



IN THE PUNJAB AND HARYANA HIGH COURT AT
CHANDIGARH

214

CWP-30227-2019
Date of Decision: 17.09.2024

OK PLAY INDIA LIMITED

... Petitioner

VERSUS

STATE OF HARYANA AND OTHERS

... Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

Present: Mr. Gurmohan Singh Bedi, Mr. Vipul Kumar
Mr. Anand Vardhan Khanna and Mr. Rahul
Rohilla, Advocates for the petitioner.
Mr. Pankaj Mulwani, DAG, Haryana.

VINOD S. BHARDWAJ, J. (ORAL)

The question that arises in the present writ petition is as to whether the petitioner is liable to discharge the additional liability towards ST/VAT, as a result of enhancement of the tax slab, if the rate quoted refers to a specific ST/VAT liability?

While the counsel for the petitioner-supplier contends that the bid submitted by it contained the terms and conditions of offer and the liability to pay ST/VAT to the extent of 4% and that any enhancement in the taxation slab towards ST/VAT has to be discharged by the buyer (respondent-State herein), the stand of the respondent-State is that the bid quoted by the petitioner was inclusive of the taxes and that any other levy/taxes were also required to be discharged by the bidder alone.

Briefly summarized the facts of the present case are that the respondent-Department of School Education Haryana had invited tenders,

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through respondent No.4-Department of Supply and Disposals on 27.02.2012 for the supply of dual desks on an annual rate contract basis.

In response to the abovesaid DNIT, the petitioner submitted its offer on 23.02.2012. The bids submitted by various interested suppliers/ sellers were considered and evaluated by the Purchase Committee of respondent No.4 and finding the offer of the petitioner to be best responsive, it was accepted vide acceptance No.3359. In furtherance thereof, rate contract for the purchase of dual desks on annual contract rate was sent to the petitioner vide memo No.02/HR/RC/E-4/2011-12/5013 dated 26.06.2012. As per Schedule –A attached with the rate contract, the agreed terms and conditions of the supply were set out, as amended w.e.f. 28.05.2010. The abovesaid rate contract, agreed upon by the parties, was thus binding and enforceable amongst the parties. The terms and conditions thereof are extracted as under:

"TERMS AND CONDITIONS

1. *F.O.R.:- Destination basis i.e. distt. level in Haryana at supplier risk.*
2. *ST/VAT:- Inclusive @ 4% against VAT Form C-3, billing from Haryana.*
3. *EXCISE DUTY: No Excise will be charged if necessary excise duty exemption certificate issued by the Department otherwise excise duty will be extra as applicable.*
4. *DELIVERY PERIOD:- within 6 months from the date of issue of supply order @ 20000 Nos. per month starting one months after receipt of supply order.*



5. *PAYMENT TERMS: 100% payment will be made within 30 days against physical delivery of inspected/ accepted goods duly supported with satisfactory inspection note and after receipt of correct goods at Consignee's site.*
6. *WARRANTY:-*
 - (i) *The dual desk shall be warranted for a period of 01 year from the date of receipt of material at site and there shall be replacement guarantee against all manufacturing defects.*
 - (ii) *The manufacturer shall supply minimum six (6) additional 4mm steel screws for each dual desk supplied by him as part of stores and repair. The screws should be of the same quality as used in the fabrication of the desk.*
7. *Remarks: Any other levies / taxes would be charged extra."*
(Emphasis Supplied)

Referring to the abovesaid terms and conditions of the rate contract under Clause-II, it is contended that the rate furnished was inclusive against "VAT Form-C-3, billing from Haryana" and it specified the rate to be inclusive of VAT @ 4%. Subsequently, the Department of Excise in the Govt. of Haryana issued a notification No.SO132/HA6/2003/S/60/2013 whereby the facility of VAT C-3 Form was discontinued w.e.f. 06.12.2013 and the goods being supplied by the petitioner were put in a VAT slab @ 13.125% instead of 4% as prescribed under the rate contract. The entire supply of the dual desks was completed by the petitioner by 08.03.2014 in terms of his commitment. He contends that the abovesaid amendment by the Department of Excise was



brought to the notice of the respondents by the petitioners and a revised payment was claimed towards the additional levy. The table showing an excess payment towards the differential amount of sales tax is extracted as under:

