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

S.A. No. 159(V) of 2010-11

(Arising out of the order of the learned JCCT, Koraput Range, Jeypore, in First Appeal case No. AA-V(KOR)42/09-10 disposed of on 31.07.2010)

P r e s e n t: Shri G.C.Behera, Chairman. Sri. S.K.Rout Judicial Member-II & Shri M.Harichandan, Accounts Member-I.

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

- V e r s u s –

Jagannathe Choudhury, Contractor, 98-Kharvel Nagar, Bhubaneswar. ... Respondent.

For the Appellant ... Mr. D.Behura, S.C. & Mr.S.K.Pradhan, ASC..

For the Respondent ... None.

Date of hearing: **20.09.2022** * * * Date of Order:**26.09.2022**

O R D E R

Challenge in this appeal is the order dated 31.07.2010 passed by the learned Joint Commissioner of Sales Tax, Koraput Range, Jeypore (in short, JCST/FAA) in first appeal case No.AAV(KOR)42/09-10 thereby allowing the appeal in part.

2. In nutshell, the case at hand is that the dealer assessee is a contractor who executes different works under different authorities of the State Govt. As the dealer did not respond to the notice issued by the assessing officer under Section 43 of the OVAT Act for the period from 01.04.2005 to 31.03.2008, ultimately the assessment order was passed exparte basing on the TDS received from the contractee. The assessing officer found that during the relevant period an amount of Rs.751731/- has been deposited by the

Executive Engineer, N.H.Division, Sunabeda in favour of the contractor. So the gross turnover as well as the taxable turnover of the dealer were determined at Rs.1,67,19,727.00. Tax was levied @12.5% which was computed at Rs.20,89,965.87. After adjustment of tax payment of Rs.7,51,731.00 balance tax payable arrived at Rs.13,38,234.87. Further, the assessing officer imposed penalty of Rs.26,76,469.74 under Section 43(2) of the Act. So the assessment order was passed for Rs.40,14,705.00.

3. Being aggrieved with such assessment order, the dealer assessee preferred first appeal before the learned JCST, Koraput Range, Jeypore who allowed the appeal in part by reducing the tax demand.

4. Being dis-satisfied with the order of the first appellate authority, the State has preferred the present second appeal.

5. No cross objection is filed by the dealer respondent in this case.

6. In spite of due service of notice on dealer respondent, he neither preferred to participate in the appeal nor engaged any one on his behalf to be present during the time of hearing of this appeal. So finding no alternative, this Tribunal proceeded to dispose of this appeal on exparte basis on merit hearing the State appellant.

7. Heard the contentions and submissions of the State appellant. Learned Standing Counsel Mr. D.Behura during course of argument submitted that the learned first appellate authority is not justified in not imposing penalty which is double the amount of tax assessed under Section 43(2) of OVAT Act,2004 and that the learned first appellate authority should have calculated the tax and penalty

leviable in material position of work and should have allowed adjustment of TDS from total demand of tax and penalty.

8. In the instant case, the issues that emerged for adjudication are such as:

(i) Whether, there should be imposition of penalty double the amount of tax assessed?

(ii) Whether, the tax and penalty leveiable on material position of work should have been calculated and allowed adjustment of TDS from total demand of tax and penalty?

(iii) What should be the percentage of deduction on labour and service charges?

9. Perused the materials available on record vis-à-vis the grounds of appeal as well as the first appeal order. From the record, it reveals that notice was served on the dealer assessee in Form VAT-307 for production of books of accounts. After issuance of notice, many opportunities were given to the dealer assessee, but in spite of such, the dealer did not produce books of accounts before the assessing officer for which the assessment order was passed on exparte on dated 07.08.2009. Further, it reveals that the contentions of the dealer assessee before the first appellate authority was that he had to obtain the required contractural papers and documents from the office of the Executive Engineer, N.H.Division, Sunabeda which were not made available to him on time and as such he was not able to produce the same before the assessing officer on the due date. Further contentions of the dealer assessee before the learned first appellate authority was that when the assessment was not barred by limitation and the reason for non production of books of accounts was beyond the capacity of the dealer assessed, the assessing officer should have awaited for further time instead of passing exparte assessment order hurriedly. However, the contentions of the dealer

