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

S.A. No. 219 (V) of 2017-18

(Arising out of the order of the ld. JCST (Appeal), Bhubaneswar Range, Bhubaneswar, in First Appeal Case No. AA/106221622000275/ OVAT/BH-III, disposed of on dtd.21.06.2017)

P r e s e n t: **Shri S. Mohanty,**
1st Judicial Member

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

- V e r s u s -

M/s. Omm Maa Construction, HIG-47/01/02/, BDA Complex, Jayadev Vihar, Bhubaneswar. ... Respondent

For the assessment period: 01.04.2012 to 31.03.2014

For the Appellant ... Mr. M.L. Agarwal, S.C.
For the Respondent ... Mr. A.K. Mahapatra, Advocate

Date of hearing: 31.05.2019 ******** Date of order: 31.05.2019

O R D E R

When the tax due with penalty assessed in an assessment u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) by the assessing authority is reduced in appeal by the first appellate authority, the order of the first appellate authority is challenged by the Revenue in this second appeal on the grounds that, the first appellate authority has committed wrong in application of the Rule 6 of the OVAT Rules for calculation of labour and service charges against the works contract and accordingly prayed for restoration of the order of the assessing authority by setting aside the impugned order.

2. The instant dealer is a works contractor executed job work awarded by the government departments. For the tax period 01.04.2012 to 31.03.2014, the dealer was assessed u/s.42 of the OVAT Act on the basis of

audit visit report submitted by the Tax Audit Team, Bhubaneswar Range. The audit team has alleged that, the dealer has not maintained the register of expenses towards labour and service, therefore, Appendix to Rule 6(e) of the OVAT Rules is to be applied for determination of labour and service charges i.e. to be calculated @ 30%. It is also reported that, though dealer had claimed to have paid tax thorough TDS for Rs.9,50,733.00 but on verification the dealer had deposited TDS certificate to the extent of Rs.6,21,054.00 in xerox and failed to produce the TDS certificate to the tune of Rs.3,29,679.00. The assessing authority, in the assessment, found the dealer has not maintained the relevant accounts towards labour and service charges in the manner prescribed under the Act. So, he applied Rule 6(e) of the OVAT Rules for the purpose of determination of labour and service charges i.e. 50% deduction from 01.04.2012 to 18.07.2012 and thereafter @ 30% from i.e. from 19.07.2012 to 31.03.2014. The TDS certificate to extent of Rs.9,47,293.00 was produced before him and accordingly accepted. However, it is found that, the dealer has purchased 'bajury' and 'stone chips' from interstate unregistered dealers to the tune of Rs.69,01,439.00 and also affected interstate purchase of bitumen of Rs.4,86,934.00. Thus, the total materials purchased and utilized was calculated at Rs.12388373.00, the materials were covered under 5% taxable group, the tax was calculated accordingly by determining the TTO at Rs.1179645.00, the tax deposited by the dealer for Rs.947293.00 by way of TDS was adjusted and the balance tax payable by the dealer was calculated at Rs.2,32,352.00. The dealer having paid no tax with the return was assessed to pay tax to that extent. Besides, penalty i.e. twice of the tax due calculated at Rs.4,64,704.00 was also imposed u/s.42(5) of the OVAT Act. Thereby, the total demand against the dealer was raised at Rs.6,97,056.00.

3. Being aggrieved by the assessment above, the dealer carried the matter in appeal before first appellate authority. Learned Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar vide impugned order held that, besides the deduction towards labour and service charges as calculated by the assessing authority, the dealer is also entitled to

further deduction of Rs.3,60,000.00 and Rs.7,22,970.00 as expenditure incurred towards 'supervisors salary' and 'site expenses'. Consequently, the first appellate authority re-determined the taxable turnover which was calculated at Rs.1,99,44,330.00, tax on it was calculated at Rs.9,97,217.00, adjusting the deposited tax in the shape of TDS for an amount of Rs.9,47,293.00 from the out of the tax assessed. The tax payable was calculated at Rs.49,924.00, penalty u/s.42(5) was imposed on it for Rs.99,848.00 i.e. twice of the tax due and as a result, the total demand including tax due and penalty was raised at Rs.1,49,772.00.

