IN THE HIGH COURT OF KARNATAKA
AT BANGALORE

Dated this the 20th day of June, 2012

PRESENT

THE HON'BLE MR JUSTICE D V SHYLENDRA KUMAR

AND

THE HON'BLE MR JUSTICE B MANOHAR

Sales Tax Revision Petition No 126 of 2008

Between:

LARSEN & TOUBRO LIMITED
19, KUMARA KRUPA ROAD,
BANGALORE – 560 001,
REPRESENTED HEREIN BY
MS. SHANTALA VIDYADHAR,
EXECUTIVE-INDIRECT TAXES. ... PETITIONER

[By Sri T Suryanarayana, Adv. for
M/s King & Partridge, Advs.]

And:

THE STATE OF KARNATAKA
REP. BY THE COMMISSIONER
OF COMMERCIAL TAXES,
VANIJYA THERIGE KARYALAYA,
KALIDASA ROAD,
GANDHINAGAR
BANGALORE - 560 009 ... RESPONDENT

[By Ms S Sujatha , AGA]

THIS REVISION PETITION IS FILED UNDER SECTION 23 (1) OF THE KST ACT, 1957 AGAINST THE JUDGMENT AND ORDER DATED 30.05.2008 PASSED IN STA NO 895 OF 2005(KST) ON THE

FILE OF THE KARNATAKA APPELLATE TRIBUNAL, BANGALORE, DISMISSING THE APPEAL AND ETC.,

THIS PETITION COMING ON FOR HEARING, THIS DAY, ***SHYLENDRA KUMAR J.,*** MADE THE FOLLOWING:

O R D E R

This revision petition is presented under Section 23(1) of the Karnataka Sales Tax Act, 1957 [for short, the Act] by a dealer registered under the provisions of the Act.

2. The assessee, a registered dealer, carries on business in various activities, manufacturing and otherwise, and in so far as the present revision petition is concerned, we are concerned only with civil works contract executed by the assessee in favour its clients for the purpose of determining the tax liability of the value of the goods which passes on the execution of such works contracts, which is liable to tax under the provisions of Section 5-B of the Act.

3. The assessee had filed a return of its turnover and to the return had appended several annexures, which, according to the assessee, gave particulars of the nature of civil contracts executed by the assessee, whether totally executed by the assessee or executed through its subcontractors, and the value of the total turnover attributable to works contract undertaken by the assessee, as also details of payments made to its contractors.

4. The assessee had claimed that in respect of the value of the goods which would pass through its clients on the execution of the works contract, whether executed by the assessee itself or got executed through its subcontractors, there were certain contracts which had been totally exempted from levy of tax under the Act and had, therefore, claimed that no tax was payable in respect of such turnover relating to exempted works. The assessee had also claimed that it had undertaken certain

exclusive labour contracts and in execution of such contracts, assessee had not either utilized or passed on any taxable goods and therefore the turnover relating to such labour contracts were not taxable. Assessee had indicated one such category of contracts, which, it had described as 'back to back' basis contracts, in the sense, the entire contract was got executed through its subcontractors. Details of such works were given in Annexure-5 to the form No 4 return. Assessee had also indicated other work contracts executed by it and the value of the goods involved and had given particulars of these nature of contracts in Annexure-6 appended to the return.

5. A tabulated details of individual nature of contracts as per such annexures 3, 4, 5 and 6 are to be found in Annexure-2 to the form 4 return and is under:

Annexure – 2

LARSEN & TOUBRO LIMITED-ECC DIVISION-BANGALORE REGION
KST ASSESSMENT FOR THE YEAR 2002-2003
CONSOLIDATED GROSS TURNOVER/EXEMPTIONS/TAXABLE TURNOVER &
TAX PAYABLE FOR THE PERIOD 01-04-2002 TO 31-03-2003

(Figures in Rupees)

