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

S.A. No. 894/03-04

(Arising out of the order of the learned ACST, Puri Range, Puri in first appeal Case No. AA..92(PUII)001-02 disposed of on 29.11.2002.)

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

M/s. Bovis Lend Lease India(P) Limited
No.105, Embassy Square, 148,
Infantry Road, Bangalore, PUIIK-649. ... 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. M.S. Raman, A.S.C(C.T.)

Date of Hearing : 09.12.2021 *** **Date of Order :06.01.2022**

O R D E R

The present appeal of the dealer has been directed against the impugned order of learned Assistant Commissioner of Sales Tax, Puri Range, Puri (in short, ld. FAA) passed on dated 29.11.2002 in Appeal Case No. AA..92(PUII)001-02, enhancing the demand to Rs.32,84,488.00 against the demand of Rs.1,56,611.00 raised by the Learned Sales Tax Officer, Puri-II Circle, Puri (in short, LAO) in his assessment order framed Under Section12(4) of the Odisha Sales Tax Act (in short, OST Act) relating to the year 2001-02.

Being aggrieved by the aforesaid order, the dealer-appellant preferred appeal before this Tribunal challenging both the assessment order and first appeal order as arbitrary, excessive and bad in law and prayed for proper justice.

2. The brief fact of the case in hand is that the instant company is a works contractor that entered into an agreement with M/s. Hindustan Coca Cola Pvt. Ltd. on 15.05.1999 for designing, construction, project management, commissioning, testing etc. of a plant for manufacturing of soft drinks with a project cost of Rs.17,00,00,000.00 including delaying cost on a turnkey basis.

3. At assessment stage, the LAO found that the assessee has received a gross amount of Rs.8,93,16,040.00 from its principal during impugned period. He observed that in pursuance to the contract, the assessee has engaged 12nos. of sub-contractors to execute different types of work and has paid a total sum of Rs.3,49,24,294.00 to these sub-contractors in the relevant year and has claimed deductions from its gross receipts which the LAO allowed. Secondly, he observed that the assessee has adjusted advance payments made of Rs.16,14,529.00 from the bills of sub-contractors which he allowed towards deduction from gross receipts of the assessee. Thirdly, he observed that the assessee has claimed a further sum of Rs.33,57,531.00 towards profit derived out of labour charges towards deduction. However, in the absence of balance sheet and necessary documentary evidence towards such deduction, he disallowed the above claim. Fourthly, against claim

of deductions of Rs.1,18,34,831.00 from the gross receipts towards goods purchased from outside the State used in works contract, the LAO allowed such deductions for Rs.20,12,284.00 towards purchase of iron and steel goods covered U/s.14 of the CST Act. Fifthly, he allowed deductions of Rs.9,73,32,225.00 from gross receipts on purchase of goods from registered dealers of Odisha and used in works contract. He also allowed a sum of Rs.92,56,345.00 towards labour & service charges. Accordingly, he determined the Taxable Turn Over(TTO) at Rs. 4,05,35,365.00 which he taxed @8% & levied surcharge @15% of tax assessed, resulting in extra demand of Rs.1,56,611.00 after allowing deductions towards TDS deposited of Rs 35,72,642.00 U/R 37-A of OST Rules from Tax assessed.

4. Being aggrieved by the aforesaid order, the dealer preferred first appeal before the ld. FAA who issued notice for enhancement of turnover and sales tax vide No1844 dtd.31.10.2002 because of wrongful deduction allowed by LAO for Rs.3,49,24,294.00 towards payment made to sub-contractors as no evidence was available on the record that these sub-contractors have been assessed by respective circles on amount received from the dealer-assessee. However, the assessee contented before the ld. FAA that as per decision of Full Bench of OSTT in case of Tata Robins Faser Ltd., Jamsedpur in S.A. No.1357 & 1358 passed on 30.11.1992 in which it is held that the payment of sub-contractors should be deducted from the turnover of principal contractor, the enhancement of his turnover on this score should not be

made. Moreover, he has deducted tax at source from respective sub-contractors and deposited the same in State ex-chequer, duly observed by LAO in his order. However, in the absence of documentary evidence towards assessment of these sub-contractors on amount received from the assessee, the ld. FAA didn't allow the above deductions from the gross receipts of the assessee and taxed him accordingly. Nonetheless, he allowed 10% profit towards deductions on labour applying ratio of judgment of Hon'ble Apex Court in case of Gannon Dunkerly Vs. State of Rajasthan reported in 88 STC 204 to determine the TTO. All these resulted in extra tax demand of Rs.32,84,488.00 including surcharge.

