BEFORE THE JUDICIAL MEMBER-I:
ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 239(V) of 2018
(Arising out of the order of the learned JCST, Ganjam Range, Berhampur, in First Appeal Case No. AA(V).70/2012-13, disposed of on dtd.03.08.2018)

P r e s e n t: Shri A.K. Dalbehera, O.S.J.S.
M.A., LL.M.
1st Judicial Member

M/s. Bhawani Electric,
At/P.O.-Lanjia, Berhampur,
Dist.- Ganjam-760001. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. B. Das, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 31.03.2021 *** Date of order: 27.04.2021

O R D E R

This appeal is directed against the order dtd.03.08.2017 passed by the learned Joint Commissioner of Sales Tax, Ganjam Range, Berhampur (hereinafter referred to as, the learned JCST) in First Appeal Case No. AA(V).70/2012-13, wherein he confirmed the order of assessment passed by the learned Sales Tax Officer, Ganjam II Circle, Berhampur (hereinafter referred to as, the learned STO) for the assessment period 01.04.2008 to 31.03.2011 u/s.43 of the

Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act).

2. The brief facts of the case are that, the appellant-dealer deals in manufacturing and sale of new electrical transformers. The appellant-dealer also undertakes repairing and reconditioning of old and defective electrical transformers for the South Co, Berhampur and other customers. The appellant-dealer effects purchase of constituent items for transformer like transformer oils, aluminium, copper conductors, porcelain insulators, insulating materials and minor electrical goods both from inside and outside the State of Odisha. The Sales Tax Officer of Vigilance, Berhampur Division, Berhampur had paid a surprise visit to the place of business of the appellant-dealer on 13.09.2011. At that time Sri Bhabani Prasad Panda, the proprietor of the business firm who was looking after the business was present. On demand Sri Panda could not produce any books of account on the spot on the plea that the same were in his residence. Later on, Sri Panda appeared before the STO, Vigilance, Berhampur Division, Berhampur on 20.09.2011 in their office and produced the books of account comprising purchase register, sales register, purchase invoice files and sale invoices maintained for the years 2008-09 to 2011-12 for verification. The said books of account were verified by the STO, Vigilance, Berhampur and the contents of the recovered documents were confronted to the appellant-dealer Sri Panda whose statement was recorded. Sri Panda admitted that South Co supplies old and defective transformers without any oil for repairing and reconditioning of the same to make them workable condition.

As per work order he takes up refilling of new transformer oil, fitting of new aluminium and copper conductors and changing the insulator to make such old and defective transformer into workable condition. The South Co. deducts VAT @ 4% before making payment to him and he takes adjustment of such deducted amount against output liability. Sri Panda admitted that the use of transformer oil constitutes about 40% to 50% of the total material components used in such work. Sri Panda also admitted to have charged VAT @ 4% on material components involved in repairing of the electrical transformer and separately shows the labour components in the invoices raised by him. However, on thorough verification of the terms and conditions of the work order issued by South Co. to the appellant-dealer and the works undertaken by the appellant-dealer as per specification and instruction of South Co. in repairing of damaged and defective electrical distribution transformer, the STO, Vigilance came to the conclusion that such activities are nothing but execution of works contract as per the definition contained in Sec.2(63) of the OVAT Act, the contractor being the appellant-dealer and the contractee being South Co. The STO, Vigilance detected that the appellant-dealer had charged VAT @ 4% on all material components in general, though the major used item of goods in repairing and reconditioning of damaged and defective electrical distribution transformer is “Transformer Oil” which was exigible to VAT @ 12.5% till 31.03.2011 and VAT @ 13.5% w.e.f. 01.04.2011 as per Sec.14 of the OVAT Act, whereas the appellant-dealer used to charge VAT @ 4% on all material components in the invoices raised by him. Thus, this act of the appellant-dealer

