

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 28.08.2019

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P.No.25450 of 2019
and W.M.P.No.24979 of 2019

M/s.Sri Ganapathy & Co.
A registered Partnership Firm
Rep. By Mr.B.Muruganantham, Partner
and Power agent of other Partners
Having office at No.352A, Gandhipuram
Udumalai Road, Dharapuram - 638 656 .. Petitioner
Vs.

1. Chief Engineer (H)
Construction and Maintenance
Guindy
Chennai-600 025

2. Special Chief Engineer (H)
Construction and Maintenance
Tiruppur

3. Divisional Engineer (H)
Construction and Maintenance
Dharapuram

4. The Superintendent of GSTS Central Excise (HPU)
No.1, Foulk's Compound
Anani Medu
Salem - 636 001

.. Respondents

Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Mandamus, directing the respondents 1 to 3 to pay the GST in respect of proceeding No.CR (10yrs)5778/Contract-1/2017

consisting of Package-6, Package - 7, Package 18, Package 19, Package 25 as per G.O(Ms) No.296, Finance (Salaries) Department, dated 09.10.2017.

For Petitioner : Mr.G.Surya Narayanan

For Respondents : Mr.R.P.Pratap Singh
Government Advocate for R1 to R3

Mr.K.S.Ramaswamy
Standing Counsel for R4

ORDER

Mr.G.Surya Narayanan, learned counsel on record for writ petitioner, Mr.R.P.Pratap Singh, learned Government Advocate, who has accepted notice on behalf of Respondents 1 to 3 and Mr.K.S.Ramaswamy, learned Standing Counsel, who has accepted notice on behalf of fourth respondent, are before this Court.

2. With consent of all the aforesaid learned counsel, main writ petition is taken up.

3.It is submitted without any dispute or disagreement that the instant matter is directly and squarely covered by the principle laid down in the order dated 01.08.2019 made by this Court in W.P.Nos.21196 and 21198 of 2019.

4. Relevant paragraphs in the aforesaid order dated 01.08.2019

are Paragraphs 5 to 20 and the same read as follows:

'5. Subject matter of the instant writ petitions is payment of 'Goods and Service Tax' ('GST' for brevity) under 'Central Goods and Services Tax Act, 2017' ('CGST Act' for brevity).

6. There is no dispute or disagreement before this Court that GST regime became operational on and from 01.07.2017. As mentioned supra, the contract which forms subject matter of these two writ petitions is dated 23.01.2015, which is prior to the GST regime. Therefore, the contract does not provide for payment of GST.

7. This Court is informed that work under the said contract is now under way.

8. When the work was under way, the GST regime became operational on and with effect from 01.07.2017 and therefore, writ petitioner wrote to the second respondent i.e., Salem City Municipal Corporation on 11.07.2018, regarding liability to pay GST. To this communication from the writ petitioner, second respondent responded vide a communication dated 10.08.2018, bearing reference No.Na.Ka No.38631/2014/SS1. Vide this communication, the second respondent informed the writ petitioner that GST payable is 1% as far as the State GST is concerned and 1% as far as Central GST is concerned. In other words, it is 1% as State GST and 1% as Central GST, totalling 2%. On this basis, second respondent informed the writ petitioner that they would be deducting 2% at the time of making payments under said contract pursuant to which work is under progress. There is no disagreement before this Court that 2% tax is so being deducted at source (TDS) by the 2nd respondent now.

