BEFORE THE JUDICIAL MEMBER-I:
ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 62(V) of 2019
(Arising out of the order of the learned Addl. CST (Appeal), South Zone, Berhampur, in Appeal Case No. AA(VAT) 13/2018-19, disposed of on dtd.14.02.2019)

P r e s e n t: Shri A.K. Dalbehera, O.S.J.S.
M.A., LL.M.
1st Judicial Member

M/s. Sri Akshya Kumar Dash,
At/P.O.- Neherunagar, 7th Lane,
Berhampur. ... Appellant

- V e r s u s -

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

For the Appellant ... Mr. B.B. Panda, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C.

Date of hearing: 24.02.2021 *** Date of order: 16.03.2021

O R D E R

This appeal is directed against the order dtd.14.02.2019 passed by the learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur (hereinafter referred to as, the learned ACST) in Appeal Case No. AA(VAT) 13/2018-19, wherein he confirmed the assessment made by the learned Deputy Commissioner of Sales Tax, Ganjam I Circle, Berhampur (hereinafter referred to as, the learned DCST) for the assessment period 01.07.2011 to 31.03.2012

u/s.43 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act).

2. The brief facts of the case are that, the appellant-dealer is a Works contractor. Proceeding was initiated u/s.43 of the OVAT Act on the basis of the Tax Evasion Report submitted by the Sales Tax Officer, CT & GST Enforcement Unit, Berhampur. It was pointed out in the report that there was no transaction relating to the purchase and sale for the quarter ending 06/2011 and that there was escapement of turnover. In response to notice the appellant-dealer appeared and produced the books of account for verification. The learned DCST stated that the appellant-dealer could not produce necessary documents and accounts in support of labour and service charges incurred for the execution of works contract relating to the material period. The learned DCST found that the appellant-dealer had filed returns for the aforesaid period showing total purchase of goods at Rs.2,54,31,376.00 and claimed input tax credit worth Rs.9,44,559.00. As per the learned DCST the appellant-dealer had neither brought forward any ITC from the previous tax period nor carried forward any ITC to the subsequent period of assessment. However, the appellant-dealer had carried forward the balance TDS amount of Rs.10,04,443.00 to the subsequent tax period out of the total TDS of Rs.20,18,027.00 deposited in this period. As per the tax evasion report the appellant-dealer had effected purchases worth Rs.1,12,82,204.00 from unregistered dealers. The learned DCST allowed labour and service charges @ 30% for the construction of bridge works as per the rate mentioned at Sl.

No.3(b) of the Appendix to Rule 6 of the OVAT Rules, 2005 in the absence of related books of accounts instead of 50% as claimed by the appellant-dealer. Total labour and service charges was allowed for Rs.1,51,18,001.00 out of the gross payment of Rs.5,03,50,712.00 and taxable turnover was determined at Rs.3,52,32,711.00. The TTO has been bifurcated into different taxable groups proportionately taking into consideration the ratio of purchase effected by the appellant-dealer excluding the purchase of capital goods for Rs.25,16,619.00. So, the total output tax was calculated at Rs.20,93,416.00. Out of the ITC claim of Rs.9,44,559.00, the learned DCST disallowed ITC of Rs.12,727.00 in the absence of relevant original invoice and double claim of ITC and ITC has been allowed for Rs.9,31,832.00. On deduction of ITC of Rs.9,31,832.00 and TDS of Rs.8,79,284.00 out of the output tax due of Rs.20,93,416.00, the balance tax due was calculated at Rs.2,82,300.00. Besides, penalty of Rs.5,64,600.00 was imposed u/s.43(2) of the OVAT Act for which the demand came to Rs.8,46,900.00.

3. Being aggrieved by the order of the learned DCST, the appellant-dealer preferred an appeal before the learned ACST who confirmed the order of assessment. Being further aggrieved by the order of the learned ACST, the appellant-dealer has preferred the second appeal.

4. The appellant-dealer has come up with the second appeal on the grounds that the learned ACST upheld the assessment which is unreasonable and contrary to law; that the Executive Engineer (R&VB) Division, Baliguda furnished deduction certificate in form VAT-605 for Rs.4,45,690.00

against which Rs.3,11,409.00 is allowed but differential amount of Rs.1,34,281.00 should be allowed; that the learned ACST did not consider the deposit in favour of the dealer vide Ch.37 dtd.31.03.2012 in the absence of required PCR details. The learned DCST has allowed a sum of Rs.1,33,986.00 vide Ch. No.37 dtd.31.03.2012 and Rs.1,34,280.00 has been deposited in some challan out of the total deduction of Rs.30,00,000.00; that the appellate order cannot be held to be sustained in the eye of law being not fair by disallowing the deposited amount for want of PCR number; that the learned DCST imposed penalty u/s.43(2) of the OVAT Act taking extent of an amount equal to twice the amount of tax assessed. The amendment came into effect from 01.10.2015 thereby the extent of penalty on assessment of escaped turnover has been reduced to the extent of an amount of one time of tax assessed. There is no mention of tax periods on or before 30.09.2015 is equal to twice the amount of tax assessment as per amendment, thus the imposition of penalty is illegal and unwarranted in the circumstances of case.