<i>Period of supply</i>	<i>No. of Dual Desks supplied</i>	<i>Sales tax value at 4.2% (VAT+5% surcharge) (Rs.)</i>	<i>Sales Tax value at 13.125% (Rs.)</i>	<i>Difference of Sales Tax (Rs.)*</i>
06.12.2013 to 18.12.2013	4,355	Rs.8,48,105.69	Rs.26,50,330.28	Rs.18,02,224.59
19.12.2013 to 28.12.2013	4,631	Rs.9,01,854.79	Rs.28,18,296.10	Rs.19,16,441.31
30.12.2013 to 28.01.2014	4,651	Rs.9,05,749.60	Rs.28,30,467.47	Rs.19,24,717.87
29.01.2014 to 28.02.2014	4,305	Rs.8,38,368.53	Rs.26,19,901.67	Rs.17,81,533.14
06.12.2013 to 05.02.2014	4,843	Rs.9,43,140.22	Rs.29,16,276.22	Rs.19,73,136.00
06.02.2014 to 08.03.2014	570	Rs.1,11,003.50	Rs.3,77,923.21	Rs.2,66,919.71
Total	23355	Rs.36,42,472.73	Rs.1,42,13,194.95	Rs.96,64,972.62

The petitioner submitted numerous representations to the respondent-Education Department to clear the additional liability towards VAT as the same was not included in the price quoted by the petitioner. The respondent-Education Department, in response to the said communication, sent a letter dated 27.03.2015 calling upon the petitioner to furnish proof of the sales tax having already been deposited by him with the Government of Haryana. Responding to the above, the copies of all the relevant VAT submission challans for the period from 06.12.2013 to 31.03.2014 were furnished by the

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petitioner containing details of the VAT amount paid by him for the dual desks supply. Nonetheless, despite furnishing of the said proof, the payment was not released and no remedial steps were taken by the respondent-Department. The matter was also sent by the respondents for seeking the advice from the Legal Remembrancer-cum-Administrative Secretary Law, to the Government of Haryana. The Directorate of Supplies and Disposals eventually intimated the respondent-Director, Elementary Education, Haryana, vide Memo No.02/HR/E-4/2012-13/7131 dated 23.08.2016 that the liability to pay VAT/ST in excess of 4% is to be discharged by the Department itself. The said communication sent by the Director of Supplies and Disposals to the Respondent-Director, Elementary Education, Haryana is extracted as under:

“From

*The Director, Supplies & Disposals, Haryana
SCO No.9 (1st & 2nd Floors), Sector-16, Panchkula.*

To

*The Director, Elementary Education, Haryana,
Plot No.1 B, Sikhsa Sadan, Sector-5, Panchkula*

Memo No.02/HR/E-4/2012-13/7131/23.08.2016

***Sub: For payment of Sales Tax by M/s OK Play India Ltd.
Mewat.***

This has reference on the subject noted above,

The matter regarding payment of Sales Tax to the State Govt. by M/s OK Play India Ltd. Mewat after issuance of Government Notification No.S.O.132/S.A.6/2003/S.60/2013 of dated 31.12.2013 vide which the provision of Form VAT-C-3 was omitted w.e.f. 06.12.2013 has been examined by this office and it is found that the firm is only liable to pay VAT/ST @ 4%. In case the



firm has paid excess due to non-supplying of Form C-3 by the Indending Department itself, the same is liable to be reimbursed/refunded to the concerned firm.

This is as per the advise rendered by L.R. Administrative Secretary to Govt. Haryana vide their U.O. No.5346-G (18) Industries, op.BR.151/104 of dated 08.03.2016.”

However, despite the abovesaid advice and clarification having been sent by respondent No.4-Department, no action was taken by the respondents, thus, compelling the petitioner to serve a legal notice dated 10.05.2017. Yet, no decision was taken whereupon the petitioner approached this Court vide CWP No.14620-2018. The said writ petition was disposed of by this Court vide order dated 10.07.2018 with the following directions:

“This petition is disposed of with liberty to the petitioner to approach the administrative head of Taxation Department, Haryana in the light of the advisory letter dated 23.08.2016 to take a decision. It is expected that from the date when a representation is made to the State Government through the Principal Secretary, the decision will be taken within three months. However, it will be open to the authority to examine the question of delay as well.”