9. Adverting to the prescribed rates of GST contained in Chapter 24 and the relevant entry viz., Heading 9954 captioned

'Construction Services', it is submitted that the GST liability qua aforementioned contract dated 23.01.2015 is 12% and the same reads as follows:

Serial No.	Chapter, Section or Heading	Description of Service	IGST Rate	Condition
1.				
2.				
3.	Heading 9954 (Construction Services)	(i) Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. (Provisions of Paragraph 2 of this notification shall apply for valuation of this service)	18	
		(ii) composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act 2017.	18	
		(iii) Composite supply of works contract as defined in clause (119) of Section 2 of the Central Goods and Services Tax Act, 2017,		Provided that where the services are supplied to a Government

Serial No.	Chapter, Section or Heading	Description of Service	IGST Rate	Condition
		Supplied to the Central Government, State Government, Union Territory, a local authority, a Government authority or a Government Entity by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of,--- (a) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958); (b) canal, dam or other irrigation works; (c) pipeline, conduit or plant for (1)water supply, (ii) water treatment, or (iii) sewerage treatment or disposal		Entity, they should have been procured by the said entity in relation to a work entrusted to it by the Central Government, State Government, Union territory or local, as the case may be
				

10. There is no dispute or disagreement before this Court that the tax liability is 12 % for aforesaid contract.

11. This has impelled the writ petitioner to file the instant writ petitions, with prayers *inter alia* to direct the respondents 1 and 2 to pay the difference of 10% GST on the original agreed contract value, so that the tax liability is in accordance with law that has become operational when contract was in vogue and work pursuant to the contract was in progress.

12. In the light of the heading under which the instant contract which forms subject matter of instant writ petitions falls and in the light of there being no dispute that the rate of tax is 12%, it may not be necessary to advert to further details.

13. What would be necessary to be resolved in these writ petitions is how the tax liability qua GST is to be paid.

14. Learned counsel for Second respondent i.e., Standing Counsel for Salem Corporation drew the attention of this Court to G.O.Ms.No.296, Finance [Salaries] Department, dated 09.10.2017, being a Government Order issued by the Government of Tamil Nadu.

15. There is a short history for this Government Order and it may be necessary to take a bird's eye view of that history. Originally the Government issued a Government Order being G.O.Ms.No.264, Finance [Salaries] Department, dated 15.09.2017 fixing the GST on works contract for Government work at 12%. To be noted, it stood as 18 % earlier to that.

16. Thereafter, a writ petition came to be filed in this Court being W.P.No.24853 of 2017 and a Hon'ble Single Judge of this Court disposed of the writ petition on 05.10.2017, directing the authorities concerned to consider the representation made by the writ petitioner therein and take a call.

17. Pursuant there to, the aforesaid G.O.Ms.No.296, Finance [Salaries] Department, dated 09.10.2017 came to be issued.

18. There is a short history post Government Order also. This Government Order being G.O.Ms.No.296, Finance [Salaries] Department, dated 09.10.2017 came to be challenged in this Court by way of W.P.No.2307 of 2018. The challenge failed and the writ petition came to be disposed of by an order dated 28.01.2019 by a Hon'ble Single Judge of this Court. Writ petition was carried in appeal by way of an intra Court appeal being W.A.No.1499 of 2019 and the intra Court appeal also came to be dismissed by a Hon'ble Division Bench of this Court vide order dated 27.06.2019.

19. This Court is informed that the aforesaid challenge to G.O.Ms.No.296, Finance [Salaries] Department, dated 09.10.2017 has been given legal quietus and therefore, G.O.Ms.No.296, Finance [Salaries] Department, dated 09.10.2017 is now operating. This takes us to the question as to which portion of G.O.Ms.No.296, Finance [Salaries] Department, dated 09.10.2017 is applicable.

20. Here again, the task in instant writ petition is cut out as there is no disputation that paragraph 10(a) is applicable up to 30.06.2017 and paragraph 12 is applicable post 30.06.2017 i.e., on and from 01.07.2017. Paragraphs 10(a) and 12 of G.O.Ms.No.296, Finance [Salaries] Department, dated 09.10.2017, read as follows

'10(a) If the supplier has furnished break up of taxes within the quoted value (bid value) at the time of submission of tenders, it shall be taken as the basis for estimating the value of subsumed tax. If, after negotiation, the contracted value is less than the bid value, the tax quoted shall be proportionately reduced to arrive at estimate of the value of subsumed tax. For instance, if the bid value was Rs.50 lakh and the break up of tax is Central Excise Duty of Rs.1 lakh and VAT or CGST of Rs. 1 lakh, the corresponding subsumed tax as per his break up of taxes is Rs.2 lakh and after negotiation, the contracted value was reduced

to Rs.48 lakh, the subsumed tax shall be taken as Rs.2 lakh x 48/50=Rs.1.92 lakh.