assessee found convincing for which, the turnover was re-determined by the learned first appellate authority. It is seen from the first appellate order that the contratural documents were furnished before it (first appellate authority) for the period from 01.04.2005 to 31.03.2008 which shows that the dealer assessee (contractor) had received gross amount of Rs.2,58,77,734.00 from the contractee towards execution of works contract against three agreements such as agreement No.15F2/02-03, agreement No.40F2/05-06 and agreement No.185F2/02-03. From these agreements, it becomes clear that the nature of works involved only road work. The work involves scarifying and removing existing bituminous and kankar/ gravel/ metal surface, earth work in excavation of all kinds of soil, compaction of original ground, filling sand in foundation trenches, trench cutting, conveying excavated earth from trench cutting/ excavation/ stack piles and laying and dressing, stone dry packing in aprons and revetments, earth in back filling over hume pipe, dismantling RCC works etc. etc. Likewise, in second work it is cleaning grass and removal of rubbish, earth work in excavation, providing and laying pitching on slopes laid over prepared filter media including boulder apron laid dry on the slope of hill side etc. etc. Likewise, the third work involves providing 50 mm thick compacted bituminous macadam, providing 25 mm thick semi dense bituminous concrete, providing road marking with hot applied thermoplastic compound etc. etc. After careful scrutiny of the agreements, it becomes quite clear that no where it has been agreed upon that the department will supply any materials for the work.

Under such circumstances, the contractor claimed 70% of the total works as labour and service oriented out of which 30 % as material portion. Even if such a claim was made by the contractor but he failed to substantiate his claim as no documentary evidence was relied upon. Apart from this, no books of account is maintained by the contractor for execution of works contract. But

how it can be possible and believable that no books of accounts is maintained by the contractor. On the other hand, the contractor is duty bound to submit the contractural particulars in detail to the contractee as well as to the Income Tax Department. Under such circumstances, in view of such latches on the part of the contractor, the claim putforth by him before the learned first appellate authority was discarded on the basis of Section 11(2)(C) read with Rule 6(e) of the OVAT Act and Rules which specifies as " where a dealer executing works contract, fails to produce evidence in support of expenses 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, expenses on account of labour and service shall be determined at the rate specified in the Appendix/" After have a glance to the Appendix to the OVAT Rules, the percentage of labour, service and like charges of the total value of the works has been prescribed at 50%. So when the dealer contractor failed to produce any evidence to support his claim towards labour and service charges, as per Appendix the percentage of 50% was considered bythe learned first appellate authority to be deducted from his gross receipt instead of 70% as claimed. The dealer contractor has received gross payment of Rs.2,58,77,734.00 for the period under assessment which is the gross turnover and as such deduction of Rs.1,29,38,867.00 and tax payable at 4% on Rs.1,03,51,093.60 and @12.5% on Rs.25,87,773.40 is calculated at Rs.7,37,515.42 against which an amount of Rs.10,35,111.00 was deducted at source and deposited into sales tax account. The dealer appellant has also paid excess tax of Rs.2,97,596.00 under the VAT law by way of TDS.

10. In view of such analysis, we are of the unanimous view that the learned first appellate authority has rightly considered all the aspects inconsonance with the provisions of law and as such the same needs no interference.

11. In the result, we have no hesitation to dismiss the appeal preferred by the State. As a corollary, the order passed by the learned first appellate authority on dated 31.07.2010 in first appeal case no.AAV(KOR/42/09-10 is hereby confirmed.

Dictated and Corrected by me,

Sd/-
(Shri S.K.Rout)
Judicial Member-II

Sd/-
(Shri S.K.Rout)
Judicial Member-II

I agree,

Sd/-
(Shri G. C. Behera)
Chairman

I agree,

Sd/-
(Shri M. Harichandan)
Accounts Member-I

Challenge in this appeal is the order dated 06.04.2018 passed by the learned Joint Commissioner of Sales Tax (Appeal), Balasore Range, Balasore in first appeal case No.AA.12/BSC/2017-18(CST) thereby confirming the re-assessment order dated 31.12.2016 passed by the learned Sales Tax Officer, Balasore Circle, Balasore (in short, AA/STO) under Rule 12(3)(f) of the CST (O) Rules, 1957 for the period from 01.04.2007 to 31.12.2017 raising demand of Rs.2,23,223.00 which includes interest of Rs.87,920.00 levied under Rule 8(1) of the CST (O) Rules, 1957 for non-submission of declaration in Form 'C' in support of claim of concessional rate of tax claimed in returns.