Sl. No	Description	Gross Turnover	Exemptions									Total Exemptions	Taxable Turnover	Rate of tax	EST	Resale Tax		Total Tax Paid
			Exempted Turnover	Clients Materials	II Sales		Sub-Cont. Turnover	Tax Collected	Pumping & Delivery Charges	Loading Charges	Labour & other like charges					@ 1.5% on II Sales Others	@ 0.3% on II Sales Steel	
					Steel	Others												
1	Deemed Sales-Works Contract																	
	(A) Contracts Exclusively Exempted – Annx-3	223926600	191135969		29067217	3723414						223926600	0			55851	39710	95561
	(B) Pure Labour Contracts – Annx-4	86686834	86686834									86686834	0					
	(C) Contracts on Back-to-Back Basis – Annx-5	497574059					497574059					497574059	0					
	(D) Contracts involve transfer of property – Annx-6 in goods	2731401749		34414333	178124736	170574644	701148686				1414139289	2498401688	*233000061	12%	27960007	2558620	374674	30893301
	(Note: Taxable Turnover as per books of accounts is at Rs.38,61,95,766/- as furnished vide Ann-21)																	
	Sub-Total (A)	3539589242	277822803	34414333	207191953	174298058	1198722745	0	0	0	1414139289	3306589181	233000061		27960007	2614471	414384	30988862

6. A perusal of this Annexure-2 indicates that the total value of the works contract executed by the assessee, whether by employing subcontractors or otherwise, was to the tune of Rs 1,19,87,22,745/-. The assessee had subdivided this turnover as Annexure-C and D contracts and Annexure-5 related to details of category-C contracts which were described by the assessee as 'back to back' contracts. The value for such contracts was indicated to be Rs 49,75,74,059/-. The balance of Rs 70,11,48,686/- was claimed as contracts wherein there was transfer of goods in the execution of the works contracts and the assessee had shown this turnover as taxable under Section 5-B of the Act, but claimed that in so far as the value of the back to back contracts are concerned, it had made payments to subcontractors only to an extent of Rs 42,29,80,872/- and had retained a sum of Rs 7,45,83,087/- and further claimed that this retained amount represented the profit component to the assessee in respect of 'back to back' contracts.

7. The assessee claiming this profit as not taxable under Section 5-B of the Act, as it did not represent the value of any taxable goods passing on the execution of the works contracts and on the other hand, the assessing officer having taken the entire turnover of Rs 1,19,87,22,745/- as the turnover involving the transfer of taxable goods in the execution of the works contracts, has given rise to the present revision petition after the assessee's version was not accepted by the first and the second appellate authorities.

8. To put it in other words, the authorities not making a distinction between the kind of contracts as claimed by the assessee as per Annexures-5 and 6, but taking the value of turnover by adding the turnover as indicated in Annexures-5 and 6 has given rise to the dispute and being aggrieved by the concurrent view taken by all the authorities below, the present revision petition by the assessee.

9. In so far as the present revision petition is concerned, it is the business relating to the activities of the assessee as a contractor having undertaken execution of civil works in favour of its clients involving transfer of property of goods in the course of execution of such contract, which attracts liability for payment of tax under the provisions of Section 5-B of the Act, reading as under:

> ***5-B Levy of tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of works contracts –***
>
> *Notwithstanding anything contained in sub-section (1) or sub-section (3) or sub-section (3-C) of Section 5, but subject to sub-section (4), (5) or (6) of the said Section, every dealer shall pay for each year, a tax under this Act on his taxable turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract mentioned in column (2) of the Sixth Schedule at the rates specified in the corresponding entries in column (3) of the said Schedule.*

10. The dispute is of a limited nature, as can be ascertained from the issues which the tribunal has formulated for its examination in the appeal of the

assessee, which were as many as seven in number in para-7 of its judgment, and in so far as the present revision petition is concerned, it only pertains to answers given by the tribunal in respect of the following two issues:

> *(b) Whether tax under section 5-B of the KST Act is leviable on the appellant's gross profits in respect of works done through sub-contractors (who are local registered dealers)? If yes, at what rates?*
>
> *(c) Whether re-sale tax under Section 6-B is leviable on the transfer of property involved in sub-contracted works at the hands of the appellant? If yes, at what rates?*

as indicated by the tribunal and both issues having been answered in the affirmative and against the assessee.

