

period i.e. from the year 2001 to 2002 it had executed various types of works contract and received gross payment of `3,65,97,815.29. It claimed deduction of `25,14,077.00 towards first point tax paid materials utilized in the execution of works contract undertaken by it and `2,47,13,405.00 towards labour and service charges. The dealer had also claimed deduction of an amount of `36,29,024.00 on the ground of its receiving the same from M/s. Indian Oil Corporation Limited, Refiners Division, Paradeep Refinery Project which was granted specific concession from tax liability on works contract awarded by them vide Notification No. 13793/VIII-25/2001 dated 21.06.2001 of Government of Orissa, Industry Department, Bhubaneswar. The Sales Tax Officer, Sambalpur-III Circle, Jharsuguda (in short, 'assessing officer') pursuant to the aforesaid notification allowed deduction of entire amount of gross payment of `36,29,024.00 which was received by the dealer towards works contract under the aforesaid M/s. Indian Oil Corporation Limited, Refiners Division, Paradeep Refinery Project but as the dealer had not maintained accounts pertaining to labour and service charges he (the assessing officer) considered the nature of works executed by the dealer-assessee and applied the principle of best judgment and then

calculated the tax liability of the dealer-assessee. Ultimately he allowed refund of `4,01,140.00 in favour of the dealer-assessee.

Being dissatisfied with the said order the dealer-assessee preferred an appeal before the first appellate authority seeking further relief in respect of labour and service charges. However, the first appellate authority after considering the materials on record, the order of assessment and the arguments advanced on behalf of the dealer-assessee before him revised the order of assessment and held the dealer liable to pay the balance tax of `44,800.00.

3. Being aggrieved with this order the State has preferred the present appeal with following grounds :-

- (i) The order of the first appellate authority is not appropriate and sustainable in the eyes of law;
- (ii) The deduction allowed in respect of the works executed is found to be in excess;
- (iii) The deduction allowed by the first appellate authority relating to supply of ballast is not appropriate as the same should be taxed at the goods rate since it is a supply contract; and
- (iv) The deduction on labour and service charges in respect of road works should be limited to 42% and for construction

work 32% and lastly but not the least the first appellate authority has not properly appreciated the agreement.

The dealer-respondent has not filed any cross-objection in this case.

4. In course of hearing argument it was brought to the notice of this Bench that the dealer-respondent had also preferred an appeal against the very same impugned order of the first appellate authority in S.A. No. 2183 of 2004-05. The said appeal was heard and decided by the Division Bench of this Tribunal. Considering the argument advanced on behalf of the dealer-appellant and the State-respondent (appellant in the present appeal) and also considering the evidence placed before them learned Members allowed the appeal of the dealer-respondent in part while setting aside the impugned order passed by the first appellate authority. They categorically held that the dealer is entitled to get refund of `2,25,495.62 as per the provisions of law. Learned Addl. Standing Counsel (CT) appearing on behalf of the State submitted that while passing the order in the aforesaid second appeal preferred by the dealer-assessee the Tribunal did not address the submission made by the State regarding supply of ballast which was a sale and as such in the present appeal the said fact can be taken into consideration for a just decision. Xerox copy of the order passed by this Tribunal in S.A. No. 2183 of 2004-05 has been filed by the learned

Counsel for the dealer-assessee and as revealed from the said order the State had then neither filed any cross-objection nor raised this issue in course of hearing of the said appeal. In paragraph-7 of the order passed in S.A. No. 2183 of 2004-05 the learned Bench have categorically mentioned the points raised by the Revenue.

5. In such circumstances any further order in respect of this argument as advanced by the State in the present appeal may unsettle the matter already set at rest by the order of a Division Bench of this Tribunal.

6. In the result, we hold that the dealer-assessee is entitled to get refund as determined by this Tribunal in S.A. No. 2183 of 2004-05 and this appeal is disposed of accordingly in terms of the said order of the Tribunal as above.

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

Sd/-
(Subrat Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Ranjit Kumar Rout)
Accounts Member-II