W.P.No.25119 of 2019
&
W.M.P.No.24683 of 2019

M.SUNDAR,J.

This matter was listed today under the caption 'FOR BEING MENTIONED' at the instance of the writ petitioner.

2. After hearing learned counsel for petitioner and learned State counsel Mr.Sri Charan Rangarajan, it emerges clearly that there is no consensus between two sides that a clarification or correction is necessary. Any further ploughing into the matter would tantamount to a rehearing, which is impermissible .

3. Suffice to say that it is open to the parties to pursue legal avenues available to them and all questions in this regard are left open.

10.01.2020

gpa

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **27.08.2019**

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

W.P.No.25119 of 2019
and
WMP No.24683 of 2019

M/s.Sri Ayyappan Constructions
Rep. by Managing Partner
Mr.Ayyappan.

... Petitioner

vs.

1.The Chief Engineer
NABARD and Rural Roads
Highways Department
Chennai - 600 032.

2.The Superintending Engineer Highways
NABARD and Rural Roads Circle
Post Box No.816, A 12/3, & 3 & 4
Samathi School Street, Kaja Nagar
Trichy - 620 020.

3.The Divisional Engineer
Thanjavur Highways
NABARD and Rural Roads
Thanjaviur - 613 001.

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

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Mandamus, directing the 1st respondent to pay the GST to the petitioner in respect of CR Agreement No.3/2016-2017 as per G.O.(MS)No.296, Finance (Salaries) Department, dated 09.10.2017; to pass such further or other orders as this Hon'ble Court may deem fit and proper on the facts and circumstances of the case and render justice.

For Petitioner : Mr.G.Surya Narayanan

For Respondents : Mr.R.P.Prathap Singh,

Government Advocate for R1 to R3

Ms.Hema Muralikrishnan,

Senior Standing Counsel for R4

ORDER

Mr.G.Surya Narayanan, learned counsel on record for writ petitioner, Mr.R.P.Prathap Singh, learned Government Advocate, who accepts notice on behalf of respondents 1 to 3 and Ms.Hema Muralikrishnan, learned Senior Standing Counsel, who accepts notice on behalf of respondent No.4 are before this Court.

2. With consent of all the aforesaid learned counsel, main writ petition is taken up, heard out and is being disposed of.

3. It is submitted by learned counsel for writ petitioner and learned Government Advocate for respondents 1 to 3 without any disputation or disagreement that the instant matter is directly and squarely covered by a common order dated 01.08.2019 made by this Court in

W.P.Nos.21196 and 21198 of 2019.

4. Paragraphs 3 to 22 of the aforesaid common order dated 01.08.2019 are relevant and the same read as follows:

'3. Subject matter of instant writ petitions is a contract between the second respondent the Salem City Municipal Corporation and the writ petitioner company. The contract is dated 23.01.2015 and this Court is informed that the contract is for providing under ground Sewerage system (Collection System) to Salem Corporation -Package III (Zone III) (balance work).

4. In the light of the submissions made at the bar today and in the light of what unfurled in the hearing, the writ petitions now turn on an extremely narrow compass.

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 disputation 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	18	

Serial No.	Chapter, Section or Heading	Description of Service	IGST Rate	Condition
		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)		
		(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, 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*		*Provided that where the services are supplied to a Government 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*

Serial No.	Chapter, Section or Heading	Description of Service	IGST Rate	Condition
		treatment, or (iii) sewerage treatment or disposal		
		....		

10. There is no disputation 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 apeal 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.'

21. Therefore, the parties 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.

22. The exercise of quantification qua para 10(a) shall be completed by both the parties as expeditiously as possible 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 without being impeded by this exercise.'

5. In the light of the undisputed position that this matter is directly and squarely covered by the aforesaid order, this writ petition is disposed of with the same set of observations and directions contained in the aforesaid order more particularly paragraphs 21 and 22 thereat. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

27.08.2019

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Speaking Order/Non-Speaking Order

Index : Yes/No
Internet: Yes/No

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