11. Assessment period is from 1-4-2002 to 31-3-2003 and the present revision petition is on the premise that answers to these issues, as answered by the tribunal is erroneous and contrary to the settled legal position, as emerges from the law governing the subject matter.

12. Sri T Suryanarayana, learned counsel for the petitioner-assessee has launched a two-thronged attack

on the assessment order as affirmed by appellate authorities on the aspect of taking out the sum of Rs 7,45,83,087/- from out of the total turnover to get over the order of the assessing officer as affirmed by appellate authorities.

13. It is submitted that the assessing officer has unnecessarily thrust the deduction as indicated under Rule 6 of the Rules for arriving at the taxable turnover, particularly in terms of Rule 6(4)(n) of the Rules to determine the taxable turnover liable to tax under Section 5-B of the Act. It is urged that the assessee had claimed deduction/exemption of entire turnover of Rs 49,75,74,089/-, which was the value of the turnover which the assessee had given to the subcontractors on back to back basis, but the assessing officer refusing to grant the benefit of exemption in respect of part of this turnover by invoking the provisions of Rule 6 of the Rules was uncalled for and is not justified. In this regard Sri Suryanarayana submits that the assessing officer has

proceeded on an erroneous premise in law and has called in aid a theory of second deemed sale to bring the assessee within the scope of Section 5-B of the Act; that the position of law is now made clear by the Supreme Court in the case of ***STATE OF ANDHRA PRADESH vs LARSON & TOUBRO LTD [(2008) 17 VST 1],*** wherein the Supreme Court indicated that there is no question of a second deemed sale and it is only one sale of goods involved in the execution of works contract; that the charging section - Section 5-B – operates when goods involved in the execution of the work contract becomes property of the principal for whose benefit the work is being executed and on the principle of accretion, this can happen only once and not twice, as is reasoned by the assessing officer to fasten the liability on the assessee and therefore submits that the assessment order is bad in law.

14. In the alternative, Sri Suryanarayana submits that a sum of Rs 7,45,83,087/-, which admittedly was retained by the assessee from out of the total turnover of

Rs 49,75,74,059/-, which is the value of the contracts subcontracted by the assessee, represents the profit component of the assessee from out of such subcontracts; that this amount does not represent any part of the value of the goods involved in the execution of the works contract and is, therefore, an amount outside the scope of charging Section 5-B of the Act and not at all liable to tax.

15. In this regard, it is further claimed that the assessing officer even if had called in aid the provisions of Rule 6(4)(n) of the Rules to arrive at taxable turnover of the assessee liable to tax under Section 5-B of the Act and even if in a sum of Rs 7,45,83,087/-, which represents the margin of profit of the assessee and which, at any rate, was not any part of the value of the goods involved in the execution of the contract, it should have, nevertheless, been allowed as a deduction independent of Rule 6(4)(n) of the Rules, as in terms of the ratio of the judgment of this Court in the case of ***LARSON & TOUBRO LIMITED vs STATE OF KARNATAKA [(2010) 34 VST 53],*** deductions

allowable under Rule 6 of the Rules for arriving at taxable turnover being not exhaustive and profit component of the contract being not liable to tax under Section 5-B of the Act, the assessing officer should have recognized this position and should have allowed the amount as a deductible item from the total turnover of the assessee.

16. It is also urged that the assessee had placed reliance on the certificates issued by the Sub-Contractor to demonstrate that tax as is payable under Section 5 B of the Act in respect of the value of the goods that passes on the execution of the works contract had already been paid by the sub-contractors and therefore nothing else was required to be taxed or required to be paid by the assessee; that when once the value of the entire goods that passes in favour of the principal had been made subject matter of the assessment under Section 5B of the Act, taxing in any other manner of sum of Rs 7,45,83,087/- retained in the hands of the assessee, as forming part of the taxable turnover, which was not

actually liable to tax under Section 5B of the Act as it was not representing any part of the value of the goods.

