

**BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.**

**S.A. No.1649 of 2006-07**

(From the order of the Id.ACST, Balangir Range, Balangir,  
in First Appeal Case No. AA-28 (BPII)2006-07,  
confirming the assessment order of the Assessing Authority)

**Present: Smt. Suchismita Misra, Chairman,  
Sri Subrata Mohanty, 2<sup>nd</sup> Judicial Member  
&  
Sri R.K. Rout, Accounts Member-II**

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

... Appellant

**- V e r s u s -**

M/s. D.K. Engineering and Construction,  
Belgaon,  
Dist.- Balangir

... Respondent

For the Appellant : Mr. S.K. Pradhan, A.S.C.  
For the Respondent : Mr. K.C. Jain, Advocate

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Date of Hearing: 22.01.2019 \*\*\*\*\* Date of Order: 22.01.2019  
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**ORDER**

Revenue has challenged the percentage of deduction towards labour and service charges allowed by the fora below as exorbitant and has prayed for deduction of less amount towards labour and service components in application of Rule 4-B of the OST Rules this second appeal.

2. The assessee-dealer was a works contractor and has receipt a sum of Rs.5,55,00,664.00 as against the job under two works contracts during the tax period 2002-03. In a proceeding under Section 12(4) of the OST Act, the assessing authority determined the deduction towards labour and service charges applying best judgment principle as he rejected the account shown by the respondent-dealer. Applying reasonable guess work the AA has allowed deduction @ 72% and 47% deduction against works

contract. Accordingly, the total deduction towards labour and service charges was determined at Rs.7,91,791.00.

3. Being dis-satisfied with the percentage of deduction the respondent-dealer had preferred First Appeal Case No. AA-28 (BPII)2006-07. Learned ACST, Balangir Range, Balangir as the First Appellate Authority has also applied the same best judgment principle to determine the labour and service charges and in ultimate analysis he confirmed the percentage of deduction allowed by the assessing authority, thereby the demand remain undisturbed.

4. Being aggrieved and dissatisfied with the percentage of labour and service charges, State has preferred this appeal on the contentions like the first appellate authority should have allowed deduction @ 82% against road work and @ 55% against construction work. State has added new grounds of appeal to apply Rule 4-B of the OST Rules for determination of labour and service charges.

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

5. The substantial questions framed for decision are,

(i) whether the application of best judgment principle to determine labour and service charges was appropriate in the case in hand, (ii) whether the standard deduction by the first appellate authority in replacing the percentage of deduction by the assessing authority is erroneous and if so, (iii) whether the deduction given by the assessing authority should be restored or a fresh judgment assessment is to be made or (iv) if the provision under Rule-4-B should be applied to the case in hand ?

**Findings :**

6. 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. In cases where the contractor does not maintain proper accounts or the accounts maintained by him are 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.”

7. In the case in hand, the respondent-dealer is not satisfied with the application of principle of best judgment assessment as applied by the AA. Similarly State is not satisfied with best judgment assessment of FAA. It is not out of place to mention that, by the time the assessment was made i.e. on 16.10.2006. Rule 4-B of the OST Rules had not come into the book. So application of best judgment principle by the assessing authority at that point of time was not wrong. The assessing authority on due verification of the nature of work undertaken by the respondent-dealer had decided the percentage of deduction towards labour and service charges. In that case, it can safely be said that, if the assessment as per the best of the judgment of the assessing authority is not found to be absurd, unreasonable or without application of mind but simply a guess work having no reasonable nexus to the nature of work and when it is believed that the assessing authority was vindictive in that case the first appellate authority can exercise the

jurisdiction to interfere with the order of AA and then he can independently apply his mind to ascertain the percentage of deduction on the best judgment of his own. When the matter stood thus, the first appellate authority confirmed the assessment of the assessing authority and thereby the percentage of deduction remained as it was.

8. It is pertinent to mention here that Rule 4-B of OST Rules is notified on 7<sup>th</sup> November, 2009 and as per the notification the provision shall be deemed to have come into force on 13<sup>th</sup> July, 1999. When the provision has come into force and it has got retrospective effect then, Rule 4-B can safely be applied to the case in hand as appeal is continuation of the proceeding. When an amendment to the provision has got retrospective effect and it's application is not specifically denied to the pending cases in express terms then it has got application to the pending cases i.e. before the lower forum or before the higher appellate forum.

In the case in hand, it is found that, AA has allowed @ 72% and 47% deduction against labour and service charges. On the other hand, Ld. FAA has continued the same. The nature of works undertaken by the respondent-dealer are earth work, village road work as well as construction of road work of IDCO, Sunabeda, OHSDP, Bhubaneswar, OHSDP, Bhubaneswar, GM, OSWCOP, Bhubaneswar, GE, FY, Badmal and Executive Engineer (R&B) Division, Burla respectively.

The relevant portion of the provision under Rule 4-B of the OST Rules reads as follows:-

**“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%

Bare perusal of the provision above, it is found that, Rule 4-B cannot be applied universally. It is subject to the satisfaction of contingencies mentioned above. In the case in hand, it is found that, the assessee-contractor has undertaken job work under the departments of State Government through different contracts signed between them. The contracts must speak of the nature of work and the materials to be supplied by the parties to contracts. It is a common experience of this Tribunal while deciding similar cases that, the authorities below have invariably applied a reasonable guess work/best judgment principle to determine the labour and service charges. Needless to mention here that, even though it has been observed by the authorities time to time that, amendment to tax law should invariably be prospective in nature but the Rule 4-B has been made effective retrospectively with a definite intention to calculate the labour and service charges at a particular rate for a particular type of job work i.e. to avoid unnecessary intentional or unintentional favour or harassment to the dealers in the hands of the assessing authorities.

With the view above, it is believed that in the case in hand, all endeavors should be made to ascertain the amount of goods supplied by the dealer-contractor, contractee and the labour and service charges incurred in

the job work from the terms and conditions of the contract agreement with connected documents. In the event the documents are not sufficient, then Rule 4-B of the OST Rules is to be applied. Further, where the works do not fall under any of the category of work included the chart of the provision, then the assessing authority is at liberty to apply best judgment principle.

The appeal is allowed on contest. 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/-  
(Subrata Mohanty)  
2<sup>nd</sup> Judicial Member

Sd/-  
(Subrata Mohanty)  
2<sup>nd</sup> Judicial Member

I agree,

Sd/-  
(Suchismita Misra)  
Chairman

I agree,

Sd/-  
(R.K. Rout)  
Accounts Member-II