4. When the demand is reduced as above by the impugned order of the first appellate authority, Revenue being aggrieved preferred this appeal. The contentions of the Revenue in this appeal is, the first appellate authority has wrongly interpreted and applied the Rule 6 of the OVAT Rules to the case in hand. As a result, the TTO determined by deducting the 'supervisory salary' and 'site expenses' which are not covered under eligible category, the authority has calculated the tax liability which is not tenable in law. It is prayed for restoration of the order of assessment.

The appeal is heard without cross objection from the side of the dealer.

5. In view of the grounds in appeal, the question framed for decision in this appeal is-

(i) whether the first appellate authority has committed wrong in determination of the deduction against the works contract by allowing supervisory salary and site expenses besides the deduction allowable as per Appendix to Rule 6(e) of the OVAT Rules; and

(ii) what order?

6. At the outset, it can safely be said that, the law is no more *res integra* in view of the decision of the Hon'ble Supreme Court in Gannon Dunkerley & Co. and others Vs. State of Rajasthan and others (1993) in 88 STC 204 (SC) and thereafter inclusion of the provision under Rule 6(e) of the OVAT Rules, to the text book, the method of calculation of labour and service

charges in a works contract is necessarily required to be guided by the above rules. For better appreciation of the case in hand, the Rule 6(e) is reproduced here.

> "(e) in case of works contract, the expenditure incurred towards –
> (1) labour charges for execution of the works;
> (2) amount paid to a sub-contractor for labour and services;
> (3) charges for panning, designing and architect's fees;
> (4) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
> (5) cost of consumables such as water, electricity, fuel etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract;
> (6) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;
> (7) other similar expenses relatable to supply of labour and services;
> (8) profit earned by the contractor to the extent it is relatable to supply of labour and services;
> (9) amounts paid to a sub-contractor as consideration for the execution of works contract whether wholly or partly, if the contractor proves to the satisfaction of the assessing authority that tax has been paid by the sub-contractor on the turnover of the goods involved in the course of execution of such works contract.
>
> ***Provided that*** where a dealer executing works contract, fails to produce evidence in support of such expenses as referred to above or such expenses are not ascertainable from the terms and conditions of the contract or the books of accounts maintained for the purpose, a lump sum amount on account of labour, service and like charges in lieu of such expenses shall be determined at the rate specified in the Appendix."

7. As per the explanation appended to Rule 6(e), it is only when the books of account and connected documents produced by the dealer in the assessment are found to be not sufficient for determination of the labour and service charges, in that event, the assessing authority is required to apply the Appendix to this Rule for determination of labour and service charges. Now, there should not be any quarrel on the proposition of law that, once the books of account and documents are sufficient for determination of labour and service charges there, the dealer is entitled to deduction as per the Rule

6(e)(1) to (9). Conversely, when it is found that, the books of account and documents are not sufficient and rejected by the assessing authority, in that case, Appendix to Rule 6(e) is to be applied. So, where the Appendix to Rule 6(e) is applied for deduction, then there is no question of any other kind of deduction besides the standard deduction allowed in the Appendix as the legislative mandate behind the provision is as such.

8. Taking cue from the aforesaid well settled principle reverting to the case in hand, it is found that, Appendix to Rule 6(e) of the OVAT Rules is applied but, besides that, the dealer is also given deduction under the head of supervisory salary and site expenses. It is unhesitatingly held that, view taken by the first appellate authority is not sustainable in law. At this juncture, learned Counsel for the dealer vehemently submitted that, the dealer has maintained accounts duly wherefrom the labour and service charges can be calculated safely. But, the peculiarity is, the dealer has not challenged the application of Appendix to Rule 6(e) by way of cross objection in this appeal. Once the dealer has not raised any cross objection then, there is no scope to accept the argument submitted by the dealer in the argument that, the dealer has documents with him to in prove of labour and service charges.

9. In that view of the matter, the claim of the dealer cannot be sustained as a third case raised in the argument without any pleading, by way of cross objection. Hence, it is held that, the deduction towards supervisory salary and site expenses as allowed by the first appellate authority in the impugned order is not sustainable in law. In consequence thereof it is held that, the tax liability determined by the assessing authority is justified under law as discussed above. The tax due for the dealer is Rs.2,32,352.00 as determined by assessing authority.