A representation was accordingly submitted by the petitioner once again with the Department of Excise and Taxation, Haryana. There was a continuous follow-up by the petitioner and eventually, a decision was communicated vide order dated 04.02.2019 (received by the petitioner on 06.03.2019) from the Supdt., Sales Tax, Excise and Taxation Department, forwarding the representation of the petitioner to the Administrative Secretary of the Education Department for a suitable decision in the following terms:



"4. The issued raised in the representation of the Petitioner has been decided to the extent of levy of tax in view of the extant provisions of the Haryana Value Added Tax Act and Rules. The Remaining issue relating to the reimbursement/ releases of the additional tax paid by the supplier after 05.12.2013 is a subject matter of examination of the Agreement which has been signed with the supplier by the Education Department based on the facilitation provided by the Director Supplies and Disposal. Under the Business of Haryana Government (Allocation) Rules, 1974, this subject of supply of Dual Desks for use by schools of the Education Department would lie with the Department of Education and not the Department of Excise and Taxation. As such, that part of the representation would need to be considered by the Administrative Secretary, Education Department. Accordingly, the representation be forwarded to the Administrative Secretary, Education Department for a suitable decision."

No communication was thereafter received by the petitioner from the Administrative Secretary in the Department of Education. Hence, the petitioner approached this Court yet again for seeking release of the said amount.

Reply on behalf of respondents was filed by way of affidavit of Dr. Mahavir Singh, the Addl. Chief Secretary to Government of Haryana, School Education Department, wherein it was averred that the respondent-Department had constituted a Technical Committee to decide the claim of the petitioner under the chairmanship of Joint Director, Admin.-II vide memo dated 10.01.2020. The petitioner was called upon to produce evidence in his defence. After analyzing the facts of the case, inquiry report dated 19.05.2020 was



submitted by the Technical Committee and it was held that the petitioner firm did not supply the dual desks within the stipulated period as per the agreement and in the meantime, the Government of Haryana in the Department of Excise and Taxation increased the VAT from 4% to 13.125% including the surcharge w.e.f. 06.12.2013. It was thus informed that the respondent-Department would thus not be liable to bear the increased VAT. The respondents also furnished the details of the supply orders issued by them, which is tabulated as under:

Sr. No.	Name of the Firm	Supply order No. & date	Qty.	Rate
1.	M/s OK Play India Ltd. Mewat Haryana, Plot No.17 and 18, Roz KaMeo Industrial Estate, Tehsil Nuh District Mewat.	23/2-12 A&A(4) dated 28.08.2012 23/2-12 A&A(4) dated 14.01.2013 23/2-12 A&A(4) dated 13.03.2012 (Issued by Director Secondary Education, Haryana Panchkula)	8916 11044 32000	4300 (Inclusive 4% VAT Against VAT From C-3) + 12.36% Excise Duty
2.	M/s OK Play India Ltd. Mewat Haryana, Plot No.17 and 18, Roz KaMeo Industrial Estate, Tehsil Nuh District Mewat.	5/2-10 AP(1) dated 17.09.12 (Issued by Director General Elementary Education, Haryana Panchkula)	55815	4300 (Inclusive 4% VAT Against VAT From C-3) + 12.36% Excise Duty



Referring to the above, it was submitted that the supply period was six months from the date of placing of the supply order but the delivery was made much after the said period. Hence, the liability towards increased VAT cannot be passed onto the respondent-Department. Reliance was placed on paragraph No.6 of the Rate Contract dated 26.06.2012, which reads thus:

"The supply must be completed within the stipulated delivery period failing which the risk purchase will be affected against you and the excess cost thus incurred will be recovered from you. Delayed supplies shall be accepted under penalty clause of the Schedule "B" unless the delivery period is extended by the competent authority."

Schedule "B" condition No.4 is reproduced as under:-

"The time for and date of delivery of despatch stipulated in a supply order shall be deemed to be the essence of the contract and the contractor fail to deliver or dispatch any consignment within the period prescribed for such delivery or dispatch stipulated in the supply order, the delayed consignment will be subject to 2% penalty per consignment per month recoverable on the value of the stores supplied. In case of non-payment of the contractor, recovery will be made from his bills or amount of earnest money or security deposited with Director, Supplies and Disposals, Haryana, provided that:-

(c) on the failure of the supplies to make supply within the extended period or otherwise and the receipt of such information in the office of Director, Supplies and disposals, Haryana, risk purchase at the cost of suppliers will be made by the Director, Supplies and Disposals, Haryana within 6 months of the expiry of the stipulated delivery period by inviting short term quotations from the registered and other known suppliers. The excess cost is



thus incurred will be recovered from the suppliers from his pending bills, Earnest Money or Security whichever is available. This procedure will be adopted after serving registered notice to supply stores within 15 days."