2. The case at hand is that the dealer appellant is engaged in the business of processing of rubber scraps and china clay to produce rubber dust by using scrap rubber and china clay as raw materials. The dealer appellant also carries on trading business in china clay, rubber scraps and rubber dust. It (dealer appellant) purchases scrap tyres of car, jeep and from factories and process those to rubber scraps and finally to rubber dust for sale. Purchases are

effected both from inside and outside the State. Inside purchases are effected from registered dealers on payment of VAT and also from unregistered dealers. The assessment order reveals that the dealer appellant has effected total purchases amounting to Rs.2,08,33,176.80 which includes raw materials amounting to Rs.1,22,25,069.80 and machineries amounting to Rs.86,08,107.00 from outside the State and Rs.10,85,24,154.00 from inside the state. The above inside purchases includes 4% taxable goods of Rs.5,59,12,787.00, 5% taxable goods of Rs.85,36,978.00 and purchases from unregistered dealers of Rs.4,40,78,389.00. The dealer appellant has effected total sales amounting to Rs.17,63,47,595.90 which includes outside sales amounting to Rs.13,00,46,947.60 and inside sales amounting to Rs.4,63,00,648.30. Outside sales includes sales to SEZ amounting to Rs.3,30,000.00 in support of amounting to Rs.1,43,581.00 and interstate sales amounting to Rs.12,95,73,366.00. Against interstate sales amounting to Rs.12,95,73,366.00, the dealer appellant submitted declaration in Form –C amounting to Rs.12,03,38,142.38. After verification of books of accounts,

the learned assessing officer raised demand of Rs.6,01,023.00 including penalty under the CST Act earlier due to non-submission of declaration in Form 'C'.

3. Being aggrieved by the order passed earlier, the dealer preferred appeal before the learned JCST, (first appellate authority), Balasore Range, Balasore wherein the first appellate authority observed that the imposition of penalty on the facts and circumstances of the case is unwarranted since no suppression of turnover has been established by the assessing officer for which the first appellate authority set aside the case and remanded back to the assessing officer to levy interest instead of penalty on the additional tax so assessed. Pursuant to such observation, the learned assessing officer completed the reassessment and raised the demand of Rs.2,23,223.00 which includes interest of Rs.87,920.00.

4. Being aggrieved with such reassessment order dated 31.12.2016, the dealer preferred first appeal before the learned JCST (Appeal), Balasore Range, Balasore, who confirmed the assessment order.

5. Being further dis-satisfied with the order of the learned first appellate authority, the dealer appellant has preferred the present second appeal.

6. Cross objection has been filed in this case by the state respondent.

7. Heard the contentions and submissions of both the parties in this regard. Learned counsel appearing for the dealer appellant contended that the order of assessment passed by the learned STO is erroneous and illegal and non sustainable in the eye of law. That the appellant has no control over the purchasing dealer to collect form for submission for which it (dealer) has already paid the tax at higher rate and charging interest on it is illegal. That the assessing authority has not gone into the veracity of the transaction although placed before it and the demand made is excessive and illegal. That the appellate authority has gone wrong in confirming the appeal and disallowance of adjustment of tax deposited under OVAT Act.

8. Per contra, learned Addl. Standing Counsel Mr. D.Behura for revenue argued that the grounds taken by the

dealer appellant is without material fact because there is no dispute on transaction and the demand raised is due to non-submission of statutory 'C' form and interest there on is as per statute. Mr. Behura also submitted that the learned STO has rightly determined the tax liability by imposing interest under Section 8(1) of the CST Act for failure of the dealer appellant to comply the statutory provisions as stated under Rule 12(7) of CST (R & T) Rules and Rule-7(A) of the CST (O) Rules.

From the rival contentions of the parties, the issues emerged for adjudication are as follows:

(i) Whether, the claim of concessional rate of tax is justified even non-submission of declaration in Form-'C'?

(ii) Whether, submission of Form-'C' is optional?

(iii) Whether, deposit of Rs.4 lakhs under OVAT is liable to be justified against CST demand?

(iv) Whether, imposition of interest by the STO is genuine?

