IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 404 OF 2012

Punj Lloyd Ltd.
A Company incorporated under the
provisions of the Companies Act, 1956
having its registered Office at 17-18,
Nehru Place, New Delhi, India, through
is authorized Representative Mr.V.N.Prasad) ….. Petitioner

Versus

Bharat Petroleum Corporation Ltd.
MMPL Extn. Project Part "A"
Plot No. A-5 & 6, Sector – 1
Noida – 201 301 (UP) ….. Respondent

Mr.M.P.S.Rao, Senior Advocate, a/w. Mr.Zerick Dastur, Ms.Khursheed Vajifdar, i/b. J.Sagar Associates for the Petitioner.

Mr.Phiroz Palkiwala, i/b. Mr.S.R.Page for the Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 7th JULY, 2015
PRONOUNCED ON : 13th AUGUST, 2015

JUDGMENT :

1. By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioner has impugned the arbitral award 28th April, 2011 passed by the learned arbitrator rejecting part of the claims made by the petitioner towards reimbursement of the service tax w.e.f. 16th June, 2005 with interest. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner herein was the original claimant whereas the respondent herein was the original respondent in the arbitral proceedings. Sometimes in the month of January 2005 M/s. Engineers India Ltd. who had been appointed as Project Management Consultant for implementation of the project of the respondent, invited sealed bids for laying of pipeline and associated works under Single Stage II Envelope system from competent agencies with sound technical and financial capabilities and meeting the qualification criteria.

3. On 28th February, 2005 in the Finance Bill 2005, the Finance Minister announced that the service tax would be payable on the "construction of a new building or a civil structure or a part thereof" and "construction of pipeline or conduit" from such date as the Central Government may, by notification in the Official Gazette, appoint. The said Finance Act 2005 came into force on 13th May, 2005.

4. The respondent introduced the Commercial Addendum No.1 in the tender document inserting the words "Service Tax" after the words "Excise Duty" in the Clause No.14.5 of the Instructions to Bidder as well as Clause No.22.1 of the Special Conditions of Contract. The last date for submission of the bids by the bidders was 7th June, 2005 and the bids were to be opened on the same day.

5. On 6th June, 2005, the petitioner submitted their bid for the said project. On 7th June, 2005 the Central Government issued a Notification No.15/2005 appointing 16th June, 2005 as the date from which the said section 88 of the Finance Act, 2005 was to come into force.

6. On 8th September, 2005, the price negotiation took place between the

petitioner and the respondent. On 4th October, 2005 the respondent issued a letter of Acceptance to the petitioner for carrying out the work under the said tender. By the said letter, the respondent intimated the petitioner about the award of the contract works to the petitioner at an estimated contract value of Rs.84,20,53,896.57. On 10th November, 2005 the respondent issued a Detailed Letter of Acceptance in favour of the petitioner subject to the terms and conditions contained therein. On 10th November, 2005 the petitioner signed and forwarded the contract agreement to the respondent. During the course of the contract, the petitioner raised various Running Account bills upon the respondent based on the quantum of the work carried out and the respondent settled the bills after due certification by the said Project Management Consultant. The said work awarded to the petitioner was completed on 15th April, 2007.

7. On 14th June, 2007, the petitioner raised a demand for reimbursement of service tax alleged to have been deposited with the statutory authority in view of Clause 22 of the Special Conditions of Contract and other terms of the contract. On 1st April, 2008, the respondent denied admissibility of reimbursement of service tax and contended that the service tax was deemed to have been included in the quoted price and that any change in the service tax shall be governed by Clause No.22.1 of the Special Conditions of Contract. On 2nd June, 2008 the petitioner invoked arbitration clause recorded under Clause 91 of the General Conditions of Contract for adjudication of the disputes by requesting the Director (Marketing) of the respondent for the appointment of an arbitrator. On 24th June, 2008 the Director (Marketing) of the respondent nominated Mr.S.Chandramohan, GM (Finance), Refinery, BPCL to adjudicate the said dispute. Since the said Mr.S.Chandramohan expressed his inability to adjudicate the dispute, the Director (Marketing) vide his letter dated 13th April, 2009, nominated Mr.J.Dinaker as the

sole arbitrator to adjudicate the said dispute.

