

**BEFORE THE FULL BENCH, ODISHA SALES TAX
TRIBUNAL: CUTTACK**

S.A. No. 1625 of 2003-04

(Arising out of order of the learned Asst. Commissioner of
Sales Tax, Koraput Range, Jeypore,
in Sales Tax Appeal No. AA (KOI)543/2002-2003,
disposed of on dated 29.05.2003)

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

M/s. D.N. Balabantaray, Contractor,
Irrigation Colony, Jeypore,
Dist.- Koraput (Orissa). ... Appellant

-Versus-

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

For the Appellant : Sri B.B. Panda, Advocate
For the Respondent : Sri D. Behura, S.C.
Sri S.K. Pradhan, A.S.C.

Date of hearing: 21.03.2022 *** Date of order:23.03.2022

ORDER

The dealer-appellant has preferred this appeal
assailing the order dtd.29.05.2003 passed by the Asst.
Commissioner of Sales Tax, Koraput Range, Jeypore in
Sales Tax Appeal No. AA (KOI)543/2002-2003, thereby
reducing the tax demand to Rs.8,64,879.92 from
Rs.11,58,830.00 including surcharge of Rs.1,51,152.00

for the assessment period 1999-2000 invoking power u/s.12(4) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as, the OST Act).

2. Briefly stated the relevant facts of the case leading to the filing of the present appeal are that, the dealer-appellant was engaged in undertaking works contract under the Executive Engineer, Upper Kolab Irrigation Division No.IV, Boriguma for executing works like excavation and construction of Belgaon Distributory from R.D. 00 to 7.392 km, Ex-R.D. 9.695 km. of Sankarada Distributory with all its structure and lining thereof. The dealer-appellant for this purpose received a gross payment of Rs.2,37,95,200.00 from the Executive Engineer, Upper Kolab Project, Irrigation Division for the assessment year 1999-2000. The learned assessing officer to assess the dealer initiated proceeding u/s.12(4) of the OST Act and issued notice to it. Pursuant to such notice the dealer appeared and produced the books of account like purchase register, purchase invoices along with TDS certificates, annual statement of turnover, copy of work order with schedule of rates, statement of purchase of tax suffered materials as well as materials purchased from outside the State of Orissa. The learned assessing authority on scrutiny of the documents filed by the dealer-appellant, allowed deduction of Rs.22,11,221.00 towards escalation price and labour charges, Rs.21,13,041.65 towards tax suffered materials utilised in course of

execution of works contract and 32% deduction from gross receipt towards labour and service charges. On completion of the assessment, the assessing authority raised an extra demand of Rs.2,98,024.00. The dealer-assessee challenging the aforesaid extra demand of Rs.2,98,024.00 raised by the assessing authority preferred appeal before the first appellate authority u/s.23(1) of the OST Act which was partly allowed and tax demand of Rs.11,58,830.00 raised by the assessing authority was reduced to Rs.8,64,879.00, requiring the dealer to pay Rs.4074/- as it had already deposited Rs.8,60,806/-. The first appellate authority while reducing the tax demand raised by the assessing authority allowed 72% deduction on account of labour charges and 32% deduction towards structural work. The dealer-appellant being further aggrieved with the above demand raised by the first appellate authority preferred the present second appeal.

3. It was vehemently contended by the learned Counsel for the dealer-appellant that both the fora below committed serious illegality in not granting 100% deduction towards labour and service charges. The nature of work executed by the dealer-appellant was such that the entire expenditure incurred should have been allowed as deduction towards labour and service charges but the first appellate authority as well as the assessing authority both erred in law in granting deduction as per their whim and caprice not as per the law. He further submits that

the appellant in order to execute the works contract purchased some materials from outside the State which should not have been taxed under the OST Act. The transaction made by the dealer-assessee is covered u/s.3(a) of the CST Act. He submits to set aside the order of the first appellate authority and allow deduction as claimed by the dealer-assessee before the assessing authority.

4. Per contra, the learned Standing Counsel for the Revenue vehemently urged that the first appellate authority has allowed deduction on higher side towards labour and service charges without considering the provisions contained u/r.4-B of the Orissa Sales Tax (Amendment) rules, 2010. In view of introduction of Rule 4-B, the first appellate authority should not have allowed deduction as per his whim and caprice thereby reducing the tax liability of the dealer-assessee. He further submits that the dealer-appellant also did not raise any claim of deduction towards interstate sales before the first appellate authority. He challenged the order of the assessing authority only on the ground of disallowing the claim of deduction made by him towards labour and service charges, no other contention was raised by him before the first appellate authority. Therefore, he is estopped to raise such contention before the second appellate forum. He submits to set aside the impugned order of both the forums below and remit the matter back

to the first appellate authority to recompute the tax liability of the dealer-assessee keeping in view the provisions contained in Rule 4-B of the OST (Amendment) Rules, 2010.