With regard to issue No.1 & @, first have a glance to the language of Section 8(4) of the CST Act which provides for condition to be fulfilled for availing aforesaid concessional rate of tax. Said sub-section lays down that "the provisions of sub-section(1) shall not apply to any sale in the course of interstate trade or commerce unless, the dealer selling the goods furnishes to the prescribed authority at the prescribed manner a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority:

Provided that the declaration is furnished within the prescribed time or within such further time as that the authority may, have sufficient cause, permit"

Further more, Rule 12(1) of the Central Sales Tax (Registration & Turnover) Rules, 1957, prescribes that the declaration referred to in sub-section (4) of Section 8 shall be in Form 'C'. Rule 12(7) ibid, further prescribes that the declaration in Form 'C' shall be furnished to the prescribed authority within three months after the end of the period to which the declaration relates.

In the instant case it is quite evident from the materials available on record that the appellant dealer though claimed concessional rate of tax but could not be able to furnish declaration form. The dealer appellant though claimed concessional rate of tax as per Section 8(1) of the CST Act did not furnish requisite declaration in Form C at the relevant point of time as required to do so under section 8(4) of the said Act in respect of certain transactions. So in view of such for submission of form 'C' is quite required without that has not been furnished, the dealer is not entitled to claim concessional rate of tax. Accordingly, these issues are answered. With regard to issue no.3 as per say of the dealer appellant has deposited an amount of Rs.4 lakhs under OVAT Act which he claims to be adjusted against CST demand. At this juncture, noteworthy to mention that "ignorance of law is not an excuse. Why and what for the amount was not deposited against CST demand? If that is so then it cannot be adjusted against CST demand and as such the first appellate authority has rightly taxed it as unsustainable. Now, the last issue to be decided is whether the imposition

of interest by the STO is genuine? Learned Addl. Standing Counsel Mr. Behura has relied upon the decision decided in the case of Royal Boot House Vrs. State of JK (1984) 56 STC 212 (SC) where in it has been observed as follows:

" Where the tax payable on the basis of a quarterly return is not paid before the expiry of the last date for filing such return under the Jammu and Kashmir General Sales Tax Act, 1962, it is not necessary to issue any notice on demand; but on the default being committed the dealer becomes liable to pay interest under section 8(2) of the Act on the amount of such tax from the last date for filing the quarterly return prescribed under the Act.? Moreover, in the case of State of Odisha Vrs. Kali Limited, S.A. No.75(C) of 2016-17, disposed of on 14.03.2018 this Hon'ble Tribunal (Single Bench) in identical situation as obtained in the present case directed the assessing authority to impose interest in respect of tax assessed on account of non-submission of declaration form. Mr. Behura for the revenue also relied upon the order of this OSTT dated 23.05.2018 in S.A. No.4(C) for 2017-18 in case of Gupta Trading Co. Vrs. State of Odisha in which it is observed that payment of

interest is automatic on the differential amount of tax accrued due to non-submission of declaration form. This apart Mr. Behura has also relied upon the case decided in the case of CCT Vrs. Control Switch Gear Co Ltd. (2011) 10 VST 18(All), wherein it is observed that " even though declaration form for claiming exemption/concession may be required to be filed during the course of assessment proceeding but, in case of non-furnishing thereof, tax has to be levied at normal rate which would become the admitted tax and interest under Section 8(1) of the UP Act would be leviable from the due date of return in which turnover was disclosed and exemption/concession has been claimed. So in view of the above settled principle of law, the action of the learned assessing officer and the learned first appellate authority in levying tax and interest on the amount payable in addition to tax is justified.

On the other hand, the decision relied upon by the dealer appellant decided in the case of Gujarat Ambuja Cement Ltd. Vrs. Assessing Authority (2000) 118 STC 315 (HP) and J.K. Synthetics Ltd. Vrs. CTO (1994) 94 STC 422 (SC) appeared to be not befitting to the instant case in view

of its peculiar facts and circumstances. So the above analysis make it clear that the learned first appellate authority has rightly analysed all aspects in consonance with the provisions of law and as such the order needs no interference.

In the result, the appeal preferred by the dealer appellant is dismissed and the order of the first appellate authority passed on dated 06.04.2018 in first appeal case No.AA.12/BAC 2017-18 (CST) is hereby confirmed. Accordingly, the cross objection is disposed of.