8. Pursuant to the directions issued by the learned arbitrator, both the parties filed their respective pleadings and documents. The parties also filed their statement of admission and denial. The petitioner filed an affidavit of evidence on 24th August, 2009 of Mr.Swarup Kumar Patnaik, General Manager (Finance & Accounts). The said witness was cross-examined by the respondent.

9. On 28th April, 2011, the learned arbitrator made an arbitral award holding that the petitioner was entitled to the differential rate of service taxes i.e. between 10.20% to 12.24% in the bills raised after 18th April, 2006 under Clause 22.1 of the Special Conditions of Contract and directed the respondent to pay an amount of Rs.19,84,560/- on account of statutory variation. The learned arbitrator however rejected the claim for service tax claimed by the petitioner w.e.f. 16th June, 2005 holding that the contracted price was deemed to be inclusive of applicable service tax and levy of service tax w.e.f. 16th June, 2005 would not amount to statutory variation and accordingly will have to be borne by the petitioner. Learned arbitrator also directed the respondent to pay interest at the rate of 8% per annum from March 2008 till the date of award insofar as the said sum of Rs.19,84,560/- awarded in favour of the petitioner is concerned. The respondent has not impugned the said award dated 28th April, 2011. The petitioner has impugned the said award in the present petition filed under section 34 of the Arbitration and Conciliation Act, 1996.

10. Mr.Rao, learned senior counsel for the petitioner submits that under the terms and conditions of the tender, the petitioner who was one of the bidder was required to include in its bid price only such taxes which were applicable or

payable as on the last date of submission of bid and could not have included service tax which became applicable after submission of the bid. He submits that the service tax became applicable and payable only after the said tax is notified as being applicable vide publication of the notification in the Official Gazette. He submits that the Central Government had issued a notification on 7th June, 2005 appointing 16th June, 2015 as the date from which the said section 88 of the Finance Act, 2005 would come into force. He submits that since the levy on service tax on the work in question itself came into force only on 16th June, 2005, the petitioner could not have included the service tax component in the bids submitted by the petitioner on 7th June, 2005. He submits that admittedly service tax was neither applicable nor payable at the time of submission of the bids. The learned arbitrator has accordingly misdirected himself in rejecting the said claim for reimbursement of the service tax paid by the petitioner.

11. Learned senior counsel submits that the award of the learned arbitrator rejecting the claim for reimbursement of the service tax is contrary to law. There is an error apparent on the face of the award by attributing to the petitioner knowledge about the applicability of service tax on the date of submission of bid though admittedly notification was not even issued by the Central Government notifying the date of said Finance Act coming into effect.

12. Learned senior counsel placed reliance on clause 14.5 of the Instructions to Bidder and Clauses 15 and 22.1 of Special Conditions of Contract which are extracted as under :-

> **Clause 14.5 of the Instructions to Bidder :**
>
> All duties and taxes including Custom duty, Works Contract tax/Service tax, Excise duty, Sales tax, Education cess and other levies payable by the Contractor under the Contract or

for any other cause, shall be/included in the Schedule of Rates. However, statutory variations on excise duty/sales tax, works contract tax, educational cess on finished goods, during the Contractual delivery period only will be on Owner's account. If there is delay beyond contractual delivery date for reasons attributable to Contractor, any increase in taxes & duties will be borne by the Contractor and any decrease shall be passed on to Owner.

Clauses 15 of Special Conditions of Contract

The Contracted prices shall be deemed to be inclusive of all applicable taxes including works Contract Tax & duties, octroi, levies, service tax, Custom Duty, sales tax, education cess on all taxes as applicable etc. till the completion of the Contract and Contractor shall not be eligible for any compensation on this account.

Clauses 22.1 of Special Conditions of Contract

Statutory variations in Work Contract Tax, Excise Duty, Service Tax, Education Cess and sales tax on finished goods within Contractual delivery date, shall be Owner's account. However, in case of delay in delivery beyond contractual date, for reasons attributable to Contractor, any increase in these rates shall be borne by the Contractor, whereas any decrease shall be passed on to the Owner.