17. On the other hand, Smt. Sujatha, learned AGA appearing for the respondents – revenue has drawn our attention to the definition of Section 2 and the definition of the phrases, 'turnover' as in Section 2(1)(v), 'total turnover' as in Section 2(1)(u-2) and 'taxable turnover' as in Section 2(1)(u-1) and with reference to provisions of Section 5B of the Act submitted that insofar as levy of tax under Section 5B of the Act is concerned the exercise is one to ascertain the value of the goods that passes on the execution of the works contract from the contractor to the Principal; that the scheme arrived at the taxable turnover insofar as the subject matter for charge under Section 5B is concerned, it is provided for in Rule 6(4)(n) of the Karnataka Sales Tax Rules 1957; that the assessing officer in fact had allowed such of those deductions which had been claimed by the assessee and deductions permitted or enabled under Section 6(4)(n) and in respect of the total turnover of the

assessee; that the taxable turnover being Rs 1,19,87,22,745/-, gross turnover is Rs 3,53,95,89,242/-, various exemptions and deductions enabled under Rule 6 had been taken out of the gross turnover and while the assessee had claimed that the total payments made to sub-contractors was to the tune of Rs 1,19,87,22,745/-, it was factually found that the assessee had made payments to the sub-contractors only to the extent of Rs 1,12,41,39,648/- and while it has left a difference of Rs 7,45,83,087/-, which was not eligible for any deductions in terms of the rule, inevitably, qualifies as a taxable turnover and therefore, was included in the taxable turnover and on such premise the assessment had been completed. It is also submitted that while the assessing officer might have referred to the concept of second deemed sales and the view had been affirmed by the appellate authority and the Tribunal following the judgment of this court in view of the clarification of law by the Supreme Court, there will be only deemed sale; that

there is no dispute regarding the taxability being only once when the goods actually passes from the contractor to the principal; that in the instant case whether the goods passes in favour of the contractee when the contract came to be executed through sub-contractor or whether by the assessee - main contractor, it happens only once and assessee is primarily responsible for payment of tax on the value of such goods; that therefore, it was the responsibility of the assessee to pay tax on the value of the goods that passes in favour of the principal, whether through work done by sub-contractor or by the work done by the assessee-contractee and therefore, assessee was liable to account for the entire turnover and the assessee having accounted for the turnover of Rs 1,12,41,39,648/- from out of the turnover attributed to the work got done through sub-contractor assessee did not account for the balance amount of Rs 7,45,83,087/- and therefore, the assessing officer is justified in bringing to tax, this part of the turnover.

18. It is also submitted that the argument in respect of Rs 7,45,83,087/- and odd from out of the total contract value attributed to sub-contractor for Rs 1,19,87,22,745/- as the profit part of the assessee and therefore, does not represent the value of the goods that passes in favour of the principal is not an argument that can be accepted for the reason that it forms very much part of the total turnover and therefore, cannot be just characterized as the profit part of the contract; that the exercise being for assessing the value of the goods unless that exercise is complete in a manner as provided for in law, the charge on the taxable turnover and liability on the assessee remains and therefore, submits that the argument of 7 crores and odd is a profit margin cannot be accepted.

19. Learned AGA submits that independent of the theory of second deemed sale, assessment order can be sustained by working out the taxable turnover, which the assessing officer has done in order to arrive at the same by applying Rule 6(4)(n) of the Rules, which is the statutory provision,

which regulates the manner to arrive at the taxable turnover from out of the total turnover of the assessee.

20. Incidentally it is also brought to our notice that in terms of the returns filed by the assessee the tax liability, was on a taxable turnover of the assessee for the period in question was Rs 3,09,88,862/- and as against this the assessing officer had determined the taxable turnover on the part of the assessee in terms of Section 5-B of the Act, to be at a sum of Rs.5,96,66,470/-.

