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

**S.A. No. 65 (VAT) of 2011-12**

(Arising out of the order of learned JCST, Balangir Range, Balangir, in First Appeal Case No. AA- 44 (KA) of 2010-11, disposed of on dt. 11.03.2010)

**Present** : **Smt. Suchismita Misra**, **Chairman**
**Shri Subrat Mohanty, 1st Judicial Member**
**&**
**Shri Rabindra Ku. Pattnaik, Accounts Member-III**

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

**- V e r s u s –**

M/s. B.K. Construction Co., At/PO- Saintala, Dist. Balangir. . . . Respondent

For the Appellant … Mr. M.L. Agarwal, S.C. (CT)
For the Respondent … Mr. Damodar Pati, Advocate

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Date of hearing: 30.08.2019 **** Date of order: 24.09.2019

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***O R D E R***

This appeal is directed against the order dated 11.03.2011 passed by the Joint Commissioner of Sales Tax, Balangir Range, Balangir (in short, "first appellate authority") in First Appeal Case No. AA- 44 (KA) of 2010-11 allowing the appeal in part preferred by the dealer against the order of assessment passed by the Asst. Commissioner of Sales Tax, Balangir Circle, Balangir (in short,

'assessing officer') u/S. 42 of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') for the tax period 01.04.2005 to 31.03.2010.

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

The dealer-assessee M/s. B.K. Construction Co., Saintala in the District of Balangir is a works contractor and during the period under assessment it had executed works contract under the Executive Engineers, R.W.D., Balangir, Titilagarh, Phulbani and Boudh as well as under the Divisional Engineer, East Coast Railway, Sambalpur. Pursuant to the Audit Visit Report a notice u/S. 42 of the OVAT Act was served on the dealer for assessment by the assessing officer. The dealer-assessee for the aforesaid tax period i.e. from 01.04.2005 to 31.03.2010 had received gross payment of ₹28,74,29,451.00 which was determined as its gross turnover. The nature of works executed by it related to road works and track maintenance works. Out of gross payment received by the dealer a sum of ₹28,57,80,654.00 related to road works and a sum of ₹16,48,797.00 related to track maintenance works. However, the assessing officer allowed deduction of ₹14,42,09,364.00 towards labour and service charges taking into account whole work executed by the works contractor and then after allowing such deduction he determined its taxable turnover at ₹14,32,20,087.00. The assessing officer further determined the tax to be paid in respect of material components utilized

by the dealer in two categories i.e. 4% and @ 12.5% and accordingly the tax calculated @ 4% on materials worth ₹9,60,58,749.00 and calculated @ 12.5% in respect of materials worth ₹4,71,61,338.00 resulted tax due of ₹97,37,517.00. The assessing officer also allowed ITC of ₹45,10,520.00 and tax paid in shape of TDS of ₹82,37,966.00. Ultimately he passed his order of assessment allowing refund of ₹30,10,969.00 in favour of the dealer-assessee.

Being aggrieved with the aforesaid order of assessment the dealer-assessee preferred an appeal before the first appellate authority challenging the legality of the assessment. It was contended on behalf of the dealer-assessee that determination of its taxable turnover by the assessing officer was illegal as the same was based on presumption only. The dealer had filed return regularly from the date of introduction of OVAT Act and it had produced its books of account as well as purchase vouchers at the time of audit visit. He was not given opportunity to reconcile the discrepancies detected by the Audit Officer in respect of its business activities. The dealer thus asserted before the first appellate authority that it was liable to pay tax only on the turnover of sales and not on the turnover of purchases and accordingly it placed its own calculation in respect of materials used by it in execution of works contract alognwith its books of account before the first appellate authority. The first appellate authority considering the

grounds of appeal alongwith materials available on record concluded that the dealer-assessee was entitled to get a refund of ₹39,10,826.00.

3. The State then came up with this second appeal assailing the order of the first appellate authority on the grounds that the first appellate authority did not mention percentage of W&L deduction in case of track maintenance works and further did not find out the quantum of cement utilized by the dealer in execution of works contract. He wrongly calculated the tax liability of the dealer-assessee in the instant case for which the matter needs to be remitted back to the assessing officer for proper adjudication and assessment thereof.

