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

S.A. No. 411 of 2009-10

(Arising out of the order of learned JCST, Puri Range, Puri, in First Appeal Case No. AA-82(PUII)/2008-09, disposed of on dt. 09.07.2009)

Present : **Smt. Suchismita Misra, Chairman**
Smt. Sweta Mishra, 2nd Judicial Member
&
Shri Prabhat Ch. Pathy, Accounts Member-I

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

- V e r s u s –

M/s. Saroj Kumar Mangaraj, Bachharpatna, Jatni. . . . Respondent

For the Appellant … Mr. S.K. Pradhan, Addl. S.C. (CT)
For the Respondent … N o n e.

Date of hearing: 16.10.2019 **** Date of order: 04.11.2019

O R D E R

This appeal is directed against the order dated 09.07.2009 passed by the Joint Commissioner of Sales Tax, Puri Range, Puri (in short, "first appellate authority") in First Appeal Case No. AA-82(PUII)/2008-09 remanding the assessment for recomputation of the tax liability of the dealer-assessee as per the observations made therein.

2. The facts as revealed from the case record are as follows :

The dealer-assessee (M/s. Saroj Kumar Mangaraj, Bachharapatna, Jatni) in the instant case is a works contractor. On receipt of the notice issued to him u/S. 12(5) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act') he appeared before the Sales Tax Officer, Jatni Circle, Jatni (in short, 'assessing officer') and produced his books of account consisting of the copies of agreements and TDS certificates for the tax period 2002-03. On examination of those documents the assessing officer found that the dealer-contractor had executed contract work under South Eastern Railway, Bhubaneswar to the tune of `77,32,869.00 during the year under assessment. The dealer had got the abovesaid works on the basis of five agreements i.e. Agreement Nos. 119 dated 17.10.2001, 31 dated 15.05.2002, 115 dated 08.12.2000, 220 dated 21.03.2003 and 239 dated 25.03.2002. Accordingly, the dealer had received `5,46,971.00 under Agreement No. 31 dated 15.05.2002 and `1,51,225.00 under Agreement No.115 dated 08.12.2000 which were found to be fully labour oriented works. Therefore, the assessing officer allowed 100% deduction in favour of the dealer towards labour and service charges in respect of the works under these two agreements. The dealer had received `1,99,055.00 under

Agreement No. 220 dated 21.03.2003 and `32,26,931.00 under Agreement No. 239 dated 25.03.2002. In respect of these two agreements the dealer was allowed 42% deduction towards labour and service charges. The dealer had received an amount of `36,08,687.00 under Agreement No. 119 dated 17.10.2001 for execution of new works i.e. additions and alteration to the existing structure with ordinary repair and maintenance work of miscellaneous nature of the building. Therefore, the dealer was allowed to have 52% deduction towards labour and service charges as the material such as cement which was supplied to him by the department. In course of assessment the assessing officer determined the GTO of the dealer-contractor at `77,32,869.00 and the TTO at `37,19,241.64 after allowing deduction of `6,98,196.00 towards labour and service charges in respect of purely labour oriented work and `33,15,431.36 towards labour and service charges in respect of repair and maintenance work. Then imposing tax @8% on `37,19,241.64 with surcharge @ 10% on the tax due he calculated the total tax to be paid by the dealer for that tax period at `3,27,293.26. After deduction of TDS amounting to `2,60,670.00 which was already deducted from the bill of the contractor and deposited in the Government Treasury, the tax dues of the dealer-contractor for that

relevant period came to `66,623.26. The assessing officer then imposed penalty of `99,934.89 on the dealer u/S. 12(5) of the OST Act. Accordingly he issued a demand notice requiring the dealer to deposit a sum of `1,66,558.00 towards his tax liability.