21. The Assessing Officer had arrived at this amount of taxable turnover by giving deduction of 20% on the sum of Rs.7,45,83,087 which, according to the Assessing Officer, was the amount the assessee was required to account but had not accounted for.

22. Learned Addl.Government Advocate submits that reliance placed by the learned counsel for the appellant-assessee on the basis of judgment of Supreme Court in the case of ***STATE OF ANDHRA PRADESH vs LARSEN***

& TOURBO Ltd [(2008) 17 VST 1 (SC)] relating to inclusion or exclusion of turnover of sub-contractor in the turnover of main contractor, is not very apt. It is pointed-out that the said decision was rendered on the facts of that case and in the context of the provisions of Andhra Pradesh Sales Tax Act and Rules framed thereunder but there is no corresponding provision for excluding the value of sub-contractor by way of demand as is provided under Rule 6(4)(n)(iii) in Karnataka Rules and it was for that reason the Andhra Pradesh Vat Rules came to be amended by amending Rule 17(1)(c), which was noticed by the Supreme Court in paras 11 and 20 of the judgment. Therefore, the ratio of the decision, in so far as deduction aspect is concerned, cannot make any difference when the taxable turnover is computed by applying the provisions of Rule 6 of Karnataka Rules. Learned AGA further submits that in identical set of facts, for the purpose of determining the liability of an assessee - whether under Section 6-B or Section 5-B of the Act - the

taxable turnover has to be arrived at by the working of Rule 6(4)(n) of the Rules and not in any other manner unless and until there is a specific enabling provision and the factual position to claim the basis is properly averred and made good. Learned AGA further submits that the question as to whether the amount which the assessee has retained for itself came out of the amount indicated to be the value of sub-contracts having not been properly established before the authorities and to be the precise profit of the assessee vis-à-vis the turnover and also that value of the goods involved has already been taxed as per Section 5-B being not made good by the assessee, which is primarily the responsibility of the assessee and that part having not made out before the authorities below, cannot be an argument in relation to computation to get over the orders of the authorities and therefore submits that the revision petition has to be dismissed.

23. The arguments of learned AGA are rebutted by Sri Suryanarayana, learned counsel for the assessee, by

pointing out that the aforementioned decision was rendered on turnover tax under Section 6-B prior to the amendment on the interpretation of provisions of Section 5-B vis-à-vis Rule 6(4)(n) of the Rules. The matter came up for consideration before this Court in a subsequent case of the very same assessee, on which reliance is placed and also the decision of the Supreme Court in Andhra Pradesh's case categorically laying down law that that there cannot be two deemed sales and question of taxing the turnover in the hands of the assessee-contractor when the value of goods had already been taxed in the hands of sub-contractor does not arise at all. Therefore, the learned counsel submits that the orders passed by the authorities are not sustainable.

24. We have bestowed our consideration to the submissions made at the Bar, perused the impugned order as also of the appellate authority and assessing authority and the judgments relied upon by the learned counsel for the parties.

25. Even as indicated in Section 5-B of the Act, the charge is only on the value of the goods that passes from the contractor to the principal in the course of execution of any works contract. In so far as the deeming provision is concerned, it is at best for the purpose of ascertaining the place and time of the event, i.e, taxing event in the sale of goods and not exactly a deeming provision for creating a non-sale event as sale. The definition of 'tax on the sale or purchase of goods' as indicated in sub-article (29-A) of Article 366 of the Constitution of India enables only splitting of different values of the components involved in a works contract and levying tax only on the goods component, as there is limitation on the State Legislature for imposing tax on the sale of goods. Essentially, the charge is on the goods that are involved in the execution of contract work. Therefore, the entire exercise is to ascertain the value of those goods.