(Emphasis Supplied)

A rejoinder was filed by the petitioner to the aforesaid affidavit wherein it was averred that the period of six months was to commence from one month after the receipt of the sales order and that final date for the completion of supply order was past applicability of the revised rate schedule in relation to two purchase orders. The details of the same are tabulated as under:

<i>Sr. No.</i>	<i>Date of Purchase Order</i>	<i>Deemed date of receipt of Purchase Order</i>	<i>Date being 'one month after receipt' as per Clause 4</i>	<i>Date of completion of 'six months' as per Clause 4</i>	<i>Effective date of increase of VAT from 4.20% to 13.125%</i>
<i>1.</i>	<i>16.05.2013 (Annexure P3)</i>	<i>16.05.2013</i>	<i>16.06.2013</i>	<i>16.12.2013</i>	<i>06.12.2013</i>
<i>2.</i>	<i>19.06.2013 (Annexure P4)</i>	<i>19.06.2013</i>	<i>19.07.2013</i>	<i>19.01.2014</i>	

A further argument was also raised that since there was a clause for liquidity damages in the supply order and that the said liability having already been deducted from the dues payable to the petitioner, the increased liability on account of VAT cannot be denied to the petitioner as it would amount to penalizing the petitioner twice for the delay that has occurred.

Reference was also made to Section 64A of Sale of Goods Act, 1930 pertaining to contracts of sale and the increase or decrease in taxes, which may be applicable:



"64-A. In contracts of sale, amount of increased or decreased taxes to be added or deducted.-

- (1) *Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in Sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time-*
- (a) *if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and*
- (b) *if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.*
- (2) *The provisions of Sub-section (1) apply to the following taxes, namely;-*
- (a) *any duty of customs or excise on goods;*
- (b) *any tax on the sale or purchase of goods"*



I have heard the learned counsel for the respective parties and have gone through the documents and record available on case file with their able assistance.

Insofar as payment of revised/additional liability on account of revision of the tax slab, especially when the terms and conditions of the supply order confined the ST/VAT liability at the rate of 4% is concerned, ordinarily, the liability to be discharged by a supplier is confined to as has been agreed by him under the terms and conditions of the contract. The contracting parties are at liberty to submit the bids with or without tax liability. Depending on the nature of agreement and intention of the parties, it may be ascertained as to whether the tax liability is to be discharged by the vendor or the buyer, in terms of the agreement amongst the parties. They may also agree to apportion the liability as well. Hence, if there is an agreement amongst the parties, the liability has to be constructed and construed from the contract and the intent.

In the present case, the terms and conditions in the specific supply order issued to the petitioner confined the VAT/ST liability @ 4% and it was not a generic total liability towards VAT/ST. Merely because the applicable VAT/ST as on the said date was also @ 4%, it cannot be interpreted as if the supply order at the assigned rate was inclusive of total VAT/ST. Once the above tax component had been fixed in the pricing factor quoted by the bidder, the same cannot be read as variable and flexible. The terms of the contract, supply order and the intent fastened a fixed liability towards VAT/ST. The said aspect was thus rightly considered by respondent No.4-Department of Supplies



and Disposals and an advice was sent to the respondents to pay the additional tax liability.

Insofar as the reliance by respondent No.4 on Clause VII of the terms and conditions to recover the liability from the supplier under "any other levies/taxes" is concerned, the said clause does not come to the aid of the respondent-Department. The said clause contemplates "any other levy/taxes" that may be charged. The said clause has to be read in relation to the taxes/levies other than the taxes/levies specified in Clause-II i.e. ST/VAT. It is not an enabling or empowering clause to include enhancement in the rate of slab of taxation and rather contemplates levy of any other category or nature that may be notified during the course of the contract being in force.

The next question which, however, comes up for consideration is the effect of delay in making the supplies beyond the specified time schedule for completing the same on the consequent additional liability that emanates therefrom.

While the respondent-Department contends that the period of six months is prescribed for completion of the supplies and the same came to an end much before 06.12.2013 and that it was only on account of the delay by the petitioner in completing the supplies that the incidence of increased ST/VAT occurred. The liability is thus solely attributable to the petitioner-supplier as it occurred due to delay on his part and that the respondent-Department cannot be burdened with additional financial responsibility to pay the said tax liability.