12.The procuring entities shall negotiate existing agreements with works contractors and enter into supplemental agreements with revised agreement value fixed as the original contracted value minus the value of subsumed tax arrived in paragraph 11 above plus GST as applicable. The procuring entities shall make payment of final bills accordingly, in cases where 'on account' payment has been made as per Government Order first read above and any excess payment, if made 'On account', shall be adjusted from out of 5 percent amount retained by the procuring entities.'

5. Therefore, this writ petition will also be disposed of in accordance with the same set of directions as in the earlier order. The following order is passed:

a) Parties hereto will now stand governed by paragraph 10(a) and paragraph 12 of aforesaid G.O.Ms.No.296, Finance [Salaries] Department, dated 09.10.2017.

b) The exercise of quantification qua para 10(a) shall be completed by both the parties as expeditiously as possible and in any event within 12 weeks from the date of receipt of a copy of this order. Though obvious it is made clear that work under the aforesaid contract shall continue (if not already completed) without being impeded by this exercise.

This Writ petition is disposed of with the aforesaid observations holding that no further orders are necessary. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

28.08.2019

Speaking order
Index : Yes/No
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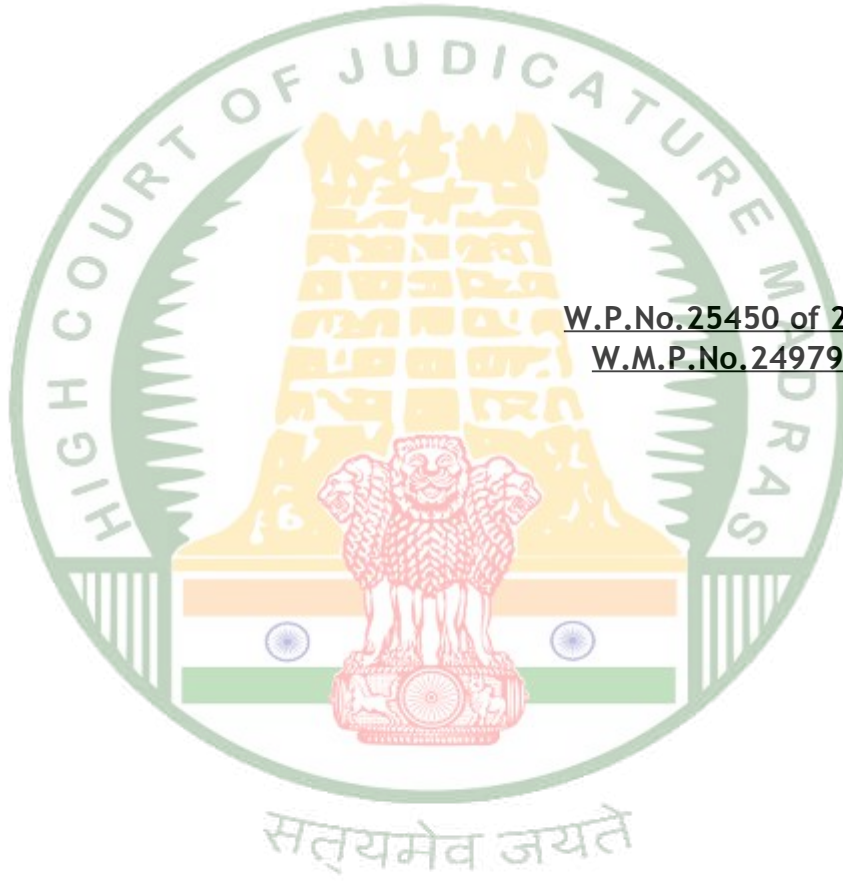
To

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