5. Being further aggrieved with the order of ld. FAA, this second appeal has been filed by the dealer before the Tribunal, mainly on following grounds:-

a) Payment of Rs.3,49,24,294.00 made to 12nos of sub-contractors should be allowed towards deductions from gross receipt as per decision of Hon'ble OSTT noted supra.

b) Inter-state purchase of goods amounting Rs.1,18,34,831.00 used in works contract should be allowed towards deductions as it relates to inter-State work not liable for state tax.

c) Restricting profit margin @10% on labour and other like charges towards deductions by ld. FAA is without any proper basis.

d) No reason has been assigned by the forums below towards levy of surcharge on tax assessed.

6. However, when the matter was called on for hearing, non-appeared on behalf of the dealer-appellant in spite of valid service of notice. Hence, the appeal was taken up for ex-parte hearing in presence of Ld. Standing Counsel and Additional Standing Counsel (C.T.) representing the State.

7. During the course of hearing, the ld SC (C.T.) vehemently argued in support of the appeal order passed by the ld. FAA claiming it as just, proper and in accordance with the provisions of law that does not warrant any further interference by the Tribunal.

However, we felt necessitated to address the main grounds taken by the assessee as appended in his appeal memorandum filed before the Tribunal taking into consideration the materials available in this record including the records of lower forums.

In order to reasonably address ground no.(a) above, it would be prudent to refer to the statutory provisions as contained in OST Act.

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."

Section 5(2)(AA):

"Notwithstanding anything contained in sub-section (2) (A) "Taxable turnover" in respect of.-

(i) 'works contract' shall be deemed to be the gross value received or receivable by a dealer for carrying out such contract, less the amount of labour charges and service charges incurred for the execution of this contract."

Section13(AA). Deduction of tax at source from payment to works contractors-

(1) Notwithstanding anything contained in Section13 or any other law or contract to the contrary, any person responsible for paying any sum to any contractor (hereinafter referred to in this Section as the 'deducting authority') for carrying out any works contract....

shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or any other mode, whichever is earlier, deduct, subject to the certificate, if any, produced by the contractor in pursuance of sub-section 5, an amount towards sales tax equal to four per centum of such sum in respect of the works contract, if the value of the works contract exceeds rupees one lakh: .....

(2) .....

(3)The amount deducted from the Bills or Invoices shall be deposited into a Government Treasury within one week from

the date of deduction in such form or challan as may be prescribed.

(4) Such deposit into Government Treasury shall be adjusted by the Sales Tax Officer towards the Sales Tax liability of the contractor and would also constitute a good and sufficient discharge of the liability of the deducting authority to the contractor to the extent of the amount deposited."

On a bare reading of the above provisions of the Statute, we observe that both the forums below have admitted in their respective orders that the assessee has made total payment of Rs.3,49,24,294.00 to his 12 nos of sub-contractors in the relevant year for execution of different works as per contract and the assessee has made TDS on such payments which he has deposited into State ex-chequer. Thus, as per section 13-AA (4) of OST Act, the assessee has discharged his liability as a deducting authority to its sub-contractors to the extent of the amount deducted & deposited. The amount on which such TDS has been made by the assessee becomes the turnover of respective sub-contractors as per section 2(jj) read with Section 5 (2) (AA) of OST Act who should be assessed separately by the respective circles. Moreover, on the issue of as to whether the amount paid by a Contractor to its sub-contractors will be included in the turn-over of the contractor has already been settled by the Full Bench of OSTT in their order dtd.30.11.1992 in case of Tata Robins Faser Ltd. Vs. State of Orissa (S.A. No.1357 & 1358) in which it is held that payments effected to sub-

contractors are allowable as deductions from the turnover of the principal contractor. Since, the assessee has discharged his liability in deducting and depositing tax at source in a lawful manner, it is the mundane responsibility and duty of the CT Department to assess the above sub-contractors separately on the amount received from the assessee as per provisions of the Act. Moreover, as the payments are made to the sub-contractors, the amount so paid is to be deducted from the gross receipt of the assessee as per above provisions of Statute together with settled judgment of this Tribunal noted supra. Accordingly, the amount of Rs.3,49,24,294.00 paid by the assessee to its sub-contractors is to be deleted in determining the TTO of the assessee and is deleted.

