

**BEFORE THE JUDICIAL MEMBER: ODISHA SALES TAX TRIBUNAL:
CUTTACK.**

S.A. No. 150 (V) of 2017-18

(Arising out of the order of the learned ACST (Appeal), Central Zone, Odisha, Cuttack, in Appeal Case No. AA-106101610000075/2015-16, disposed of on dtd.18.05.2017)

P r e s e n t: Shri A.K. Panda,
1st Judicial Member

M/s. ECP Industries Ltd.,
Cylinder Division, 27-Industrial Estate,
Balasore. ... Appellant

- V e r s u s -

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

S.A. No. 152 (V) of 2017-18

(Arising out of the order of the learned ACST (Appeal), Central Zone, Odisha, Cuttack, in Appeal Case No. AA-106101610000075/2015-16, disposed of on dtd.18.05.2017)

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

- V e r s u s -

M/s. ECP Industries Ltd.,
Cylinder Division, 27-Industrial Estate,
Balasore. ... Respondent

For the Dealer : Mr. S. Panigrahi, Advocate
For the Revenue : Mr. M.L. Agarwal, S.C.

Date of Hearing: 20.08.2018 **** Date of Order: 06.10.2018

O R D E R

As both these second appeals arose out of the self-same order,
both are disposed of by this common order.

2. S.A. No. 150 (V) of 2017-18 has been preferred by the dealer-assessee whereas S.A. No. 152 (V) of 2017-18 has been preferred by the Revenue against the order dtd.18.05.2017 passed by the learned Addl. Commissioner of Sales Tax (Appeal), Central Zone, Odisha, Cuttack (hereinafter referred to as, the learned ACST) in Appeal Case No. AA-106101610000075/2015-16, wherein and whereby he has allowed the first appeal in part by reducing the balance tax demand and penalty to Rs.21,42,034.00 from Rs.22,82,852.00 raised by the learned Joint Commissioner of Sales Tax, Balasore Range, Balasore (hereinafter referred to as, the learned JCST) in an assessment u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) in respect of the dealer-assessee for the assessment period from 01.04.2012 to 31.03.2014.

3. The dealer-assessee is a manufacturer of gas cylinders and it used to sale the same to various oil companies. Similarly, the dealer-assessee also used to undertake hot repair as well as cold repair of cylinders being ordered by them. Basing upon an Audit Visit Report (in short, the AVR), the learned JCST initiated a proceeding u/s.42 of the OVAT Act against the dealer-assessee for its assessment for the period from 01.04.2012 to 31.03.2014 and issued a notice in form VAT-306 to appear and to produce the books of account and in response to the notice, the dealer-assessee appeared through an Advocate and produced the books of account which were duly been examined in the light of the allegation of the AVR. During assessment, among other transactions, the learned JCST found out that, though the dealer-assessee has claimed deduction of Rs.1,42,06,266.00 towards the labour and service charges, it has not maintained any account showing such expenditure and as such he determined the labour and service charges to be Rs.49,92,003.00 which is 20% of the total value of the works contract as per the provision mentioned in Rule 6(e) of the Orissa Value Added Tax Rules, 2005 (hereinafter referred to as, the OVAT Rules) and determined the TTO in respect of the works contract at Rs.1,99,68,013.00. Similarly, taking the average price of VP ring, foot ring and stay plates at Rs.116.50, the total value of such goods in respect of 58292 numbers of

cylinders was determined to be Rs.67,91,018.00 and tax was levied thereon @ 5%. Thereafter, the learned JCST also determined the total value of the paints used by the dealer-assessee in execution of the works contract at Rs.1,31,76,995.00 and levied tax thereon @ 13.5%. Finally, on consideration of all the transactions, the learned JCST determined the GTO at Rs.6,35,12,564.00 and after allowing deduction of Rs.49,92,003.00 towards labour and service charges and Rs.27,89,686.00 towards collection of VAT, determined the TTO at Rs.5,57,20,875.00 and levied tax @ 5% and 13.5% on different transactions which came to be Rs.46,28,855.00. After allowing the ITC amounting to Rs.24,30,690.00 and after considering of the payment of tax amounting to Rs.10,56,739.00 made earlier, he raised the balance tax demand of Rs.11,41,426.00 and also imposed a penalty of Rs.22,82,852.00, equal to twice of the balance tax demand u/s.42(5) of the OVAT Act and as such both the balance tax demand and penalty came to be Rs.34,24,278.00 in total, to be paid by the dealer-assessee.

4. After the assessment, being aggrieved with the order of the learned JCST, the dealer-assessee preferred an appeal before the learned ACST bearing Appeal Case No. AA-106101610000075/2015-16. On hearing and on consideration of the entire materials available on record in detail, though the learned ACST agreed to the finding of the learned JCST, re-determined the tax liability of the dealer-assessee and the same resulted in reduction of the balance tax demand and penalty to Rs.21,42,034.00 from Rs.22,82,852.00 as raised earlier by the learned JCST. But, thereafter being aggrieved with the order of the learned ACST, the dealer-assessee as well as the Revenue has preferred two separate second appeals as indicated above.