was treated as wrong application of tax rate which resulted in loss of revenue. The sale value of transformer oil utilised in course of undertaking repairing works of the damaged and defective electrical distribution transformer during the period 2008-09 to 2011-12 (upto August, 2011) was estimated at Rs.54,30,280.00 which is taxable with VAT @ 12.5% or VAT @ 13.5% but not VAT @ 4% as charged by the appellant-dealer and initiation of proceeding u/s.43 of the OVAT Act was suggested. On receipt of tax evasion report from the Deputy Commissioner of Sales Tax, Vigilance, Berhampur Division, Berhampur the learned STO initiated a proceeding u/s.43 of the OVAT Act by issuing notice to the appellant-dealer for appearance and production of books of account. In response to the notice, the appellant-dealer appeared and produced the books of account and taxed @ 4% on Rs.60,07,084.59 and taxed @ 12.5% on escaped turnover of transformer oil of Rs.54,30,280.00. Accordingly, the learned STO calculated the output tax at Rs.9,19,068.38 and allowed ITC of Rs.3,58,202.90 for the said period and calculated the net tax payable at Rs.5,60,865.48. The learned STO also imposed two times penalty of Rs.11,21,730.96 u/s.43(2) of the OVAT Act. Thus, the learned STO raised an extra demand of Rs.16,82,596.00 for the aforesaid tax period.

3. Being aggrieved by the order of the learned STO, the appellant-dealer preferred an appeal before the learned JCST who confirmed the order of assessment. Being further aggrieved by the order of the learned JCST, the appellant-dealer has preferred the second appeal.

4. The appellant-dealer has come up with this second appeal on the grounds that the bifurcation of taxable turnover of Rs.1,14,37,364.59 in different tax groups and thereby the demand of tax and penalty, total amounting to Rs.16,82,596.00 is arbitrary, excessive and bad in law; that the learned STO while making assessment arbitrarily disallowed 4% taxable sale of Rs.54,30,280.00 for the period 01.04.2008 to 31.03.2011 and taxed @ 12.5% tax group which attracted excess tax liability and the same was confirmed by the learned JCST in a routine manner without going through the facts and merits of the case which is arbitrary, excessive and in violation of natural justice; that the learned STO as well as the learned JCST while passing the respective orders did not take into account the TDS deducted by the South Co. amounting to Rs.3,96,637.00 but put the appellant-dealer with an extra VAT burden by raising a demand of Rs.5,60,865.48 which is not only arbitrary but also bad in the eye of law; that the appellant-dealer prayed before the learned JCST to get the TDS amount of Rs.3,96,637.00 being deducted by South Co. to be adjusted from the total VAT demand but the same was not duly taken into consideration, rather sought confirmation from the department itself so also from the appellant-dealer as regards such payment of TDS. The appellant-dealer during the course of hearing duly submitted a letter bearing No.775 dtd.19.07.2018 received from SOUTHCO UTILITY confirming the TDS deducted amounting to Rs.3,96,637.00 in respect of the years 2008-09, 2009-10 & 2010-11 but the learned JCST did not take the same into consideration and without even waiting for the department's

clarification passed an order arbitrarily confirming the demand raised in the order of assessment being passed by the learned STO which is nothing but a clear reflection of harassment to the appellant-dealer to suffer with extra tax burden; that as per specific work order South Co., Electrical Division, Berhampur supplies empty transformer cabinet and the appellant-dealer manufactures transformer being assembled with other required parts and minerals. Then the appellant-dealer supplies to the South Co., Electrical Division, Berhampur the said transformer after being duly inspected verified and certified by competent authorities. Simultaneously, a testing report for each transformer is also given by the appellant-dealer at the time of supply for which it is never treated as repairing of old and defective transformer, rather it is completely manufactured/assembled of the same by the appellant; that the transformer oil is one of the principal ingredients of manufacturing a transformer which is recommended for use as dielectric and coolant in all oil-filled transformers, switchgear, welders and other electrical equipment and this petroleum oil is never used for any other purpose; that the transformer oil is one of the principal ingredients while assembling/manufacturing/repairing and in this case the appellant-dealer has purchased the same only for the purpose of filling in the assembled/manufactured transformers and never used the same either for resale or for any other purpose. As per the OVAT Act a transformer when in operation and ready for sale is to be charged @ 4% during the financial years 2008-09, 2009-10 and 2010-11 and nowhere it is mentioned that a separate tax rate for individual

components is required for assembling of the transformers; that the learned STO and the learned JCST failed to apply their mind properly and therefore in a routine manner simply passed the orders on receipt of the tax evasion report and taxed @ 12.5% on sale of Rs.54,30,280.00 for the period 01.04.2008 to 31.03.2011 even though the rate chart of the schedule goods indicates that transformer is taxable @ 4%; that imposition of penalty is arbitrary and without any basis as the appellant-dealer never acted anything deliberately in defiance of law so as to be liable for penalty.