Addressing to ground no.(b), we observe that the assessee has made inter-State purchase of goods of Rs.1,18,34,831.00 in the relevant year towards execution of works contract from which both the forums below allowed a sum of Rs.20,12,284.00 towards deductions U/s. 14 of CST Act. However, the assessee has claimed the entire amount of Rs.1,18,34,831.00 towards deductions as these relate to inter-State work not liable for State tax as per judgment of Hon'ble Apex Court in case of Gannon Dunkerley Vs. State of Rajasthan reported in 88 STC 204. The Apex Court in the aforesaid case has held that :

"The legislative power of the States under entry 54 of the State List is subject to two limitations-one flowing from the entry itself which

makes the said power "subject to the provisions of entry 92-A of List I" , and the other flowing from the prohibition contained in article 286. Under entry 92-A of List I, Parliament has the power to make a law in respect of taxes on sale or purchase of goods other than newspapers where such sale or purchase takes place in the course of inter-State trade or commerce. The levy and collection of such tax is governed by article 269. This shows that the legislative power under entry 54 of the State List is not available in respect of transactions of sale or purchase which take place in the course of inter-State trade or commerce. Similarly clause (1) of article 286 prohibits the State from making a law imposing or authorizing the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State or (b) in the course of the import of goods into or export of the goods out of the territory of India. As a result of the said provision, the legislative power conferred under entry 54 of the State List does not extend to imposing tax on a sale or purchase of goods which takes place outside the State or which takes place in the course of import or export of goods. In view of the aforesaid limitations imposed by the Constitution on the legislative power of the States under entry 54 of the State List, it is beyond the competence of the State Legislature to make a law imposing or authorizing the imposition of a tax on transfer of property in goods involved in the execution of a works contract, with the aid of sub-clause (b) of clause (29-A) of article 366, in respect of transactions which take place in

the course of inter-State trade or commerce or transactions which constitute sales outside the State or sales in the course of import or export. Consequently, it is not permissible for a State to frame the legislative enactment in exercise of the legislative power conferred by entry 54 in State List in a manner as to assume the power to impose tax on such transactions and thereby transgress these constitutional limitations."

In this regard, we also follow the case laws in BHEL Vrs. Union of India and others (1996) 4 SCC 230 and Sawhney Steel and Press Works Ltd. Vs. CTO (1985) 60 STC 301 (SC) to conclude that inter-State sales are to be deleted from the purview of local Sales tax Act, 1947. However, in the absence of books of accounts, we could not reach to a fair conclusion as to whether the claim of inter-state purchase of goods valued Rs.1,18,34,831.00 is genuine and thus, we remit back to the LAO to re-examine the above claim with reference to books of accounts and other relevant documents together with the agreement to adjudicate in a proper rational manner.

Addressing ground no (c), we direct the LAO to re-examine the claim of assessee on deductions towards profit margin derived on labour & other charges after proper examination of books of account with audited balance sheet for the relevant year.

On levy of surcharge on tax assessed, we refer to Hon'ble Apex Court decision in case of Deputy Commissioner of Sales Tax Vs. Aysha Hosiery Factory Pvt. Ltd. reported in (1992) 85 STC 106 SC in which it

is held that surcharge is nothing but additional sales tax which can be levied on inter-state sale (if not covered under C forms). Moreover, Section 5-A of OST Act provides levy of surcharge on tax assessed. Thus, it is justified to levy surcharge on tax assessed as the statute mandates it.

8. Accordingly it is ordered.

The appeal filed by the dealer-appellant is allowed in part and the case is remanded to the LAO to re-compute the tax payable by the appellant taking into consideration the observations made herein above and pass fresh order preferably within three months from the date of receipt of this order, giving the appellant a reasonable opportunity of being heard.

Dictated & 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