BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 1133 of 2005-06

(Arising out of order of the learned ACST, Cuttack-II Range, Cuttack in First Appeal No. AA- 47/DL/2001-02, disposed of on dated 08.06.2005)

Present: **Shri A.K. Das, Chairman**
Shri S.K. Rout, 2nd Judicial Member
&
Shri M. Harichandan, Accounts Member-I

M/s. Md. Kutabuddin,
Plot No. 428/3818, Jayadev Nagar,
Near Panthaniwas, Bhubaneswar ... Appellant

-Versus-

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

For the Appellant : Sri D.K. Mohanty, Advocate
For the Respondent : Sri M.L. Agarwal, S.C. (CT)

Date of hearing: 22.08.2022 *** Date of order: 06.09.2022

O R D E R

This is an appeal u/s. 23(3) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act') at the instance of the dealer-appellant against the order dated 08.06.2005 passed by the learned Asst. Commissioner of Sales Tax, Cuttack-II Range, Cuttack (hereinafter called as 'first appellate authority') in Appeal No. AA- 47/DL/2001-02 thereby reducing the assessment to ₹4,31,396.00 from

₹4,61,396.00 raised by the Sales Tax Officer, Dhenkanal Circle, Angul (in short, 'assessing authority') for the period 1997-98 in the assessment framed u/s. 12(5) of the OST Act.

2. Briefly stated, the facts of the case are that the dealer-appellant is a works contractor, who executed construction of earth dam under Manjor Irrigation Division, Athamalik and had been assessed u/s. 12(4) of the OST Act for the year 1996-97 under Bhubaneswar-II Circle being a registered dealer thereunder. The dealer-assessee has not maintained any books of account in respect of the expenditure incurred for labour and service charges for execution of such work. The portion of the works executed under Manjor Irrigation Division and payments received for such work were reflected in the order. The dealer-assessee in order to substantiate its contention that payment received during the year 1996-97 from the Executive Engineer, M.I.D., Athamallik is covered in the assessment order passed by the Assessing Authority, Bhubaneswar-II Circle, Bhubaneswar, filed xerox copy of the assessment order. Since the work during the year 1997-98 was executed under the jurisdiction of Dhenkanal Circle, Angul, he preferred to be assessed under that Circle and accordingly furnished the

relevant documents before the Assessing Authority, Dhenkanal Circle who basing on payment figures received and TDS found that the dealer-assessee had crossed the non-taxable limit of ₹1.00 lac, therefore, the proceeding u/s. 12(5) of the OST Act was initiated against it.

2(a). In response to the notice issued u/s. 12(5) of the OST Act, the dealer-contractor appeared through his authorized agent and filed relevant documents. The assessing authority on verification of the documents filed by the dealer-assessee found that it has received total payment of ₹5,79,34,789.00 on which TDS to the tune of ₹23,17,391.00 was deducted. The dealer-assessee produced three nos. of TDS certificate to substantiate its plea of deduction of TDS of ₹23,17,391.00. The assessing authority considering the nature of works and labour component involved, allowed deduction of 65% towards labour and service charges as against the claim of 95%. Accordingly, he determined the GTO at ₹5,79,34,789.00 and after allowing deduction of ₹3,76,67,612.85 towards labour and service charges, TTO was determined at ₹2,02,77,176.15 and tax demand of ₹18,55,995.11 was raised which includes surcharge of ₹2,33,821.00. As against such liability, the dealer-assessee had already paid ₹23,17,391.00, which

includes TDS payment and book adjustment. Therefore, the assessing authority directed for refund of ₹4,61,396.00.

2(b). The dealer-appellant challenging the aforesaid direction of the assessing authority for refund of ₹4,61,396.00 filed appeal before the first appellate authority on the ground that the deduction of 65% granted by the assessing authority towards labour and service charges as against claim of 95% is illegal and arbitrary inasmuch as the works contact executed by the dealer exclusively involved labour and earth works and that the GTO and TTO determined by the assessing authority were not correct. The first appellate authority on going through the impugned order of the assessing authority and the materials on record, held that the though the dealer has been assessed u/s. 12(5) of the OST Act, no penalty has been levied; that the explanation offered by the dealer-assessee for not getting himself registered under Dhenkanal Circle is not convincing; and that when the dealer-assessee has been assessed u/s. 12(5) of the OST Act, penalty u/s. 12(5) is very much warranted. The first appellate authority with the aforesaid observation levied penalty of ₹30,000.00 and confirmed the order of assessing authority granting deduction of 65% towards labour and service charges.

The dealer-appellant being further dissatisfied with the order of the first appellate authority, filed the present second appeal.

3. It was vehemently urged by Mr. Mohanty, learned Counsel for the dealer-asseessee that when the assessing authority did not impose penalty while assessing the dealer u/s. 12(5) of the OST Act, imposition of penalty by the first appellate authority without assigning any reason is illegal, arbitrary and against the sanction of law. The dealer-assessee having no malafide intention in not getting himself registered under Dhenkanal Circle where the works were executed, the first appellate authority should not have imposed penalty. He forcefully contended that the first appellate authority lacks jurisdiction to impose penalty for the first time when the assessing authority did not desire to impose such penalty. The first appellate authority in exercise of appellate power only can modify, alter and enhance the assessment made by the assessing authority and cannot impose penalty itself. He further argued that the works executed by the dealer-assessee being labour oriented works, 65% deduction granted by the assessing authority which has confirmed by the first appellate authority, is illegal, arbitrary and whimsical. He relying on the decision of

this Tribunal in S.A. No. 1027 of 2002-03 submitted that the deduction granted towards labour and service charges should be enhanced to 95%.