5. Both the sides have filed their cross objections supporting their respective grounds of appeal.

6. Heard both the sides. The learned Counsel appearing for the dealer-assessee submitted that, the AVR in the present case has not been submitted within due time and the assessment proceeding has also not been completed within the prescribed period and as such the entire proceeding can be considered to be an illegal one. He further submitted that, the learned

forums below have not considered the matter in its proper perspective and have passed the order in an improper and unjustified manner. Though the dealer-assessee has produced sufficient materials relating to the expenditure incurred towards the labour and service charges, the learned forums below have not taken the same into consideration and have applied Rule 6(e) of the OVAT Rules wrongly only on the ground that the dealer-assessee has not maintained any labour account. He further submitted that, as the entire order passed by the learned ACST is erroneous and is not based upon the materials available on record, the same is liable to be set aside and the appeal preferred by the dealer-assessee is liable to be allowed. On the other hand, the learned Standing Counsel appearing for the Revenue submitted that, the learned ACST has committed a gross error by reducing the value of the paints to a considerable extent without any material. Similarly, though the dealer-assessee has failed to maintain proper account, the learned ACST has allowed deduction of certain amount towards the labour and service charges on his own calculation and the order passed by the learned ACST on both the count being erroneous and not being based upon the materials available on record, the same is liable to be set aside and the order passed by the learned JCST being proper and justified, the same is liable to be restored.

7. Perused the orders of both the learned forums below and the other materials available on record. First of all, the dealer-assessee has challenged the orders of the learned forums below on the ground that, the AVR has not been submitted within due time and the assessment proceeding has also not been completed within the prescribed period. But, most peculiarly, the dealer-assessee has failed to show what prejudice has been caused to it by non-submission of the AVR in due time and for non-passing of the order of assessment within the prescribed period. Further, sec.98 of the OVAT Act is a clear bar for a party to challenge the order of assessment only on the ground of certain technicalities and as such the contention taken by the dealer-assessee in this regard needs no consideration at this stage.

8. But, so far as the factual aspect is concerned, from the materials available on record, it is seen that, during the assessment period in question,

the dealer-assessee has shown a total turnover of Rs.6,35,12,564.00 and the same relates to sale of new cylinders amounting to Rs.84,97,250.00, sale of HR coils amounting to Rs.2,63,35,112.00, sale of scrap amounting to Rs.9,35,500.00 and sale of repaired cylinders amounting to Rs.2,49,60,016.00. Further, as the sale of repaired cylinders amounting to Rs.2,49,60,016.00 involves segregation of the cylinders, depressurization of cylinders or removal of valves, surface cleaning and washing, re-painting and stenciling of cylinders as per specification and the same is coming under the purview of works contract, the learned JCST examined the purchase order dtd.15.05.2013 showing the approved rate of stay plate and VP ring for cylinder at Rs.110.00 and purchase order dtd.13.03.2014 showing the approved rate of those goods at Rs.123.00 and found out some discrepancies in the claim of deduction towards the labour and service charges advanced by the dealer-assessee. As the dealer-assessee could not be able to produce any account of expenditure incurred towards the labour and service charges and as the same was not ascertainable from the purchase orders, the learned JCST invoke the provision mentioned in Rule 6(e) of the OVAT Rules which prescribes deduction @ 20% of the total expenditure as per Sl. No.23 of the appendix and determined the same at Rs.49,92,003.00. Then, out of the rest amount of Rs.1,99,68,013.00 which is the value of the goods, he determined the value of the foot ring, VP ring with stay plates at Rs.67,91,018.00 liable to be taxed @ 5% and the value of the paints at Rs.1,31,76,995.00 liable to be taxed @ 13.5% on examination of the materials on record in detail. But, at the first appeal stage, the learned ACST placing much reliance upon the labour chart furnished by some of the oil companies, ascertained the labour and service charges to be Rs.12.87 per cylinder and allowed deduction of Rs.39,57,538.00 towards the same from the gross receipt. Not only that, after determining the rest of the amount i.e. Rs.2,10,02,478.00 as the taxable turnover relating to the works contract, he allowed further deduction @ 20% by invoking the provision mentioned in Rule 6(e) of the OVAT Rules. Admittedly, the dealer-assessee has failed to produce any account showing expenditure incurred towards the labour and service charges. From the

materials available on record, it is also certain that, the expenditure incurred towards the labour and service charges was not ascertainable from the contracts or the other documents furnished by the dealer-assessee. Therefore, both the learned forums below have rightly invoked the provision mentioned in Rule 6(e) of the OVAT Rules by allowing deduction @ 20% of the gross receipt relating to the repaired cylinders as per Sl. No.23 of the appendix. But, in addition to such deduction, the learned ACST has allowed further deduction of Rs.39,57,538.00 towards the labour and service charges on consideration of the labour chart furnished by some of the oil companies and the same can clearly be considered to be an illegal one. Similarly, so far as the determination of the value of the paints, which is liable to be taxed @ 13.5% is concerned, the order passed by the learned ACST appears to be a wrong one as the same is not based upon the materials available on record. On the other hand, the learned JCST has considered the matter properly and has passed the order in a proper and justified manner. As regard the imposition of penalty u/s.42(5) of the OVAT Act, it is to be seen that, the dealer-assessee has not shown the TTO properly by deducting the labour and service charges in accordance with law. Therefore, the imposition of penalty at the appropriate rate upon the dealer-assessee can never be considered to be unjustified in the facts and circumstances of the present case.

9. In view of the above discussion, the appeal preferred by the dealer-assessee i.e. S.A. No.150(V) of 2017-18 is dismissed. But, the appeal preferred by the Revenue i.e. S.A. No.152(V) of 2017-18 is allowed. The order passed by the learned ACST is set aside and the order passed by the learned JCST is hereby restored. The cross objections are disposed of accordingly.

Dictated & corrected by me,

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

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