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

S.A. No. 38(V) of 2018
(Arising out of the order of the learned JCST (Appeal), Bhubaeswar Range, Bhubaneswar, in First Appeal Case No. AA-006/BH-IV/2017-18(OVAT), disposed of on dtd.30.12.2017)

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

M/s. Samasti Infrastructure Pvt. Ltd.,
Plot No.85(A), 2nd Floor, Bapuji Nagar,
Bhubaneswar. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. K.K. Sahoo, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 19.02.2021 *** Date of order: 12.03.2021

O R D E R

This appeal is directed against the order dtd.30.12.2017 passed by the learned Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar (hereinafter referred to as, the learned JCST) in First Appeal Case No. AA-006/BH-IV/2017-18(OVAT), wherein he confirmed the order passed by the learned Sales Tax Officer, Bhubaneswar IV Circle, Bhubaneswar (hereinafter referred to as, the learned STO) for the assessment period 01.04.2010 to

31.03.2013 u/s.44 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 is engaged in construction of duplex, simplex and apartment and by selling the same to the customers. As per the Tax Evasion Report, the Sales Tax Officer, Bhubaneswar IV Circle visited the place of business of the appellant-dealer. As per the report, the appellant-dealer's company has completed two projects namely Amrapalli at Patia and Samasti Residency at Satabdi Nagar, Bhubaneswar and another project is under construction namely Samasti 01001, Greens, Ghatikia, Khandagiri. It was reported that the appellant-dealer had received gross payment of Rs.12,78,94,217.00. On receiving the report, the learned STO issued and served a notice to the appellant-dealer in form VAT-308 and in response to the said notice, the learned Advocate for the appellant-dealer appeared and submitted a note of written submission refuting the charges leveled against the appellant-dealer. The learned STO after verification of documents determined the GTO at Rs.12,78,94,217.00. After allowing deduction of Rs.5,59,54,840.00 towards land cost, Rs.2,32,06,953.00 towards payments made to sub-contractor and Rs.3,26,55,400.00 towards labour charges the learned STO determined the TTO at Rs.1,60,77,024.00. The learned STO assessed the tax at Rs.7,87,082.00 and no ITC was allowed to the appellant-dealer being unregistered. The learned STO also imposed penalty of Rs.7,87,082.00 which is equal to the amount of tax due u/s.44(1) of the OVAT Act. So the penalty alongwith demand came to Rs.15,74,164.00.

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

4. The appellant-dealer has come up with the second appeal on the grounds that the order of the learned STO is perverse, vitiated inasmuch as there was total non-application of mind; that the learned STO without fixing the liability of the dealer under the Act, when the appellant-dealer is not a dealer under the Act and is not coming under the ambit/purview of the Act and is not liable to pay any tax, completed the assessment, for which the order of assessment is not maintainable and/or sustainable in the eye of law and is liable to be quashed in the interest of justice; that levy of penalty u/s.44(1) of the Act by the learned STO is highly illegal, arbitrary, unreasonable and unfair and accordingly the same is liable to be deleted in the interest of justice; that the appellant-dealer had purchased the land and after developing the land, constructed flats and duplexes which were sold to the intending buyers, which is a transfer of ownership of the immovable property and not a works contract and therefore the petitioner is not a dealer under the OVAT Act and is not liable to pay any tax for which the order of assessment levying tax and penalty is without authority of law and is liable to be quashed; that the appellant-dealer is not a dealer u/s.2(12) of the OVAT Act which speaks that the STO has no authority and jurisdiction to assess the appellant-dealer and levy tax and penalty; that the appellant-dealer had purchased the building

materials like iron rod, cement, bricks, chips, sanitary goods from unregistered dealers by paying the requisite VAT and is liable to avail input tax credit, but the learned STO has denied the ITC by concluding that the appellant-dealer is not entitled to claim any ITC being an unregistered dealer and in that case the value of the tax suffered goods must be deducted from the gross turnover while computing the taxable turnover which has not been done which leads to double taxation and is not permissible under the law; that the State Legislature lacks legislative competence to levy tax on the transfer of immovable property under Entry 54 of list II of the VIIth Schedule for which the levy of VAT and penalty by the learned STO is without jurisdiction and without any authority of law; that the Builders Association of Bhubaneswar on an earlier occasion met the Commissioner of Sales Tax and the Joint Commissioner of Sales Tax, in connection with grant of registration certificate to the builders/developers and it was told that the activities of the developers/builders were not coming under the ambit of OVAT Act and some of the builders who had applied for Registration were denied/refused Registration under the Act and that the assessment order suffers from infirmity causing serious prejudice to the appellant-dealer since the learned STO based heavily on the report, which itself is nonest, therefore the assessment becomes perverse and tainted; that there was no material evidence in the hands of the learned STO to prove that the appellant-dealer is liable under the Act and relying on the judgment in the case of K. Raheja Development Corporation v. State of Karnataka, the learned STO on presumption and

assumption came to a conclusion that the appellant-dealer is a works contractor and accordingly completed the assessment u/s.44 of the OVAT Act and levied tax and penalty particularly when the said judgment is not applicable in this case and that the learned JCST ought to have quashed the order of assessment but unfortunately the learned JCST without going into the merits and without proper application of mind in a very casual and mechanical manner dismissed the appeal and upheld the order of assessment which is not maintainable in the eye of law.

