

ORDER

These appeals S.A. No.34 (VAT) of 2011-12 and S.A. No. 38 (VAT) of 2011-12 preferred by the State and the dealer respectively are directed against the same order dated 23.02.2011 passed by the Joint Commissioner of Sales Tax, Balasore Range, Balasore (in short, "first appellate authority") in First Appeal Case No. AA- 21/BA- 2009-10. Therefore, both the appeals are taken up together for disposal by this common order.

2. The facts as revealed from the case records are that the dealer M/s. Khilani Construction Co. (P) Ltd. is a Private Limited Company. It was engaged in execution of works contract at Dhamara and Chandipur under D.R.D.O., Ministry of Defence, Government of India. During the period of assessment it had received gross payment amounting to ₹4,80,17,750.00 for special repairs to road from Jamjhari to Dhamara, widening and resurfacing of approach road, painting and repairs of certain buildings, extension of helipad and construction of pavement. During that period the dealer had applied before the Sales Tax Officer, Balasore Circle, Balasore to pay tax by way of composition but without receiving approval of his application in this regard the dealer enjoyed the benefit of composition on his own accord and simultaneously enjoyed the benefit of using declaration forms for purchase of goods in concessional rate of tax from outside the State of

Odisha. However, the application of the dealer-assessee for making payment of tax by way of composition was declined. The assessing officer after verifying all the documents pertaining to the business transactions of the dealer completed the assessment u/S. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') for the period 01.04.2005 to 31.03.2007 and held the total amount of tax dues to be paid by the assessee at ₹25,94,655.00.

Being aggrieved with this order the dealer preferred an appeal before the first appellate authority. The first appellate authority after due consideration of the materials on record held that the dealer was to pay only a sum of ₹9,82,322.00 towards its tax liability including penalty.

3. Being aggrieved with the aforesaid order the State preferred the second appeal challenging the same on the grounds that the impugned order reducing the demand of tax is unjust, arbitrary and against the provision of law. The first appellate authority has wrongly allowed labour and service charges @ 40% for pavement construction enhancing the same by 10% as allowed by the assessing officer. Therefore, this order of the first appellate authority is liable to be quashed and the order of the assessing officer should be restored. In this appeal the dealer has not filed any cross-objection.

4. Similarly the dealer also having not been satisfied with the impugned order filed an appeal before this forum challenging the same on the ground of its being illegal and erroneous. The dealer further contended that the assessing officer misinterpreted the provisions of OVAT Rules. The dealer had rightly applied for payment of tax on composition basis in consonance with Rule 8 of the OVAT Rules pertaining to the periods 2005-06 and 2006-07 when there was no prohibition or condition provided for purchasing materials from outside the State of Odisha. Rule 8 of the OVAT Rules was amended w.e.f. 25.02.2009 and as such was not applicable for the tax periods 2005-06 and 2006-07. That apart the labour and service charges determined by the assessing officer and the first appellate authority basing upon their best judgment without analyzing the nature of contract work executed by the dealer is not only arbitrary but also beyond the scope of relevant statutory provisions. In the instant case Appendix to Rule 6 of the OVAT Rules should not have been applied because the books of account of the dealer were clear for determining the nature of work as well as the corresponding labour and service charges incurred by it. The dealer also contended that imposition of penalty in its case u/S. 42(5) of the OVAT Act is also illegal. In this appeal the State also has not filed any cross-objection.

5. However, in course of hearing both the appeals the State urged before the Bench for restoration of the order of assessment whereas the dealer restricted its grievance to the extent of allowing it to have deduction @ 50% towards labour and service charges for the construction of pavement since pavement is nothing but a road only in common parlance. Thus after hearing both the parties and on perusal of the order of assessment as well as the impugned order passed by the first appellate authority it is felt that the dispute involved in these appeals is now confined to the interpretation of pavement as a road or not since that would ultimately determine whether the dealer is entitled to have deduction @50% towards labour and service charges for construction of the same. The meaning of pavement as given in the Oxford Dictionary is as follows :-

Quote : "a paved path for pedestrians at the side of and a little higher than a road; the covering of a street, floor, etc. made of tiles, wooden blocks, asphalt, and esp. of rectangular stones; a roadway" Unquote.

'Pavement' as explained in the Chambers Dictionary is a level surface for walking on, a footway by the side of a street. Therefore, it can be understood from these meanings that a pavement is something which is used as nothing short of a road by the people for their movement. Under this circumstance the labour and service charges for the

construction of pavement can be taken as 50% being part and parcel of a road work only as per Appendix to Rule 6 of the OVAT Rules. Thus the matter needs to be remanded to the assessing officer for fresh determination of the tax liability of the dealer.

6. In the result, the appeal preferred by the State is dismissed and the appeal preferred by the dealer is allowed in part. The impugned order of the first appellate authority stands modified to the extent of only labour and service charges now allowed for deduction in favour of the dealer for construction of its pavement work. The matter is thus remitted back to the assessing officer for fresh assessment keeping in view the observation made above in respect of the construction of pavement by the dealer within a period of three months from the date of receipt of this order.

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

Sd/-
(Smt. Sweta Mishra)
2nd Judicial Member

I agree,

Sd/-
(Rabindra Ku. Pattnaik)
Accounts Member-III