13. Learned senior counsel for the petitioner submits that under clause 14.5, the petitioner could have included the service tax in their bids which were payable by the petitioner under the contract. He submits that under clause 15 of the Special Conditions of Contract, the contracted price shall be deemed to be inclusive of all applicable taxes. He submits that since the service tax was not applicable on the date of submission of the bid, the question of inclusion of this service tax in the price bid submitted by the petitioner did not arise. He submits that the impugned award is contrary to the terms of the contract. Learned senior counsel submits that in view of the express and specific provisions of Clause 22.1

of the Special Conditions of Contract, the respondent was liable to bear total liability in respect of service tax brought upon by the Finance Act, 2005 w.e.f. 16th June, 2005 which was admittedly levied after submission of the bid by the petitioner.

14. It is submitted by the learned senior counsel that even in the detailed Letter of Acceptance issued by the respondent much later, it was clearly provided that the rate was inclusive of all applicable taxes including service tax except the statutory variation as defined in the Bidding Documents and its Addendum.

15. Learned senior counsel placed reliance on clause 13.4.1 of the biding documents and submits that under the said provisions the petitioner was not allowed to make any corrections, make additions, deletions or modifications in price or any part or to impose any conditions and any such condition if stipulated would have been treated as null and void and the bid of the petitioner would have rejected on that ground. He submits that even under clause 14.7 of the Instructions to the Bidder, the petitioner was not allowed to submit any alternative bid and if the same would have been submitted, the respondent would not have considered the same.

16. Learned senior counsel placed reliance on clause 16.1 of the Instructions to Bidder and submits that the bid submitted by the petitioner was valid for a minimum period of six months from the date of opening of Bid Security and Techno-Commercial Bids. Without any consent in writing of the respondent, the petitioner could not have revoked or cancelled their bid or varied any term thereof otherwise the respondent would have forfeited the earned money deposit paid by the petitioner along with their bids.

17. Reliance is also placed on Clause 26.4 of the Instructions to Bidder and it is submitted that once the petitioner had submitted the bid, the petitioner was not allowed to make any subsequent price changes, whether resulting or arising out of any technical/commercial clarifications sought on any deviations or exceptions mentioned in the bid. He submits that under the said clause, the petitioner was not allowed to make any revision in the quoted price and any proposed price changes would have rendered the bid liable for rejection. Under clause 30.2, the respondent had reserved their right to negotiate the quoted price with the lowest bidder before award of work.

18. Under Clause 31.1 the respondent was entitled to notify the successful bidder in writing by Fax of Intent/Letter of Acceptance that their bid had been accepted. It is provided that the Letter of Acceptance would constitute the formation of a contract until the contract agreement had been signed. Clause 32.1 of the Instructions to Bidder provided that until the final contract document was prepared and executed, the bid document together with the annexed documents, modifications, deletions agreed upon by the owner and bidders acceptance thereof was to constitute contract between successful bidder and the owner based on terms contained in the said documents and the finally submitted and accepted prices. Clause 32.2 provided that the contract document shall consist of (I) original bidding document alongwith its enclosures issued, (ii) amendment/Corrigendum to original Bidding Document issued, if any, (iii) Fax/Letter of Intent, (iv) Detailed letter of award/acceptance along with enclosures attached therewith.

19. Under Clause 8.1 of the General Conditions of Contract, it is provided that the Addendum/Corrigendum to the tender documents can be issued prior to the date of opening of the tenders to clarify documents or to effect modification in

the design or contract terms.

20. Clause 16.1 of the General Conditions of Contract provided for interpretation of the contract documents which is extracted as under :-

Clause 16.1 of the General Conditions of Contract

> Except if and to the extent otherwise provided by the Contract, the provisions of the General Conditions of Contract and Special Conditions shall prevail over those of any other documents forming part of the contract. Several documents forming the contract are to be taken as mutually explanatory should there be any discrepancy, inconsistency error or omission in the contracts or any of them the matter may be referred to Engineer-in-Charge who shall give his decision and issue to the contractor instructions in consultation with Owner directing in what manner the work is to be carried out. The decision of the Engineer-in-Charge shall be final and conclusive and the contractor shall carry out work in accordance with the decision.