Cross objection has been filed by the respondent-Revenue supporting the order of the learned ACST.

5. Heard the learned Counsel for the appellant-dealer so also the learned Addl. Standing Counsel appearing for the Revenue. Perused the materials available on record so also the orders passed by both the fora below. I also perused the grounds taken in the appeal so also the plea taken in the cross objection. In this case it is necessary to determine whether on the facts and circumstances of the case the fora below are justified to impose tax without deducting

determined tax from the gross receipts; whether proper rules as per the circulars and provisions of the Act have been followed while allowing the TDS. The learned DCST determined the GTO which has been challenged by the learned Counsel for the appellant-dealer during the course of hearing. Hence, now it is pertinent to look at the definition of gross turnover as defined u/s.2(24) of the OVAT Act which states that gross turnover in relation to any period means the aggregate of the turnover of sales and the turnover of purchases made by a dealer during that period. Section 2(56) of the OVAT Act defines taxable turnover which means the turnover on which a dealer is liable to pay tax as determined after making deduction from his gross turnover and in such manner as may be prescribed. On analyzing such provisions it is seen that gross receipts against the goods should be treated as the gross sale price. As per the explanation (d) to Section 2(46) of the OVAT Act any amount of duties, charges, taxes levied or leviable under any Act (other than tax levied or leviable under this Act) in respect of such goods shall be included in the sale price. In the present case the sale price has been determined by the learned DCST after deduction of labour and service charges only. It was submitted by the learned Counsel for the appellant-dealer that the balance amount which is included in the tax levied or leviable under this Act as per the terms and conditions of the contract has not been deducted from the gross value received for which the fora below assessed tax on tax component which is part and parcel of the gross turnover. As per the terms and conditions of the contract there was no separate tax charged on each

running bill and the same has been reflected in tabular form in the order of assessment. To that effect it was submitted that the amount of determined tax amounting to Rs.20,93,416.00 should be deducted from the GTO in order to make a true and fair assessment as no one can be compelled to pay tax on tax component in same series of sale by a particular person in any manner.

6. The learned DCST at page-9 of the order of assessment has reflected as follows:-

> "Regarding TDS there is no dispute and the TDS deposited is Rs.20,18,027.00. The gross payment received by the dealer-contractor is Rs.5,03,50,712.00. The TDS is shown in the table as Rs.4,45,690.00. As per form VAT-605 the TDS has been reflected as Rs.3,11,409.00. The total TDS allowed by the learned DCST is Rs.18,83,726.00 as per the table."

It was submitted by the learned Counsel for the appellant-dealer that the learned DCST has not made any inquiry whether such TDS has been deposited by the deducting authority or not. The Addl. Standing Counsel could not substantiate anything to that effect. If that be so it will be appropriate to remand the case to the learned DCST to examine the details of the TDS certificates available with the appellant-dealer in support of the deposit.

7. As per the circular of the office of the Commissioner of Commercial Taxes, Odisha, Cuttack vide letter No.5060 dtd.28.03.2018, following the observation of the Hon'ble High Court of Orissa in the case of Radha Krishna Engineering v. DCST, Balasore Circle in W.P.(C) No.10362/2016 dtd.24.09.2016 the procedure for adjustment

of the TDS against tax liability of a contractor was laid down as follows:-

> "If it is found that the amount mentioned in the TDS certificates has not been deposited into Government Treasury, necessary action should be taken against the Deducting Authority by the concerned Circle Officer under whose jurisdiction the Deducting Authority is located.
> If PCR verification of deducted TDS is not received within 3 months, it will be deemed that the TDS has been deposited into Government Treasury and if it is found otherwise later on, the concerned Circle Officer shall be held personally responsible and loss of revenue will be recovered from him."

It seems that the fora below in spite of above circular of the Commissioner have not acted properly. The learned Counsel for the appellant-dealer also agitated about imposition of penalty by the learned DCST in the absence of any suppression and in view of the acceptance of the books of account. However, question of imposition of penalty will arise after recomputation of tax liability of the appellant-dealer. The learned Counsel for the appellant-dealer urged for remand of the case for necessary computation to which the learned Addl. Standing Counsel did not raise any objection. Hence it is a fit case for remand of the matter for fresh computation. Hence, it is ordered.

8. The appeal is allowed and the impugned order is hereby set aside. The matter is remitted back to the learned DCST for necessary computation in view of the aforesaid observations preferably within a period of three months from the date of receipt of this order. The appellant-dealer is directed to produce all relevant materials including the books

of account before the learned DCST to enable him to complete the assessment. The cross objection is accordingly disposed of.

Dictated & corrected by me,

Sd/-
(A.K. Dalbehera)
1st Judicial Member

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