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

5. Heard the learned Counsel for the appellant-dealer so also the learned Addl. Standing Counsel appearing for the Revenue. Perused the materials available on record so also the orders passed by both the fora below. I also perused the grounds taken in the appeal, plea taken in the cross objection so also the written submissions of both the sides. In this case the learned STO on receipt of tax evasion report initiated assessment proceeding u/s.44 of the OVAT Act on the ground that the appellant-dealer exceeded the liability to pay tax u/s.10 of the OVAT Act, as a works contractor. Section 44 of the OVAT Act speaks about assessment of a dealer who being liable to pay tax fails to register. It was submitted by the learned Counsel for the appellant-dealer that the appellant-dealer is not at all liable to pay the tax under the Act, as the nature of business is purchase and sale of land, construction and sale of duplex, apartments which involve transfer of immovable property and hence not taxable under the OVAT

Act. It was also submitted that the appellant-dealer was not earlier registered under the OVAT Act. Moreover, for sale of flats there was no pre-existing contract/agreement prior to completion and sale of flats for which the appellant-dealer cannot be treated as a works contractor as submitted by the learned Counsel. From the record it is seen that the appellant-dealer was granted R.C. w.e.f. 29.09.2015. The appellant-dealer purchased land and after developing the same sold the same to the intending buyers as submitted. The appellant-dealer also availed bank loan for construction of houses and after constructing the same sold the constructed houses to the intending buyers and there was no pre-existing agreement to that effect as per the submission of the learned Counsel. Per contra, the learned Addl. Standing Counsel submitted that the appellant-dealer has not produced any agreement with the intending buyers after construction of the houses. In view of the same the grounds taken by the appellant-dealer cannot stand as submitted by the learned Addl. Standing Counsel. In the cross objection it is also stated that the appellant-dealer should be instructed to produce the audited account and other related accounts to ascertain the exact sources of income on which income tax filed and for substantiation of liability under the OVAT Act. The learned Addl. Standing Counsel stated that the grounds taken in the second appeal and submissions made by the appellant-dealer being not supported by evidence should not be accepted by the Tribunal. Moreover, the appellant-dealer has not brought on record any evidence showing agreement with the prospective buyers after completion of the building as submitted by the learned Addl.

Standing Counsel. It was further stated that the appellant-dealer has not placed any material to show that whatever consideration it received from the prospective buyer has not been made over to it after transfer of immovable property on completion of building/flat. It was also stated in the written submission that the assertion that there is absence of pre-existing contract during the course of construction of building is out and out a myth.

6. It is seen from the record that the Revenue has failed to submit the tax evasion report and other related documents. The learned STO concluded that the appellant-dealer is liable to pay tax under the OVAT Act without taking into consideration the fact that it is also selling completed ready built flats to the customers by examining necessary documents. The copies of the agreements should have been examined to ascertain whether the activities of the appellant-dealer are coming under the purview of works contract. Thus, the sale of flats cannot be considered as pre-determined sale during the process of construction. No demand can be raised on assumption and surmise. It should have been proved that the appellant-dealer had entered into agreements with the prospective buyers before completion of flats during the period which has not been done in this case. The learned STO has not ascertained about sale of flats as immovable properties. No demand can be raised on the basis of assumption, presumption without any corroborative evidence and no adverse inference can be drawn from the documents submitted by the appellant-dealer that the said dealer has constructed residential flats on behalf of the intending

purchasers by collecting money during the process of construction. The learned JCST without analyzing the assessment order in detail just confirmed the same. Section 2(63) of the OVAT Act defines works contract and section 2(12) defines a dealer which read as follows:-

Sec.2(63) of the OVAT Act-

> ""**WORKS CONTRACT**" means a contract for the construction, building, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any property;"

Sec.2(12) of the OVAT Act-

> "**DEALER**" means any person who carries on the business of buying, selling, supplying or distributing goods, executing works contract, delivering any goods on hire-purchase or any system of payment by instalments, transferring the right to use any goods or supplying by way of or as part of any service, any goods directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration"

7. In view of the aforesaid discussion it is necessary to remand the case to the learned STO for fresh assessment by examining all the relevant documents including copies of agreements to be produced by the appellant-dealer. Hence, it is ordered.

8. The appeal is allowed and the impugned order is hereby set aside. The matter is remitted to the learned STO for fresh assessment in view of the aforesaid observations preferably within a period of three months from the date of receipt of this order. The appellant-dealer is directed to produce all the relevant documents before the learned STO for the said purpose. The cross objection is disposed of accordingly.

Dictated & corrected by me,

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

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