It is submitted by the learned senior counsel that in view of Clause 16 of the General Conditions of Contract, Clause 15.1 of the Special Conditions of Contract would prevail over addendum issued by the respondent to the Instructions to Bidder.

21. Learned senior counsel placed reliance on clause 6 of the Special Conditions of Contract which provided that the contractor shall abide by all applicable rules, regulations, statutes, laws governing the performance of works in India, including but not limited to various acts mentioned therein. Clause 6.1 (xii) provides for any other Statute, Act, Law as may be applicable which will have to be abided by the contractor. My attention is also invited to Clause 7.4 of the Instructions to Bidder and it is submitted that under the said provisions, the

petitioner could have resolved all their clarifications/queries to the Bidding Document before due date of submission of bid. Clause 8.1 provides for pre-bid meeting held for the purpose of clarifying issues and to answer questions on any matter that may be raised at that stage by the bidders.

22. Under Clause 8.2 of the Instructions to Bidder, it is provided that the bidder is requested to submit any queries/clarification/information pertaining to bidding documents in writing delivered by hand or by fax or by e-mail so as to reach office of the Project Management Consultant not later than the date specified in the Invitations for Bids. It is provided that queries/clarifications/information sought in any other manner shall not be responded to. Clause 8.3 provides that the response to bidder's queries/clarifications raised would be furnished as expeditiously as possible to all who have purchased the Bidding Documents and to those who had submitted acknowledgement cum consent letter in case of downloaded document. It is further provided that any modification of the Bidding Document, which may become necessary as a result of the pre-bid meeting/conference, shall be sent to all bidders through the issue of an addendum/amendment.

23. Learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Union of India & Ors. vs. M/s.Ganesh Das Bhojraj, AIR 2000 SC 1102*** and in particular paragraphs 6, 11 and 14 and it is submitted that till the notification issued by the Central Government would have been published in the Official Gazette, the said notification would not have come into effect. It is submitted that admittedly the said notification was issued much after the last date of submission of the bid.

24. Mr. Palkiwala, learned counsel for the respondent on the other hand invited my attention to various averments made by the respondent in the written statement and also various findings rendered by the learned arbitrator in the impugned award. He submits that the learned arbitrator has interpreted the terms of the bid document, detailed Letter of Acceptance and also the contract document which interpretation is a possible interpretation and thus cannot be substituted by another interpretation by this court under section 34 of the Arbitration and Conciliation Act, 1996.

25. Reliance is placed on Clause 15.1 of the Special Conditions of Contract and it is submitted that under the said clause, the contracted price included all taxes including service tax. He submits that the Finance Bill, 2005 was already announced by the Government on 28th February, 2005 by which the Government had proposed to levy service tax on the "construction of a new building or a civil structure or a part thereof" and "construction of pipeline or conduit" from such date as the Central Government may, by notification in the Official Gazette, appoint. He submits that on 13th May, 2005, the Finance Act, 2005 came into force including the said provisions. Service tax at that time was 10.20% i.e. 10% as service tax and 0.20% as education cess.

26. It is submitted that the respondent no.1 had accordingly issued a Commercial Addendum No.1 on 21st May, 2005 thereby including the point 'service tax' after the word excise tax in Clause 14.2 of the Instructions to Bidder as well as in Clause 22.1 of the Special Conditions of Contract. He submits that the petitioner was required to submit their bids on or before 7th June, 2005 and was thus fully aware of the Commercial Addendum No.1 much prior to the date of submission of the bid.

27. Learned counsel appearing for the respondent submits that much after the said section 88 of Finance Act, 2005 came into force as per the said Notification on 16th June, 2005, there was a price negotiation between the parties on 8th September, 2005 with respect to the tender bid submitted by the petitioner. He submits that after such price negotiation between the parties, the respondent had issued a Fax of Intent/Letter of Acceptance on 4th October, 2005. On 10th November, 2005 the respondent issued a Detailed Letter of Acceptance in favour of the petitioner. He submits that in the said Detailed Letter of Acceptance dated 10th November, 2005 it was clearly provided that the unit rates were inclusive of all applicable taxes including works contract tax, duties, octroi, levies, service tax, custom duty, sales tax, education cess or all taxes as applicable etc. till the completion of contract and contractor would not be eligible for any compensation on this account except the statutory variation as defined in the Bidding Document and its Addendum.

