by the assessee is allowed. The case is remanded to the LAO to make re-computation of tax in the light of our above observation and pass necessary order preferably within three months from the date of receipt of this order after giving the assessee a reasonable opportunity to being heard.

The case is disposed of accordingly.

Dictated and corrected by me.

Sd/-
(Srichandan Mishra)
Accounts Member-II

Sd/-
(Srichandan Mishra)
Accounts Member-II

I agree,

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member