The dealer preferred an appeal before the first appellate authority challenging the aforesaid order of assessment on the ground that he had executed only labour oriented work and for that reason the percentage of deduction allowed in his favour was illegal and unjustified. The penalty imposed on him u/S. 12(5) of the OST Act on account of his not being registered during the period of assessment was also not correct. The dealer-contractor had already been registered during the period of assessment. There was no scope for the works contractor to evade tax while executing labour oriented works and, on the other hand, the State had collected excess tax in shape of TDS from the payment to the contractor. The first appellate authority then examined all the agreements of work contract of the dealer and the order of assessment thoroughly. As there was no documentary evidence with the dealer to justify his claim for deduction @ 100% towards labour and service charges in respect of the works executed by him under Agreement No. 220 dated 21.03.2003, Agreement No. 239 dated 25.03.2002 and Agreement No. 119 dated 17.10.2001, he (the first

appellate authority) confirmed the finding of the assessing officer as the assessing officer had allowed the deduction towards labour and service charges on certain percentages after verification of the connected documents and also ascertaining the nature of works executed by the dealer-contractor. However, so far as imposition of penalty is concerned the first appellate authority deleted the same following the decision of the Hon'ble Apex Court rendered in the case of Hindustan Steel Ltd. Vs. State of Orissa, [1970] 25 STC 211 (SC). As the first appellate authority noticed that there was difference between the TDS asserted by the dealer-assessee and the TDS allowed by the assessing officer, he directed the assessing officer to verify certain PCR and then to allow the differential amount in favour of the dealer-assessee if the said mount is found to have been credited in the name of the dealer-assessee. He thus discussed the tax liability of the dealer-assessee elaborately in his order (at page-4) and remanded the case to the assessing officer for recomputation of the tax liability of the dealer-assessee as per the observations made by him in his order.

3. The State being aggrieved by the aforesaid order of the first appellate authority preferred this appeal on the grounds that the dealer-contracator had executed building repair work for which deduction towards labour and service charges should be allowed at 32% only and further the first appellate authority deleted the penalty to be levied from the dealer u/S. 12(5) of the OST Act even though levy of

penalty is mandatory when the dealer having liability under the OST Act, 1947 had failed to get himself registered. The State thus submitted before this Tribunal that the orders passed by both the forums below are erroneous, arbitrary and bad in law.

No cross-objection has been filed on behalf of the dealer-assessee in this appeal.

4. In course of hearing it was found that neither the dealer-assessee nor any of its authorized representative appeared before this forum on the date fixed for hearing of this appeal despite service of notice on the dealer (as per the AD kept in record). Accordingly the appeal was heard from the side of the State only to be disposed of exparte on merit as per Rule 60(2) of the OST Rules.

5. Learned Addl. Standing Counsel (CT) appearing on behalf of the State submitted that in the instant case the provision of Rule 4-B of the OST Rules should be applied in determining the percentage of deduction towards labour and service charges to be allowed in favour of the dealer-assessee and further levy of penalty being mandatory in the instant case there is absolutely no scope or option for the authority concerned to consider whether the dealer-assessee had the mens rea for evading his tax liability. If violation of the rule on the part of the assessee is made out then penalty is bound to follow to be imposed on the defaulting dealer.

6. On perusal of the order of assessment as well as the impugned order it could be gathered that both the assessing officer as well as the first appellate authority had verified the agreements pertaining to the works contract executed by the dealer-assessee during that relevant period. The assessing officer allowed 100% deduction towards labour and service charges when he found that the dealer had executed the works contract which were totally labour oriented and then he also allowed labour and service charges @42% and 52% respectively examining the nature of works executed by the dealer pursuant to certain agreements as described above. The first appellate authority had also examined the relevant documents and then confirmed the allowance by the assessing officer towards labour and service charges in favour of the dealer. So far as deletion of penalty by him (the first appellate authority) is concerned it is found that he has not whimsically come to a conclusion for deletion of penalty imposed on the dealer by the assessing officer. He has followed the decision of the Hon'ble Apex Court as quoted above and in fact there is absolutely no allegation or adverse inference against the dealer-assessee to have a different view other than the view expressed by the first appellate authority for deletion of penalty imposed on the dealer. The dealer-contractor stated to have been registered during the period of assessment. There is absolutely no cogent reason or justification which can be attributed for imposition of penalty on the dealer when there is no proof that he is

guilty of contumacious conduct or dishonesty and further he had acted on conscious disregard of his obligation.

7. In the result, as per the discussion made in the foregoing paragraph we find absolutely no reason to interfere with the order of the first appellate authority. Hence, the same is confirmed. Accordingly, the appeal preferred by the State is dismissed.

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/-
(Prabhat Ch. Pathy)
Accounts Member-I