28. Learned counsel led emphasis on Clause 8 of the said Detailed Letter of Acceptance which provides for Schedule of Rates. It was provided that the schedule of rates enclosed with the bidding documents stands replaced by the schedule of rates enclosed at Annexture A to the said Detailed Letter of Acceptance. My attention is also invited to the endorsement made by the petitioner on the said Detailed Letter of Acceptance thereby accepting the said Detailed Letter of Acceptance in totality duly signed by the authorized representative of the petitioner.

29. Learned counsel for the respondent placed reliance on the judgment of this Court delivered on 14th January, 2011 in the case of **<u>Hindustan Petroleum</u>**

Corporation Ltd. vs. Punj Lloyd Ltd. & Anr. in **Arbitration Petition No.40 of 2008** and in particular paragraphs 2 to 4, 9, 10, 13 and 14 and submits that the liability of service tax was included in the bid price submitted by the petitioner. He submits that even after the submission of bid, under clause 7.1 of the Special Condition of Contract, the petitioner could have included the service tax in the price bid with the permission of the respondent. He submits that the petitioner also could have included the service tax in the price bid even during the stage of price negotiation which admittedly took place between the parties on 8th September, 2005 much after the issuance of the notification by the Central Government notifying the date for the said provision under section 88 of the Finance Act, 2005 coming into force.

30. It is submitted that the petitioner neither applied for permission to include the service tax even in case of any doubt in the mind of the petitioner in their bid nor did apply for permission of the respondent to include the same even at the stage of price negotiation. He submits that the petitioner could have also applied for clarification in the pre-bid meeting. Learned counsel for the respondent then submits that the petitioner in this case has raised a demand much after completion of the work. He submits that the work was completed by the petitioner in the month of May, 2007, whereas the demand for reimbursement of the service tax was made for the first time on 3rd April, 2008. He placed reliance on clause 83 of the General Condition of Contract, which provides for payment of tax, duties and octroi etc. by the contractor exclusively, which were in force on the date of submission of the bid and even thereafter increased, imposed or modified from time to time.

31. Mr.Rao, learned senior counsel for the petitioner in re-joinder submits

that the respondent has not chosen to file any affidavit in reply to this petition. He submits that since there was no notification issued by the Central Government, making the provisions of the Finance Act, 2005 effective on the date of the petitioner submitting the bid, the petitioner had no option but to submit its bid without considering the service tax in the price bid. He submits that in any event, in fact in the commercial addendum issued by the respondent, the respondent itself had referred to the statutory variation and not to any new service tax. He submits that even under the said provision, the respondent was liable to reimburse the payment of service tax to the petitioner. He submits that the appeal filed by the petitioner against the order passed in case of ***Hindustan Petroleum Corporation Ltd. vs. Punj Lloyd Ltd. & Anr*** *in* ***Arbitration Petition No.40 of 2008*** is pending before the Division Bench.

REASONS AND CONCLUSIONS

32. A perusal of the record clearly emerges the following admitted facts. The last date for submission of the bids by the bidders was 7th June, 2005 and the bids were to be opened on the same day. On 28th February, 2005, the Finance Bill 2005 was already proposed. The Finance Minister had announced that the service tax would be payable on the "construction of a new building or a civil structure or a part thereof" and "construction of pipeline or conduit" from such date as the Central Government may, by notification in the Official Gazette, appoint. The said Finance Act 2005 came into force on 13th May, 2005.

33. The respondent had accordingly introduced the Commercial Addendum No.1 dated 21st May, 2005 in the tender document and included the words "Service Tax" after the words "Excise Duty" in the Clause No.14.5 of the Instructions to Bidder as well as in Clause No.22.1 of the Special Conditions of

Contract. The said commercial addendum was issued much prior to the last date for submission of the bids by the bidders. It is not in dispute that the petitioner submitted their bid for the same project on 6th June, 2005. It is not in dispute that on 7th June, 2005 the notification was issued thereby appointing 16th June, 2005 as the date from which the said section 88 of the Finance Act, 2005 was to come into force. It is also not in dispute that much after the said Finance Act, 2005 came into force, the price negotiation took place between the parties on 8th September, 2005.

