BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No. 11 of 2008-09

(From the order of the ld. ACST, Koraput Range, Jeypore,
in First Appeal Case No. AA(KOI) 68/2006-2007,
disposed of on dtd.24.11.2007)

Present: Sri S. Mohanty
2nd Judicial Member

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

- V e r s u s -

M/s. Sri Sarbeswar Samal,
Contractor, Malkangiri. ... Respondent

For the Appellant : Mr. M.S. Raman, ASC
For the Respondent : N o n e

Date of hearing: 19.01.2019 ******** Date of order: 19.01.2019

O R D E R

Revenue has challenged the percentage of deduction towards labour and service charges allowed by the First Appellate Authority, Koraput Range, Jeypore (hereinafter referred to as, the FAA) to be higher in side and in place has urged for application of Rule 4-B of the OST Rules for determination of labour and service charges as the rule covers the assessment period in question by its enforcement with retrospective effect from 30.087.1999.

2. The dealer was subjected to regular assessment u/s.12(4) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as, OST Act) for the assessment period 2002-03 on different counts the assessing authority in consideration of the GTO and TTO of the dealer calculated the tax due by

giving 42% deduction towards labour and service charges as against the job work undertaken by the dealer. The assessing authority applied best judgment principle to determine the labour and service charges since the dealer failed to produce the documents against labour and service components. However, the dealer being aggrieved with the percentage of deduction with a hope of getting more knocked the door of the first appellate authority. Learned ACST, Koraput Range, Jeypore as first appellate authority in the impugned order in consideration of the nature of work enhanced the deduction from 42% to 57%. When the matter stood thus, State for the first time getting opportunity to prefer appeal filed this second appeal. Initially, the State took the plea that the percentage allowed by the first appellate authority is higher in side but in a later period taking cue from the provision u/r.4-B of the OST Rules, the Revenue prayed for application of the provision to the case in hand for the determination of labour and service charges.

Findings :

3. At the outset, it is pertinent to mention here that, when the question of just and reasonable percentage of deduction towards labour and service charges is considered it can safely be said that, law is no more *res-integra* in view of the authority in **M/s.Gannon and Dunkely and Co. Vrs. State of Rajasthan and Others (1993) 88 STC page 204 (SC)** wherein the Hon'ble Apex Court held as follows:

> "47. Normally, the contractor will be in a position to furnish the necessary material to establish the expenses that were incurred under the aforesaid heads of deduction for labour and services. But there may be cases where the contractor has not maintained proper accounts or the accounts maintained by him are not found to be worthy of credence by the assessing

> authority. In that event, a question would arise as to how the deduction towards the aforesaid heads may be made. On behalf of the States, it has been urged that it would be permissible for the State to prescribe a formula on the basis of a fixed percentage of the value of the contract as expenses towards labour and services and the same may be deducted from the value of the works contract and that the said formula need not be uniform for all works contracts and may depend on the nature of the works contract. We find merit in this submission. In cases where the contractor does not maintain proper accounts or the accounts maintained by him arc not found worthy of credence it would, in our view, be permissible for the State legislation to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under. The formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying, scales for deduction on account of cost of labour and services for various types of works contracts."

Needless to mention here that, on this backdrop Rule 4-B of the OST Rules inserted in the text book.

4. In the case in hand, it is found that the dealer has undertaken contract job under the Executive Engineer, Malkangiri. The documents produced by the dealer is found insufficient to calculate the labour and service charges incurred by him. If that is, application of best judgment principle to the case in hand at that point of time was in accordance to law.

Similarly, the first appellate authority was also not wrong in applying the principle of best judgment assessment on this score. However, the enhancement of percentage of deduction by replacing one best judgment assessment by another is always subjected to scrutiny that whether the first appellate authority has acted bonafide in application of reasonable guess work. It is the rule precedence that one best judgment cannot be replaced by another mechanically. Since the Revenue has pleaded for application of Rule 4-B of the OST Rules, it is redundant to weigh the reasonableness bteween two best judgment assessment in the case in hand. In many of the decisions this Tribunal has consistently taken a view that unless the provision u/r.4-B is declared as ultravires, it should be followed and applied scrupulously wherever it is found applicable. The relevant portion of the rule is reproduced below:-

> "**4-B Deduction of Labour and Service Charge by Works Contractors**:
> In case of works contract, deduction of the expenditure incurred towards labour and service as provided in Section – 5(2) AA of the Act shall be subject to production of evidence in support of such expenses to the satisfaction of the Assessing Authority. In the cases where a dealer executing works contract, fails to produce evidence in support of expenses incurred towards labour and service 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 are found to be

not credible, expenses on account of labour and service shall be determined at the rate specified in the table below:

Sl. No.	Nature of the Works contract	Percentage of labour, service and like charges of the total value of the works
(1)	(2)	(3)
1	Structural Works	35%
2	Earth Work, Canal Work, Embankment Work etc.	65%
3	Bridge Work	35%
4	Building Work	35%
5	Road Work	45%

"

The provision above as it mandates the assessing authority, first should make endeavor to ascertain the labour and service charges from the contract and documents. In the event of failure to do so for the fault of the dealer, he is bound to apply the chart appended to the rule for determination of labour and service charges. At the same time it is also necessary to held that when the work in question does not cover under any of the category of work executed in Rule 4-B, in that event best judgment theory is the last recourse available to the taxing authority.

5. In view of the discussion above, it is believed that the case in hand should be remitted back to the assessing authority with a direction to apply Rule 4-B of the OST Rules. The assessing authority is required to ascertain the labour and service components as per the mandate of the provision and only when he failed to do so, he will apply the chart appended to provision but where the work does not fall under the chart above, then best judgment principle is to be applied which never can be higher or lower

than the percentage already allowed to the dealer by the first appellate authority. In the wake of above narrative, it is ordered.

6. The appeal is allowed. The impugned order is set aside. The matter is remitted back to the assessing authority for assessment afresh in the light of observation made hereinabove.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

Sd/-
(S. Mohanty)
2nd Judicial Member