26. Though, considerable reliance is placed by the learned counsel for the appellant to submit that there

cannot be two deemed sales in terms of Supreme Court decision in ***LARSON & TOURBO'S CASE*** reported in ***(2008) 17 VST 1 (SC)***, on the ratio of this very judgment, making of a dichotomy as 'contractor' and 'sub-contractor' is not permissible as, sub-contractor acts as an agent of main contractor and it is exactly for this reason the Supreme Court has held that there is only one deemed sale and at the time when the goods in the execution of any works contract becomes the property of the principal by the theory of accretion. When once it is accepted that a registered sub-contractor is an independent 'dealer' or otherwise is acting only as an agent of the contractor, the primary responsibility and liability for payment of tax in respect of the value of the goods passing on the execution of the works contract is only on the contractor. The assessee's turnover being the value of the contract it had entered into with the principal, the taxable turnover of the value of this contract being in terms of Section 5-B is only

on the value of the goods that are utilised for the over-all execution of the contract in favour of the principal.

27. It matters little as to whether execution of the work is by the main contractor or through the sub-contractor. While there can be no two opinions that the charge under Section 5-B is only on the value of the goods that are put in for the execution of the work in favour of the principal, the exercise for the purpose of Section 5-B is to ascertain this value. Rule 6 is a rule which is designed to arrive at the value of the goods involved which is in effect was a taxable turnover and by ensuring that taxable turnover does not include any other amount other than the value of the goods.

28. When a proper accounting by way of furnishing of details of value of the goods involved is not possible, the Rule provides the best method to arrive at; the value of the goods after providing for suitable deduction from the total turnover.

29. We can notice that in terms of Rule 6(4)(n)(iii), all amounts paid to such contract as consideration for execution of works, either wholly or partly, is allowed as a deductible item. What can be noticed by a perusal of this enabling deduction is, deduction is not necessarily the exact value of the goods involved in the execution of work as per the contract. In fact, much more than the value of goods is allowed as deduction under Rule 6(4)(n)(iii). It is because of this reason that an assessee, when claims for deduction as per Rule 6(4)(n)(iii) in respect of such payments actually paid to the sub-contractor is allowed as deduction, cannot turn round and put forth further claim that on the basis of the value of the sub-contractor, certain amount is to be taken as profit margin and therefore not come within the scope of charge under Section 5-B of the Act. It is for this reason that we find that the ratio of judgment of this Court in the very assessee's case to the effect that deductions mentioned in Rule 6(4)(n) are not exhaustive and can be supplemented,

if made good on facts, is not applicable or attracted to the present case.

30. One another reason why we are unable to accept the argument that the amount of Rs. 7 crore and odd is the amount the assessee claimed as profit margin provided the total turnover of Rs.119 crores said to be the value of sub-contract. Such a dichotomy has not been made in Rule 4 while allowing deduction as profit margin or net profit margin and therefore it is not possible to accept the amount retained by the assessee, which otherwise is the amount that should have been paid to sub-contractor, that amount is indicated to be the value of the sub-contract, cannot be accepted as it is only referred to profit and therefore not within the scope of Sec 5-B of the Act.

31. The argument of Sri Suryanarayana, learned counsel for the assessee that this represents profit margin and therefore not taxable, is another way of submitting that that it is not any part of value of the goods. An argument

of this nature, perhaps might have succeeded if the assessee was able to demonstrate that the actual value of the goods that passed from the contractor or through his sub-contractor to the principal on the execution of the work, is precisely the particular amount and that amount has been subjected to tax, which has already been paid and therefore no further liability in terms of Section 5-B of the Act. On perusal of records, we find that has not happened, though learned counsel for the assessee has submitted that it is to be inferred so with reference to the statements furnished by the sub-contractor indicating the value of such contract and this aspect having not been disputed or raised as a; dispute by the assessing authority or other authorities, it has to be accepted as tax on the goods has been paid. We cannot accept this submission also as there is no deeming provision in payment of tax and the liability can be ascertained from the fact that it has been paid or discharged is only by production of proof of payment and not otherwise. It is because, there is no

dichotomy between the contractor and sub-contractor, it was the primary responsibility of the assessee not part or responsibility or liability of such contract and a mere stand on the part of the assessee that it has become the liability of his sub-contractor and he should have discharged that, being an independent registered dealer, cannot be an argument to accept, to disturb the orders of the authorities below.