34. After completion of such price negotiation on 8th September, 2005, the respondent had issued a Letter of Acceptance to the petitioner on 4th October, 2005 for carrying out the said work. The respondent also intimated the petitioner about the award of the contract works to the petitioner at an estimated contract value of Rs.84,20,53,896.57 which was followed by a Detailed Letter of Acceptance dated 10th November, 2005 subject to the terms and conditions contained therein. The petitioner signed and forwarded the contract agreement to the respondent on 10th November, 2005 and also accepted the terms and conditions of the said Detailed Letter of Acceptance.

35. It is not in dispute that the work awarded to the petitioner was completed on 15th April, 2007 and during this period, the petitioner themselves had submitted various Running Account bills upon the respondent based on the quantum of the work carried out by the petitioner which bills were settled by the respondent after due certification by the said Project Management Consultant. No demand for reimbursement of the service tax was made by the petitioner during the course of execution of the said work except a claim for statutory variation under clause 22 of the Special Conditions of Contract. The demand was raised for the first time by the petitioner for reimbursement of the service tax was on 14th June,

2007.

36. A perusal of the award indicates that the learned arbitrator has allowed the differential rate of service tax i.e. between 10.20% to 12.24% in the bills raised after 18th April, 2006 under Clause 22.1 of the Special Conditions of Contract on account of statutory variation and directed the respondent to pay an amount of Rs.19,84,560/-. The learned arbitrator has rejected the claim for service tax claimed by the petitioner w.e.f. 16th June, 2005 holding that the contracted price was deemed to be inclusive of applicable service tax and levy of service tax w.e.f. 16th June, 2005 would not amount to statutory variation and will have to be borne by the petitioner accordingly.

37. A perusal of the record clearly indicates that in Clause 8 of the Detailed Letter of Acceptance, schedule of rates was provided. It was made clear that the schedule of rates to the said Detailed Letter of Acceptance with the biding documents would replace by the schedule of rates enclosed at Ex.A to the said Detailed Letter of Acceptance. A perusal of the endorsement made by the petitioner on the said Detailed Letter of Acceptance clearly indicates that the petitioner had accepted the said Detailed Letter of Acceptance and the condition mentioned thereon in totality and the same was duly signed by the authorized representative of the petitioner. In the said Detailed Letter of Acceptance, it was clearly provided that the unit rates was inclusive of all applicable taxes including works contract tax, duties, octroi, levies, service tax, custom duty, sale tax, education cess on all taxes as applicable etc. till the completion of contract and the contractor would not be eligible for any compensation on that account except the statutory variation as defined in the Bidding Document and its Addendum. It is not in dispute that the increase in the percentage of the service tax after award of

the contract and before completion of the work has been paid to the petitioner by the respondent under clause 22.1 of the Special Conditions of Contract.

38. Clause 32.2 of the Instructions to Bidder clearly indicates that the contract document shall consist of original bidding document along with its enclosures issued, amendment/Corrigendum to original Bidding Document issued, if any, Fax/Letter of Intent and Detailed letter of award/acceptance along with enclosures attached therewith. Clause 9.1 of the Instructions to Bidder provides that the respondent or the Project Management Consultant for any reason whether at his own initiative or in response to the clarification requested by the prospective bidder may issue amendment in the form of Addendum during the bidding period or subsequent to receiving the bids. It is provided that any addendum thus issued shall become part of bidding document and bidder shall submit a copy of the addendum duly signed and stamped in token of his acceptance. Clause 9.2 provides that in case Addendum is issued during the bidding period, bidder should consider its impact in his bid. In case Addendum is issued subsequent to receipt of bids, bidder should follow the instructions issued along with Addendum with regard to submission of impact on quoted price/revised price, if any.