4. Per contra, Mr. Behura, learned Standing Counsel (CT) for the revenue supporting the impugned order of the first appellate authority submitted that imposition of penalty by the first appellate authority is in accordance with law and the same does not warrant any interference. The first appellate authority after giving due notice to the dealer as required u/s. 23(2) of the OST Act read with Rule 53 of the OST Rules imposed penalty of ₹30,000.00 as per Section 12(5) of the OST Act. There is no illegality in the order of the first appellate authority imposing penalty on the dealer-assessee. He further argued that both the forums below also considering the nature of works executed and labour components involved, granted deduction of 65%, which is just, proper and reasonable and does not warrant interference of this Tribunal. He submitted to dismiss the appeal and confirm the order of the first appellate authority.

5. We have heard the rival submissions of the parties, carefully gone through the impugned orders of the forums below vis-a-vis the grounds of appeal raised in the memorandum of appeal and the materials on record. The

dealer-assessee filed the present second appeal challenging the impugned orders of the forums below mainly on two grounds that the first appellate authority could not have imposed penalty u/s. 12(5) of the OST Act when the assessing authority has not imposed such penalty and that deduction of 65% towards labour and service charges looking into the nature of works executed by the dealer is at lower side, which needs interference by this Tribunal. So far as the first contention regarding imposition of penalty of ₹30,000.00 by the first appellate authority is concerned, we are of the considered view that the first appellate authority has ample jurisdiction to impose such penalty on the dealer-assessee. The jurisdiction of the first appellate authority to impose penalty is not taken away merely because the assessing authority omitted to impose such penalty. Section 23(2)(a) of the OST Act clearly provides that the appellate authority in disposing of any appeal under sub-section (1) may confirm, reduce, enhance or annul the assessment or the penalty or interest, if any. In view of such specific provision empowering the appellate authority to confirm, reduce, enhance or annul the assessment or the penalty or interest, if any, the contention of the dealer-assessee that the first appellate authority had no power to impose penalty

under law, if the same was not imposed by the assessing authority must fall to the ground. The appellate authority is not supposed to confirm the error committed by the assessing authority while assessing the dealer-appellant. Section 12(5) of the OST Act also clearly provides where the Commissioner is satisfied that any dealer who is liable to pay tax under the OST Act in respect of any period has failed to get himself registered without sufficient cause, it (Commissioner) may, at any time within five years from the expiry of the year to which the period relates, call for return under sub-section (1) of Section 11, and after giving the dealer a reasonable opportunity of being heard, assess to the best of his judgment, the amount of tax, if any, due from the dealer in respect of such period and all subsequent periods and may also direct that the dealer shall pay, by way of penalty, in addition to the amount so assessed, a sum not exceeding one and half times that amount. The word 'may' used in Section 12(5) of the OST Act gives discretion to the authority either to impose penalty or not to impose penalty in the particular facts and circumstances of the case. In the case at hand, the assessing authority though was not inclined to impose penalty on the dealer-assessee for not getting himself registered under Dhenkanal Circle though

required under law to be registered, the first appellate authority thought it necessary to impose penalty for such default. Now, it is to be seen whether the first appellate authority was correct in its approach in imposing penalty on the dealer or not. At this juncture, we think it proper to refer to the judgment of the **Hon'ble Apex Court in case of Hindustan Steel Ltd. Vs. State of Orissa, reported in [1970] 25 STC 211 (SC)**. The Hon'ble Apex Court in para-7 of the judgment while considering the question whether imposition of penalty for failure to register as dealer was justified, held as under :-

> "7. ...An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or

> venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute..."

5(a). In the present case, the first appellate authority while imposing penalty did not discuss the necessity of taking such coercive action and did not give any finding whether the party acted deliberate in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. It simply referring to the provisions contained u/s. 12(5) of the OST Act imposed penalty as the dealer failed to get himself registered under Dhenkanal Circle. It is pertinent to mention here that the assessing authority has clearly observed in its assessment order that the dealer-assessee has got itself registered under Bhubaneswar Circle and it himself applied for assessment u/s. 12(5) of the OST Act for the works executed under Dhenkanal Circle. This conduct of the dealer-assessee clearly shows his *bona fide* intention to pay the legitimate tax due to the State Government. The dealer-assessee having no malafide intention in got getting himself registered under Dhenkanal Circle and he having not acted in conscious disregard of its obligation or in defiance of law and not being guilty of conduct contumacious or dishonest,

the imposition of penalty on it is illegal and unwarranted. Therefore, the penalty imposed by the first appellate authority without assigning any reason for the necessity of levying such penalty, is not sustainable in the eyes of law and hence, such penalty imposed on the dealer-appellant is deleted.

5(b). So far as the second issue regarding deduction granted towards labour and service charges is concerned, we are of the considered opinion that such deduction has been granted at lower side by the assessing authority when it is of specific view in page-2 of its order that the very nature of the works is mostly labour oriented involving the transfer of material of negligible quantity. The dealer-assessee to substantiate its claim of deduction of 95% filed the assessment order dated 08.03.2002 for the year 1999-2000 wherein the labour and service charges were estimated at 81.66% of the gross amount received, which was subsequently confirmed in **S.A. No. 1027 of 2002-03**. When deduction towards labour and service charges has been granted @ 81% for similar nature of works for the year 1999-2000, granting deduction of 65% for the assessment year 1997-98, in our considered view, is not justified. Therefore, we enhance the deduction towards labour and

service charges to 81% as against 65% granted by the assessing authority and subsequently confirmed by the first appellate authority.

6. For the foregoing reasons and discussions, the appeal is allowed and the impugned orders of the forums below are hereby set aside. The matter is remitted back to the assessing authority to recompute the tax liability of the dealer-assessee in accordance with law keeping in view the observations made herein above within a period of three months from the date of receipt of this order.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

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

I agree,

Sd/-
(M. Harichandan)
Accounts Member-I