BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.
S.A.No. 747/2004-05

(Arising out of order of the ld.ACST, Balasore Range, Balasore, in First Appeal Case No. AA.94/BA-2003-2004, disposed of on dtd.26.04.2004)

P R E S E N T :

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

M/s.Elsamex-Tws-SNG (JV),
Bidubazar, Bahanga,
Dist. Balasore .... Appellant

-Versus-

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

For the Appellant : Mr. D. Behura, Standing Counsel &
Mr. S.K. Pradhan, A.S.C. (C.T.)
For the Respondent : None

(Assessment Period : 2001-02)

Date of Hearing: 18.04.2022 *** Date of Order: 04.05.2022

ORDER

This appeal is preferred by the dealer against the order dtd.26.04.2004 passed by the learned First Appellate Authority/Asst. Commissioner of Sales Tax, Balasore Range, Balasore (in short, FAA/ACST) in First Appeal Case No.AA.94/BA-2003-2004 thereby allowing the appeal resulting refund of excess payment of Rs.15,73,745/- against the order of assessment u/r.12(4) of the Odisha Sales Tax Act, 1947 (in short, OST Act) by the Assessing Officer, Balasore Circle,

Balasore (in short, AO) for the year 2001-02 involving refund of Rs.5,33,595/-.

2. The case at hand is that, the dealer-appellant in the instant case is a joint venture partnership concern engaged in the business of works contract under National Highway Authority of India in the name and style of M/s. Elsamex-TWS-SNC (JV) with it's branch office at Bidubazar, Balasore, being registered under OST Act vide registration certificate No.BA-5555. Pursuant to notice u/s.12(4) of the OST Act, representative of the appellant-firm appeared before the learned AO and produced books of accounts and other records. During course of examination of books of accounts and other records, the learned AO observed that, the appellant-firm is registered under OST Act w.e.f. 05.05.2001. The appellant started receipt of payment w.e.f. 18.02.2002 and the total payment was received to the tune of Rs.8,43,09,601/- during the year under appeal out of which Rs.1,10,95,472.36 was mobilisation advance. So, the gross payment was Rs.7,32,14,129/-. The appellant said to have claimed first payment of Rs.2,04,12,479/- received on dtd.28.02.2002 allowed as deduction of first liability. But the same was disallowed by the learned AO as the appellant was registered under the OST Act w.e.f. 05.05.2001. It was further observed by the learned AO that, the appellant had claimed utilisation of materials at Rs.86,21,658/- ouot of which first point tax paid goods were total of Rs.52,82,668.92 and other items estimated to be Rs.10,00,000/- which were allowed as deductions. The appellant also claimed deduction of expenses on consumable, survey charges, laboratory testing charges but the same were

disallowed by the learned AO. The appellant further claimed administrative overheads expenses, professional consultancy charges, bank charges, interest on loan and depreciation on machineries, the total of which was at Rs.1,84,81,496/-. But the ld.AO did not allow expenses on bank charges, interest on loan and depreciation on machineries as the same were not service charges. But the consultancy charges of Rs.54,39,596/- was allowed. So, the total service charges and over head expenses of Rs.1,78,57,730/- were allowed as deduction. The appellant further claimed labour charges to the tune of Rs.2,43,22,329/- and in support of claims, the learned Advocate said to have furnished details of labour payments made during the year under challenge and found to have been reflected in the books of account maintained by the appellant. So, the total deductions allowed to the tune of Rs.4,84,62,927.92. In view of such, the TTO was determined at Rs.2,47,51,201/- and assessed to refund of Rs.5,33,595/-.

3. Being aggrieved with such calculation made by the learned AO, the appellant preferred first appeal before the learned ACST, Balasore Range, Balasore, who allowed the appeal and the excess payment of Rs.15,73,745/- was ordered to be refundable to the appellant.

4. Being further aggrieved with the order of the learned FAA/ACST, the dealer-appellant has preferred the present second appeal before this Tribunal.

5. No cross objection is filed by the State-respondent in this case.

6. In spite of due service of notice on the dealer, he neither appeared nor engaged anyone to defend him before this

Tribunal. So, having no other alternative, this Tribunal heard the argument of Mr. D. Behura, learned Standing Counsel for the Revenue and proceeded to dispose of the matter on merit on ex-parte basis.