On the other hand, the respondent-Revenue has filed cross objection supporting the impugned order.

5. Heard the learned Counsel for the appellant-dealer and the learned Addl. Standing Counsel for the respondent-Revenue. Perused the materials available on record so also the orders of both the fora below. I also perused the grounds of appeal so also the plea taken in the cross objection. The learned Addl. Standing Counsel filed two decisions of the Division Bench of this Tribunal vide S.A. Nos. 1457-58 of 2001-02 and S.A. No.353(VAT) of 2013-14, where the Division Benches held that the very nature of work of such kind does not come within the definition of manufacture. In S.A. No. 1457-58 of 2001-02 the Division Bench of this Tribunal held as follows:-

> "On going through the work order issued by Superintending Engineer, (Store), Bhubaneswar office of the State Electricity Board, Bhubaneswar it is found that the respondent dealer was involved in repair of transformers and for such repairing the respondent was receiving burnt transformers from the Board and supplying the same after due repair.

In the process of repair the respondent was rewinding the coil into the transformers and supplying the same to Executive Engineer, Electrical Division (Stores) Burla. Thus the dealer is found to have returned the transformers after winding of coil and making necessary repairs. It is found that the respondent-dealer has not supplied new transformers nor coil as qua goods. In view of such nature of work the learned STO has treated such transactions as works contract attracting liability of the dealer to pay tax. The learned STO relying on a plethora of decisions which we do not like to repeat has rightly held that the very nature of work does not come within the definition of manufacture. We do not find any compelling reason to differ from the view taken by the learned STO in this regard. On the other hand the findings of the learned ACST that the contract of the respondent is a divisible contract-one for sale of goods and the other for labour job do not stand to reasons and as such the order of the learned ACST annulling the assessments framed by the learned STO U/s.12(8) of the OST Act is not tenable.

In the result, therefore, the appeals are allowed. The order passed by the learned ACST is hereby vacated and that of the learned STO is restored."

Similarly, in S.A. No.353(VAT) of 2013-14 the Division Bench of this Tribunal held as follows:-

"As per the conditions of the work order the Electricity Board shall hand over the damaged distribution transformer at the work site of the appellant for repair and take back the repaired transformer from the work site of the appellant. From this it is crystal clear that the dealer appellant is engaged in repair work. The claim of the appellant that his work involves manufacturing activities, which brings out a change in the article as contemplated U/s.2(28) of the OVAT Act, is dubbed as vague and frivolous. Manufacture means any activity that brings out a change in an

article or articles as result of some process, treatment, labour and results in transformation into a new and different article so understood in commercial parlance having a distinct name, character and use, but does not include such activity of manufacture as may be notified. That is to say the manufacturing would bring out a new and different article having a distinct name, character and use. What happens in the instant case is that the article remains the same having same name, character and use. The repairing work undertaken by the appellant makes a unserviceable transformer a serviceable one only for which aluminium and copper wires are used and new transformer oil are poured. That is to say earlier that was a transformer and after repair that remains a transformer and nothing else. Therefore, the goods used in the repairing work cannot be taxed at the rate transformer is taxable as specified in entry in Sl. No.120 of the OVAT rate chart. The averment of the appellant that WESCO and SOUTHCO provided in their work orders for levy of tax @ 4% on the repaired transformers is also not in compatible with the requirement of the OVAT Act, since as per the requirement of the Act/Rules the goods used in the process of repairing are subject to levy of tax at the rate under which entry in Serial Number they come and since in the instant case transformer oil is sold in as it is condition being poured into the old, used and damaged transformers, the forums below are found just and proper in levying 12.5% and 13.5% tax as applicable depending upon their time of sale, which warrants no interference at present.