5. We have heard the rival submission of the parties, gone through the impugned orders of the forums below, grounds of appeal vis-a-vis the materials on record. The dealer-appellant in the present appeal challenged the impugned order of the forums below mainly on two grounds. First ground was that the deduction granted towards labour and service charges was on lower side vis-a-vis the nature of works executed by him and the second one was the claim of deduction towards interstate sales was illegally disallowed. On perusal of the impugned orders of the first appellate authority, we find that the first appellate authority in page-4 of the impugned order has observed that the only ground raised in the appeal was regarding deduction allowed by the assessing authority towards labour and service charges. This observation of the first appellate authority is contrary to the grounds of appeal quoted in page-2 of its order. In ground No.3 the dealer-appellant has specifically raised the question of taxing the goods purchased from outside the State and consumed by the contractee in process of execution of works contract. So the finding of the first appellate authority that the only issue regarding deduction granted towards labour and service charges was raised before it, is

factually incorrect. The first appellate authority has not discussed the issue of taxing the goods purchased from outside the State for the purpose of incorporation in the works contract by the assessing authority. It is settled position of law that when goods are brought from outside the State in pursuance of pre-existing contract, such goods cannot be taxed under the OST Act. It is the State from which the movement of goods occasioned competent to collect tax on such transaction. The State of Orissa has no jurisdiction to impose tax in respect of the materials purchased from outside the State by invoking power under the OST Act. The first appellate authority committed serious illegality in not deciding this issue though specifically raised in ground No.3 of the memorandum of appeal. So far as grant of deduction towards labour and service charges is concerned, it is pertinent to mention here that in the absence of books of account, the assessing authority allowed deduction of Rs.22,11,221.00 towards labour escalation and Rs.69,06,873.00 towards labour and service charges. In the appeal the first appellate authority in the absence of books of account allowed 72% deduction on account of labour charges from the payment received towards excavation work and 30% deduction on account of labour charges towards structural works. It is pertinent to mention here that by the time the impugned orders were passed, Rule 4-B of the OST(Amendment) Rules, 2010

which came into force w.e.f. 30.07.1999 was not enacted. Therefore, both the forums below allowed deduction keeping in view the nature of work executed by the contractor but in view of introduction of Rule 4-B, the dealer-appellant is only entitled to deduction towards labour and service charges as per the provisions contained therein.

It was vehemently argued by the learned Counsel for the dealer-appellant relying on the judgment of this Tribunal in case of M/s. Amar Builders vrs. State of Orissa in S.A. No.452/2006-07 and S.A. No.465/2006-07 that Rule 4-B of the Orissa Sales Tax (Amendment) Rules is not applicable to the present case. In our view such argument is fallacious and the judgment relied upon by the learned Counsel for the dealer-appellant is not applicable to the present case as the facts of both the cases are different and distinguishable. The nature of work executed by the dealer-appellant is squarely covered u/r.4-B of the OST(Amendment) Rules, 2010 but in the cited case the work executed by the dealer was not covered under the said provision. Therefore, in that circumstances this Tribunal held that Rule 4-B of the OST (Amendment) Rules was not applicable but the nature of work executed in the present case is squarely covered under the provisions of Rule 4-B of the OST (Amendment) Rules, 2010. So the dealer-appellant is entitled to deduction towards labour and service charges as per the

provisions contained therein. The other decision cited by the learned Counsel for the dealer-appellant in case of *Gunei Sahu and another v. State of Orissa and another* with due respect is not applicable to the facts of the present case after the judgment of the Hon'ble Apex Court in case of **Gannon Dunkerely Co. & Others vrs. State of Rajasthan & Others (1993) 88 STC 204.**

6. When the dealer-appellant failed to maintain books of account with regard to the expenditure incurred by it towards labour and service charges, the forums below were justified in their approach in disallowing the claim of deduction towards labour and service charges raised by it (dealer-assessee). The forums below did not commit any illegality in disallowing claim of 100% deduction towards labour and service charges. In view of introduction of Rule 4-B, it is incumbent on the forums below to recompute the tax liability of the dealer-appellant granting deduction towards labour and service charges as per the provisions contained therein and ignoring the provisions contained in Rule 4-B of the OST (Amendment) Rules, 2010 applying best judgment principle is not justified.

7. In view of the discussion made above, we are also unanimous view that the dealer having not maintained any books of account towards labour and service charges is not entitled to 100% deduction towards labour and service charges as claimed by him. The deduction should

be as per the Rule 4-B of the OST (Amendment) Rules, 2010. Accordingly, the appeal filed by the dealer-assessee is partly allowed. 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 keeping in view the provisions contained in Rule 4-B of the OST (Amendment) Rules, 2010 for grant of deduction towards labour and service charge and observation of this Tribunal with regard to claim of deduction towards interstate purchases made by the dealer-assessee. The assessing authority is directed to complete the entire exercise within a period of three months from the date of receipt of copy of this order giving the dealer-assessee a reasonable opportunity of hearing to substantiate his claim of deduction with regard to interstate purchases.

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