7. In the instant case, the first point that is to be adjudicated upon is, whether the first payment of Rs.2,04,12,479/- received on dtd.18.02.2002 for execution of works contract by the dealer should be allowed as deduction as non-taxable limit u/s.4(7)(c) of OST Act. With regard to it, after have a glance to the case record, it becomes evident that, w.e.f. 05.05.2001, the dealer-appellant was registered u/s.9 of the OST Act. If such is the position, then disallowing of deduction of non-taxable limit of Rs.2,04,12,479/- which was the first payment received on dtd.18.02.2002 by the dealer is genuine. Then comes, whether the deduction of Rs.15,83,735/- towards survey charges, laboratory testing charges, Rs.21,53,455/- towards interest on loans, Rs.43,80,587/- towards depreciation of machineries and Rs.58,55,567/- towards consumable such as POL etc. used in the execution of works contract should be allowed. With regard to this, we have a glance to the verdict of Hon'ble Apex Court decided in the case of M/s. Gannon Dunkerly and Co. Vrs. State of Rajasthan and Others reported in (1993) 88 STC page, 204 which entails allowing of deduction on expenses of POL, survey and laboratory testing charges as service charges. But the expenses on Bank charges, interst on loan etc. do not come within the purview of service charges. Another claim of the dealer is that he should be allowed for depreciation of machinery as he has utilised machinery instead of human labour in the execution of road work. Therefore

depreciation of machineries should be allowed as over head expenses. The learned Advocate cited the decision of the Hon'ble Supreme Court of India in the case of Gannon Dunkerely (supra) along with cases of this Tribunal decided in S.A.No.2165 to 2170/1989-90. In these cases, deduction of depreciation of machineries are allowed by the Tribunal. So, this case being identical to these cases, principle of consistency must be adhered to. So, in view of such, learned FAA rightly allowed deduction of Rs.43,80,587/- on depreciation of machineries relying on the earlier decision of this Tribunal. Accordingly, the GTO determined by the learned AO at Rs.7,32,14,129/- was accepted by the learned FAA and the TTO was determined at Rs.1,29,31,312.08 after allowing deductions of Rs.2,43,22,529/-, Rs.2,96,77,619/- and Rs.62,82,668.92 towards labour charges, over head expenses including service charge and tax paid materials respectively. Tax calculated @8% on Rs.94,62,024.10 comes to Rs.7,56,961.93. The last contention of the dealer that twinkles from the grounds of appeal is that levy of tax @12% on TTO in execution of works contract is not proper and against the cardinal principles of law. On this score, let's have a glance to the verdict of the Hon'ble Apex Court decided in the case of State of Orissa Vrs. M/s. B. Engineering and Builders Ltd. & Others decided on 5th June, 2020 where the Hon'ble Apex Court has clearly entailed that the rate of tax payable by a dealer on the TTO in respect of the works contract is 8% after a comprehensive reading of the circular dtd.04.11.1986 issued by the Government of Odisha by disapproving the letter/circular of Orissa Government issued on dt.07.11.2001. Noteworthy to mention

that Hon'ble High Court of Orissa had confirmed and approved the Circular dtd.04.11.1986 in W.P.(C) No.8857/2003, which was challenged by the Government of Orissa before the Hon'ble Apex Court in Civil Appeal No.2516/2020 being nomenclatured as State of Orissa –Vrs.- M/s. B. Engineering and Builders Ltd., Orissa, but the appeal of the State was collapsed. So, in view of such, to our view, it can certainly be told that the rate of tax @8% is to be levied on the TTO in respect of the works contract. So, @8% on Rs.34,69,287.98 comes to Rs.2,77,542.96. So, the total tax comes to Rs.10,34,504.89. Surcharge @10% on total tax due comes to Rs.1,03,450.04. The total tax and surcharge in toto comes to Rs.11,37,954.93. The dealer-appellant has already paid tax of Rs.28,64,349/- in shape of TDS for which now he is entitled to refund of Rs.17,26,395.93.

8. With these observations, we allow the appeal setting aside the order of the learned FAA to that extent.

Dictated and Corrected by me,

Sd/-
(S.K. Rout)
2nd Judicial Member

Sd/-
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2nd Judicial Member

I agree,

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(S. Mishra)
Accounts Member-II