4. The dealer-assessee also filed cross-objection in the appeal before this forum mentioning therein that determination of taxable turnover by the Audit Officer in its case was most illegal as the same was based on presumption only without verification of the documentary evidence which it had with him. The Audit Officer did not conduct any inquiry in respect of the works executed by it (the dealer) taking the assistance of technical persons. The dealer-assessee had produced its books of account and purchase vouchers before the Audit Officer but the Audit Officer arrived at his own conclusion in a very whimsical manner without giving opportunity to the dealer to explain the matter in respect of any sort of or specific discrepancy detected by him. The dealer-assessee further stated in its cross-objection that it had

purchased goods worth ₹6,20,954.00 taxable at the rate of 4% and further utilized materials worth ₹11,17,77,123.00 as those were materials like earth and soil which were available on the old road itself for which it did not require to purchase the same. Similarly the goods like sand, morrum, chips, boulders, bajuri were purchased by the dealer-assessee from the unregistered dealers locally and some portions of those materials were collected from the river beds in respect of which the dealer-assessee had incurred only transportation charges. He also gave a detail account of its taxable turnover and the percentage of tax to be levied on those goods.

5. In course of hearing argument from both sides it was found that the assessing officer had examined the books of account of the dealer-contractor. He (the assessing officer) then found that the dealer had received gross amount of ₹28,74,29,451.00 from the Executive Engineers of different divisions for improvement of roads during the period from 01.04.2005 to 31.03.2010 under PMGSY scheme involving both road works as well as CD works. When the dealer-contractor was confronted with the Audit Visit Report at the stage of assessment it mentioned before the assessing officer that it had undertaken road works which involved earth work and as such maintained accounts in detail which was produced before the Audit Officer. However, the Audit Officer did not allow the labour charges as

claimed by the dealer. It seems the assessing officer despite his coming across this objection of the dealer before him accepted the Audit Visit Report submitted by the Audit Officer entirely and determined the taxable turnover of the dealer-assessee. He did not assign any reason in his order of assessment as to why he accepted the report of the Audit Officer when the books of account of the dealer was not in fact rejected by him. The first appellate authority on verification of the record found that the dealer-contractor had executed two types of works i.e. road works and track maintenance works. For the road works executed by it under the Executive Engineers, R.W.D., Balangir, Titilagarh, Phulbani and Boudh it had received gross payment of ₹28,57,80,654.00 and for track maintenance works which it executed under the Divisional Engineer, East Coast Railway, Sambalpur it received gross payment of ₹16,48,797.00. Thus in total the dealer had received gross payment of ₹28,74,29,451.00. So far as the track maintenance works is concerned the dealer had claimed 100% deduction towards labour and service charges but the assessing officer did not allow the same percentage of deduction. Similarly the dealer had disclosed its sales turnover in the return @4% as well as @12.5% separately but the assessing officer determined the same afresh basing on the purchase turnover of goods and not on the use of materials by the dealer-assessee in execution of works contract. Thus it appears that some sort of arbitrariness had crept

into the order of assessment which ultimately led the first appellate authority to determine the tax liability of the dealer-assessee afresh basing upon the materials available on record. The first appellate authority gave a chart in his order to find out the justifiability of his conclusion with regard to determination of taxable turnover of the dealer-assessee. He, however, accepted the finding of the assessing officer regarding deduction towards the labour and service charges in the instant case. On a careful perusal of the both the orders i.e. the order of assessment as well as the impugned order it could be gathered that the order passed by the first appellate authority is based upon good reasons besides the materials available on record and documentary evidence filed before him by the dealer-assessee. Therefore, we do not find any infirmity in the impugned order inviting interference by this forum.

6. In the result, the appeal is dismissed and the order passed by the first appellate authority is hereby confirmed. Cross-objection is disposed of accordingly.

Dictated & Corrected by me,

**Sd/-**
**(Smt. Suchismita Misra)**
**Chairman**

**Sd/-**
**(Smt. Suchismita Misra)**
**Chairman**

I agree,

**Sd/-**
**(Subrat Mohanty)**
**1st Judicial Member**

I agree, **Sd/-**
**(Rabindra Ku. Pattnaik)**
**Accounts Member-III**