39. It is thus clear beyond reasonable doubt that the amendment in the form of addendum could be issued not only during the bidding period but even subsequent to receiving the bids. It is also clear that if the addendum is issued during the bidding period, bidder has to consider its impact in his bid. It is not in dispute that in this case the Addendum was issued by the respondent during the bidding period and much prior to the last date of submission of bid. Under clause 9.2 of the Instructions to Bidder, thus the petitioner was liable to consider the impact of the Addendum issued by the respondent in their bid. In the Commercial

Addendum No.1 introduced by the respondent on 21st May, 2005 bidding document was modified *inter-alia* inserting the word 'service tax' after the word 'excise duty' appearing in the fourth line in the second sentence of clause 14.5 of the Instructions to Bidder as well as the first line of clause 22.1 of the Special Conditions of Contract. In my view, the respondent was thus bound to consider the impact on levy of service tax in the price bid submitted by the petitioner.

40. Clause 7.4 of the Instructions to Bidder clearly provided that the bidders have to resolve all their clarifications/queries to the Bidding Document before due date of submission of bid and thereafter bidders were requested to submit their bid in total compliance to Bidding Document without any deviation/stipulation/clarification/assumption.

41. Clause 7.5 provided that the responses to Bidder's queries/ clarifications raised by the bidder was to be furnished as expeditiously as possible to all who had been issued the Bidding Documents. It further provided that any modification of the bidding document, which might become necessary as a result of the bidders query, shall be sent to all bidders through the issue of an addendum/amendment.

42. Clause 8.1 of the Instructions to Bidder clearly provided that the bidder or his authorized representative was advised to attend a pre-bid meeting as per details given in invitations to bids and the purpose thereof was to clarify the issue and the answer questions on any matter that might be raised at that stage by the bidders. Under clause 8.2, the bidder was requested to submit any queries/clarification/information pertaining to bidding documents in writing delivered by hand or by fax or by e-mail as per Annexure-XVII to Instructions to

bidder so as to reach office of Engineers India Limited not later than the date specified in the invitations to bids. It is thus clear that the petitioner was fully aware of the proposed levy of service tax before the date of submission of bid and Commercial Addendum No.1 was issued by the respondent much prior to the last date of submission of the bid. The petitioner never raised any querry, if there was any doubt in the mind of the petitioner whether to include the impact of service tax in the price bid or not.

43. Even during the price negotiation meeting, which was much after issuance of the notification by the government to make Section 88 of the Finance Act, 2005 effective, the petitioner did not seek any clarification. The petitioner accepted all the rates included in the schedule of rates annexed to the said Detailed Letter of Acceptance and accepted the terms and conditions mentioned therein. The petitioner having accepted the terms and conditions that the service tax was included in the price bid has rightly not raised any claim in respect thereof till the date of completion of the work. Only as and by way of after thought, the petitioner raised the demand which in my view was rightly rejected by the respondent and thereafter by the learned arbitrator.

44. Insofar as the submission of the learned senior counsel for the petitioner that under various provisions of the Instructions to Bidder, the General Conditions of Contract and Special Conditions of Contract, if the petitioner would have deviated from the terms and conditions of the contract or would have altered any terms and conditions or the price bid submitted by the petitioner, the bid of the petitioner would have been rejected on that ground itself and thus the petitioner could not have done any such corrections in the price bid is concerned, in my view there is no merit in this submission of the learned senior counsel. The petitioner

was permitted to seek clarification not only during the bidding period but also could seek clarification even after submission of the bid which clarification if would have been sought and if on the basis of such clarification sought by the bidder any further addendum was required to be issued, the same could have been issued by the respondent.

45. Be that as it may, even under the provisions of the contract and more particularly clause 16 of the Instructions to Bidder, in case the bidder wanted to vary any terms, the same could be done with consent of the owner in writing which was never applied for by the petitioner.

46. Insofar as submission of the learned senior counsel that under clause 14.5 of the Instructions to Bidder, clauses 15 and 22.1 of the Special Conditions to Contract, the liability to pay service tax of the petitioner which could have been included in the contract price was only in respect of such taxes which were applicable and were payable by the contractor on the date of submission of bid and in view of Central Government having issued notification making section 88 of the Finance Act, 2005 applicable much later than the last date of filing bid is concerned, in my view in view of the corrigendum issued by the respondent much before the last date of submission of the bid and in view of the petitioner not seeking any clarification of any nature whatsoever before submission of bid or even during the price negotiation meeting, there is no merit in this submission made by the learned senior counsel.