In response to the above, the petitioner referred to two instances, where the period of supply travelled beyond 06.12.2013 and claimed that the supply of the same was within the prescribed period. The counsel has emphatically argued that the liquidated damages have been levied by the respondent-Department, hence, any liability that emanates cannot now be fastened once the liquidated damages/penalties have been recovered by the respondent.

On consideration of the clause, I am unable to find myself in agreement with the submissions advanced by the counsel for the petitioner. The liquidated damages and the price on which any invoice is to be raised are not one and the same thing. A liquidated clause is a penalty to be imposed on failure to supply on time. It is not a compensation to indemnify any increase in liability of the buyer. The said clause would not extend an immunity to the supplier from any other independent claim or liability which accrues under any other clause. The supplier cannot cloak himself with an insulation to pay a liability which devolves upon him, under the contract, merely because he has paid the damages. The liquidated damages thus cannot be construed as a lump-sum payment by the seller to the buyer in lieu of all existing and future claims but is to operate only to the context in which such damages can be levied. It is thus not an exoneration of the supplier from any other liability that may have accrued.

The counsel for the petitioner claims that there would thus be no dispute to the liability of respondent to pay enhanced liability towards ST/ VAT



where the supply period travels beyond 06.12.2013 i.e. the date from which the rate has been enhanced. The argument on first principles has a force but there is yet another important condition in the sales order that may become relevant to ascertain a tax liability. The abovesaid bills may be required to be considered in light of Clause IV of the terms and conditions which even though prescribes a period of six months + one month from the date of issuance of the supply order for effecting supplies, however, there is a requirement also to supply 20000 dual desks after the expiry of one month from the date of placing of the said supply order. Hence, not only was the supply to be made within a period of six months but also to be made in a phased manner mandating 20,000 dual desks to be delivered each month. Counsel for the parties are not aware as to whether supply was made as per the supply schedule and they are also not aware whether invoices were to be raised on delivery of each batch of minimum 20,000 dual desks or was to be raised only after complete supply was made. They are also not aware as to what was the practice for raising bills followed by the parties.

However, the said question needs to be examined in much greater detail and only after granting an adequate opportunity to respective parties to establish their claims, by way of referring to the documents establishing their respective claims. There is an Arbitration Clause that has been provided in Paragraph No.18 of Schedule-B and the same is extracted as under:

“18. If any question, difference or objection whatsoever shall arise, in any way connected with or arising out of this instrument or the meaning or operation of any part thereof or the rights duties



or liabilities of either party then save in so far as the decision of any such matter is herein before provided for and has been so decided every such matter including whether its decision has been otherwise provided for and/or whether it has been finally decided accordingly in whether the contract should be terminated or has been rightly terminated in whole or part and as regards the rights and obligations of the parties as the result of such termination, shall be referred for arbitration to any officer appointed by Haryana Government and his decision shall be final & binding & where the matter involves a claim the amount if any awarded in such arbitration shall be recoverable in respect of the matters so referred.

"18 (a) The Arbitrator and his subordinate staff shall be paid a fee of Rs.100/- per hearing subject to a maximum of Rs.500/- in each case provided that out of his amount 20% will be payable to his staff. The arbitration fee will be borne equally by the Government and by the party concerned. The parties other than the Government shall deposit their share in shape of Call Deposit receipt in favour of Director, Supplies & Disposals, Haryana before the announcement of award by the Arbitrator. In case the arbitration proceedings are conducted ex-parte and the award is announced against the Government then entire amount shall be payable by the Director, Supplies & Disposals, Haryana but where the ex-parte award is announced in favour of the Government the share of the opposite party shall form part of claim and shall be recoverable from the said party"

Accordingly, the question of *inter se* liability and the numbers of dual desks to be supplied would become a disputed question of fact which is



required to be ascertained since conflicting arguments are being raised with respect to the understanding between the parties. These aspects would require leading of evidence by respective parties to establish their specific stands which cannot be gone into at this stage by this Court.

Accordingly, the present petition is disposed of at this stage with liberty to the petitioner to take recourse to the Arbitration Clause as contained in paragraph No.18 of Schedule-B of the Contract executed between the parties and without prejudice to objections by the other party.

Needless to mention that in the event of the petitioner taking recourse to any such remedy, the period spent by him before this Court shall be taken into consideration for computing limitation.

SEPTEMBER 17, 2024
rajender

(VINOD S. BHARDWAJ)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No