10. Here, the dealer is not guilty of any suppression in his claim of deduction towards labour and service charges denied as it is according to assessing authority not ascertainable for the documents produced by the dealer.

In the event of bona fide mistake on the part of the dealer, penalty has not been recognized by the authorities. For that, we can successfully rely on Commissioner of Central Excise Calcutta v. Indian Aluminium Co. Ltd. 2010 (259) E.L.T. 12 (S.C.). The authorities are there have laid down the principle that, "penalty does not arise merely upon the proof of default and penalty will not be imposed unless the party either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct or acted in conscious disregarded of its obligation." **Hindustan steel Ltd. v. STATE OF ORISSA [AIR 1970 SC 253]** is relied.

Further, it is well settled that the term 'willful' and 'suppression', signify conscious, deliberate and intentional withholding of information with mala fide, and not an unintentional failure or a failure due to inadvertence. In support of the said contention, reliance is placed in the cases of **Tamil Nadu Housing Board V. Collector of Central Excise [Madras 1994 (74) ELT 9 (SC)**; **Collector of Central Excise V. Chemphar Drugs and Liniments [1989 (40) E.L.T. 276(SC)**; **Padmini Products V. Collector of Excise 1989 (43) E.L.T. 195 (SC)**; **Pushpam Pharmaceuticals V. Collector of C.Ex., Bombay 1995 (78) E.L.T. 401 (SC)**; **Anand Nishikawa V. Commissioner of Central Excise Meerut 2005 (188) E.L.T. 149 (SC)**; **Pahwa Chemicals Pvt. Ltd., V. Commissioner of Central Excise, Delhi 2005 (189) E.L.T. 257(SC)**; **Commissioner of Central Excise Belgium V. Mysore Kirloskar Ltd. [2008 (226) E.L.T. 161(SC)**; **Continental foundation V. Commr. Of C.Ex., Chandigarh 2007 (216) ELT 177 (SC)**; **Uniworth Textiles Ltd., V. CCE Raipur 2013 (288) ELT 161 (SC)** and **Cosmic Dye Chemical V. Collector of Central Excise, Bombay (1995) 6 SCC 117**.

The term "shall" under section 42(5) of the OVAT act indicates what? Whether it relates to levy of penalty or to quantum of penalty or to both? Certainly, it never can be construed for both. So the term 'shall' in the section implies, in case of levy of penalty it must be two times of tax due. Here the term 'shall' relates to quantum of penalty only.

In Raza Buland Sugar Co. Ltd vs Municlpal Board, Rampur AIR 1965 SC 895 = 1965 SCR (I) 970, it is held as follows:-

"The question whether a particular provision of a statute which on the face of it appears mandatory, inasmuch as it uses the word "shall" as in the present case-is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the; provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory."

Keeping the ratios laid down by the authorities and the legislative intent behind the provisions above, reverting to the case in hand, it is found that, the authority has applied Appendix to Rule 6(e) of OVAT Rules for determination of labour and service charges to the case in hand. Application of Rule 6(e) of the OVAT Rules is not a straight jacket formula in every case of works contract. It is only when the documents produced by the dealer are not sufficient or in the eye of assessing authority, the documents are not acceptable, in that case, the taxing authority can apply the provision u/r.6(e) to determine the labour and service charges in a works contract. So, it is always a question of fact on which the application of Rule 6(e) depends and it varies from case to case. It is a subjective satisfaction of the assessing authority, whether Rule 6(e) will be applied to a given case or not. If that be, it is unsafe to hold that, because of the fact that, the documents of the dealer is not explicit regarding labour and service charges, it amounts to violation of any provision under the OVAT Act as contemplated u/s. 42(1) of the OVAT Act. Liability for non-maintenance of documents or registers are

covered under specific provisions like Sec.61(5) and 73(13) of the OVAT Act. But violation of provision as per Sec.42(1) is different from these.

In the wake of above, it is hereby ordered.

11. The appeal is allowed on contest. The impugned order is set aside. The dealer is liable to pay balance tax of Rs.2,32,352.00. Demand be raised accordingly.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

Sd/-
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