The contention of the dealer that the imposition of penalty equal to two times of tax assessed U/s.43 of the OVAT Act is erroneous is now tarnished as fallacious since the dealer is found to have given false declaration for which the returns showing payment of tax automatically showed less payment of tax than that was due to be paid by the dealer. Section 43 provides for best of judgment assessment, whose part and parcel is

> imposition of penalty. If the use of the word "may" is liberally used then the purpose of escaped assessment under the VAT regime would disappear. Therefore, we also do not want to interfere with this score.
>
> In the result, the appeal fails and the order of the Ld. JCST stands confirmed."

6. From the aforesaid findings of the Division Benches of this Tribunal it is clear that the work undertaken by the appellant-dealer is nothing but execution of works contract as per Sec.2(63) of the OVAT Act. The appellant-dealer has charged VAT @ 4% on all material components but the major item used in repair and reconditioning is "Transformer Oil" which is exigible to VAT @ 12.5% till 31.03.2011 and VAT @ 13.5% w.e.f. 01.04.2011. Hence, the orders of the learned STO and the learned JCST to that effect are proper which require no interference. However, the action of the learned JCST for non-entertainment of TDS amount of Rs.3,96,637.00 due to want of confirmation of TDS deposit amount from the DCCT & GST, Ganjam I Circle does not seem to be proper. The appellant-dealer seems to have deposited the substantial amount of Rs.3,96,637.00 but the learned JCST has hastily passed the order on the ground of absence of confirmation of the concerned Circle office and for safeguard of the revenue. The relevant portion of the impugned order is extracted below:-

> "On careful verification of VATIS it reveals that the TIN-21651903751 relates to the VAT TIN of M/s- Executive Engineer, Electrical Store Division, Berhampur, Ganjam. As the said Challans were prima facie found not in the name of the dealer appellant M/s. Bhawani Electric, Lanjia, TIN-21151900728, the dealer appellant was asked to

> re-verify the fact from the concerned Tax Deducting Authority and to submit a suitable responsive reply to that effect as early as possible. Thereafter, Sri Bhabani Prasad Panda, proprietor of M/s. Bhawani Electric, TIN-21151900728 voluntarily appeared before this forum on 19.07.2018 and submitted a letter No.775 dt.19.07.2018 being issued by the Executive Engineer, Electrical Store Division, Berhampur with regards to deposited WCT amount deduction of Rs.3,96,637.00 and issue of TDS certificate in Form VAT-605. Further, no reply was received till to date, though a letter was issued to the Deputy Commissioner of CT & GST, Ganjam I Circle, Berhampur vide this office letter No.1848/CT dt.18.07.2018 and pursed this matter with them for confirmation of the TDS deposit amount in respect of M/s. Bhawani Electric, Lanjia, Dist.- Ganjam, TIN-21151900728 for the years 2008-09 to 2011-12 (up to August-2011). In this juncture, the TDS amount of Rs.3,96,637.00 claimed to have been deposited against the dealer appellant M/s. Bhawani Electric, Lanjia, TIN-21151900728 by the tax deducting authority are not entertained in absence of confirmation of the concerned Circle Office, for safe guard of the revenue."

Needless to say that the tax payer's money to the extent of Rs.3,96,637.00 is involved in this case. The impugned order does not reflect that the learned JCST had sent any reminder for confirmation from the circle office. The learned JCST is also a fact finding authority. Hence, for the ends of justice it is necessary to have thorough verification of the same for which the matter needs to be remitted back to the learned JCST. In view of the decisions of the Division Bench of this Tribunal narrated supra, the other grounds taken by the appellant-dealer have no merit at all for which it

is not desirable to interfere with the rest part of the impugned order. Hence, it is ordered.

7. The appeal is allowed in part. The matter is remitted back to the learned JCST for thorough verification of deposit TDS amount of Rs.3,96,637.00 by the appellant-dealer and recomputation of tax liability as per the provisions of law preferably within a period of three months from the date of receipt of this order. The cross objection is disposed of accordingly.

Dictated & corrected by me,

Sd/-
(A.K. Dalbehera)
1st Judicial Member

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(A.K. Dalbehera)
1st Judicial Member