32. We are also not very happy the way in which the authorities have approached the matter and simply by accepting the claim made by the assessee in terms of the statements which the assessee had appended to the returns filed in Form IV. While it is the prerogative of the assessing authority to look into all aspects of the matter and examine the return filed by the dealer, it has to be done with reference to statutory provisions and bearing in mind the scope of those statutory provisions. The main exercise of assessment order is to determine the tax

liability in terms of charging section and the subsequent charge being the value of the goods passing on to the contractors. That should have been the focus. We find that the assessing authority has approached the matter in a converse way and reverse direction and to some extent, though Rule 6 which provides for arriving at the taxable turnover, the claim put forth by the assessee was not in the context of Rule 6 but on general principles and on a statement that it has placed before the authority. Unfortunately, the assessing authority has lost sight of this aspect and blindly applied the provisions of Section 6 and allowed deduction, perhaps the assessee had not even claimed the benefit of Rule 6.

33. One another reason to reject the submission of Sri Suryanarayana, learned counsel for the assessee, is that the amount of Rupees 7 crore and odd retained by the assessee and not paid to the sub-contractor constitutes only a profit part and not goods value as, the assessee, while disclosing the gross turnover of Rs.350 crore, had

indicated the value of sub-contract at Rs1,19,87,22,745. The assessee also claimed deduction towards other expenditure provided under Rule 6(4)(n) other than Rule 6(4)(n)(iii) and therefore it cannot be said that the assessee had not claimed deduction of the nature of rule 6(4)(n)(iii) and hence the other amounts should necessarily be taken as profit margin. The fact is deduction under rule 6(4)(n)(iii) is also allowed.

34. Profit margin worked out on principles of accounting is not the same as the amount which the assessee says is the profit because of payment made or not made to the sub-contractors and has significance only for allowing deductions under Section 6-B for computing taxable turnover and nothing more. Like-wise, payment not made and said to have been retained has no significance for the purpose of charge under Section 5-B as it has not necessarily reflected the value of any other component other than the goods involved in the execution of the work.

This is indefinite and unascertained and therefore we cannot accept the argument.

35. However, in view of the fact that the assessing authority had proceeded on erroneous assumption in law and also applied the exercise to determine; the taxable turnover of the assessee only in respect of part of total turnover, i.e., in respect of Rs.7 crores which was claimed as profit margin of the assessee, we find that the assessment is wholly unsatisfactory for arriving at the value of taxable turnover which is the value of the goods passed in the execution of entire contract by the assessee contractor – whether by itself or through sub-contractor.

36. In the circumstances, we allow the revision petition only in this regard and direct the assessing authority to re-do the exercise of ascertaining the tax liability of the assessee relating to execution of the works contract during the period under consideration and arrive at tax liability of the assessee bearing in mind the principle that there

cannot be any dichotomy of the contract and sub-contract; that the sub-contractor is only an agent and whatever value of the contract is got alone through sub-contractors, such contract is also virtually forming part of the turnover of the assessee and the assessee is liable and accountable for payment of tax in respect of the goods utilised for execution of the contract.

37. The tax, either paid by the assessee or his sub-contractor, can be retained by the Department and subject to re-determination of tax liability of the assessee under Section 5-B in terms of the direction issued in this order.

38. In view of our remanding the matter to the assessing authority for the purpose of proper ascertainment of the liability of the assessee under the provisions of Section 5-B of the Act and in the light of the observations made in this order, the liability under Section 6-B in respect of total; turnover of the assessee --whether by itself or through the agent – also to be retained and adjusted

towards the tax liability to be determined in terms of this order.

39. For the purpose of record, on the two questions framed in terms of the order dated 10-12-2008, we hold as follows:-

i) Question (a) becomes academic as we have held that determination was not proper and the very premise of the assessee that the amount constituted profit margin has not been accepted;

ii) Question (b) follows answer to question (a) and is therefore not specifically answered.

Sd/-
JUDGE

Sd/-
JUDGE

*pjk/NG/MP