47. The petitioner having accepted all the terms and conditions of the Detailed Letter of Acceptance which included the schedule of price with a clarification that the unit rate was inclusive of all applicable taxes including

service tax till the completion of contract and that the contractor was not eligible for any compensation, the petitioner was not eligible to make any claim for reimbursement of service tax and the liability in respect of service tax in my view was included in the unit rate submitted by the petitioner. In my view thus there is no substance in the submission of the learned senior counsel that till the Central Government would have issued a notification notifying the date of applicability of the said Finance Act, 2005 which was much after the date of submission of the bid by the petitioner respondent was liable to reimburse the petitioner the payment of service tax.

48. Insofar as judgment of Supreme Court in case of ***Union of India and others(supra)*** relied upon by the learned senior counsel for the petitioner is concerned, in support of the submission that till the said notification issued by the Central Government would have been published in the Official Gazette the petitioner was not bound to include the impact of service tax in the price bid is concerned, in my view there is no merit in this submission of the learned senior counsel. In view of the provisions referred to aforesaid, the petitioner was bound to consider the impact of the corrigendum issued by the petitioner which was issued much prior to the last date of submission of the bid. The judgment relied upon by the learned senior counsel is of thus no assistance to the petitioner.

49. In case of ***Hindustan Petroleum Corporation Ltd. vs.Punj Lloyd Ltd. and Anr.*** in Arbitration Petition No.40 of 2008 dated 14th January, 2011, this court has considered similar provisions of the contract and has held that the contract price was deemed to have been inclusive of all taxes including service tax till the completion of the contract. The said judgment of this court interpreting similar provisions of the contract in hand squarely applies to the facts of this case.

I am respectfully bound by the said judgment.

50. Under clause 31.1 of the Instructions to Bidder, it is provided that the Letter of Acceptance will constitute the formation of a contract until the contract agreement has been signed. Under clause 20.1 of the General Conditions of Contract, it is provided that the work covered by the said contract shall be deemed to have commenced from the date of issue of Letter of Intent of tender and be completed in stages on or before the dates as mentioned in the time schedule of completion of work.

51. Clause 23 of the General Conditions of Contract provided that the contract sum shall be the sum accepted or the sum calculated in accordance with the price accepted and/or the contract rates as payable to the contractor for the entire execution and full completion of the work. Clause 73 of the General Conditions of Contract provided that the schedule of rates and payment covers the taxes and duties. It is provided that the taxes and charges shall be deemed to have been executed in in and covered by the schedule of rates.

52. A perusal of the impugned award rendered by the learned arbitrator clearly indicates that the learned arbitrator has interpreted the terms of the contract including the Commercial Addendum No.1 and has held that if the petitioner intended to recover the service tax imposed by the Finance Act, 2005 with respect to the work done under the said contract, such service tax at the rates mentioned in the Finance Act, 2005 was required to be included in the tender rates of the petitioner. It is held that since the applicability of service tax, the rate and the notification had taken place within the last date of submission of the bid, it was concluded that the contracted price was deemed to be inclusive of all applicable

service tax even though the same was effective at a later date.

53. Learned arbitrator has also held that the petitioner had raised the issue of service tax for the first time only on 14th June, 2007 i.e. after the date of completion of the entire work though the petitioner could have resolved all the clarification/queries to the bidding document before the due date of submission. In my view the interpretation of the contract by the learned arbitrator is not only a possible interpretation but is a correct interpretation. Even if the interpretation of the contract of the learned arbitrator is considered as a possible interpretation, such interpretation cannot be substituted by another interpretation by this court under section 34 of the Arbitration Act. In my view there is no infirmity with the impugned award rendered by the learned arbitrator. Petition is devoid of merits. I, therefore, pass the following order :-

(a) Arbitration Petition No.404 of 2012 is dismissed.

(b) No order as to costs.

[R.D. DHANUKA, J.]