IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order Reserved on : 09.10.2018

Order Pronounced on : 23.11.2018

CORAM :

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

W.P. Nos. 28539 of 2004
and 9131 of 2008

The Indian Hume Pipe Co.Ltd.,
8, First Street,
Gopalapuram,
Chennai - 600 086.
rep. by its
General Manager Mr.Ajay Asthana
... Petitioner in both W.Ps.

Vs.

1.Tamil Nadu Water Supply & Drainage Board,
31, Kamarajar Salai,
Chennai 600 005.
rep. by its Managing Director.

2. The Chief Engineer,
Tamil Nadu Water Supply & Drainage Board,
Ganesh Nagar, Melur road,
Madurai- 625 007.

3. The Executive Engineer,
TWAD Board, Urban Division,
Valliyur, Tirunelveli.
... Respondents in W.P.28539/2004

1.Tamil Nadu Water Supply & Drainage Board,
31, Kamarajar Salai,
Chennai 600 005.
rep. by its Managing Director.

2. The Chief Engineer,
Tamil Nadu Water Supply & Drainage Board,
Ganesh Nagar, Melur road,
Madurai - 625 007.

3. The Superintendent of Central Excise,
South Range, Lal Baughdur Sastri Road,
Bibikulam,
Madurai - 625 002.

... Respondent in W.P.9131/2008

PRAYER in W.P.No.28539/2004: Petition filed under Article 226 of the Constitution of India to call for the records in B.P.Ms.NO.72 dated 14.08.2003 of the first respondent and issue a writ of certiorari on other appropriate writ, direction or other order or orders in the nature of a writ quashing the same.

PRAYER in W.P.No.9131/2008: Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Mandamus forbearing the respondents from withholding any amounts from the bills of the petitioner on account of central excise duty or making any payments to the central excise authorities purporting to be by way of central excise duty pursuant to BP MS No.72 dated 14.08.2003 or otherwise and further to pay to the petitioner the sum of Rs.5,16,711/- withheld by the respondents out of the bills of the petitioner and paid over to the centra excise department Madurai Division (South) pursuant to the letter of the 2nd respondent dated 30.01.2008.

For Petitioner : Mr.Mr.Lakshmikumar

For Respondents : Mrs.S.Thamizharasi
for RR 1 to 3 in WP 28539/04
and for R1 and R2 in WP 9131/08
Mr. T.Pramodkumar Chopda
for R3

C O M M O N   O R D E R

Writ petition No.28539 of 2004 has been filed challenging the proceedings of the first respondent in B.P.Ms.No.72, dated 14.08.2003, and W.P.No.9131/2008 has been filed seeking seeking a direction to forebear the respondents from withholding the bill amount payable to the petitioner on account of payment of Central Excise duty, pursuant to the above said Board proceedings.

2. Since the issue involved in both the writ petitions are related to the same issue, both the writ petitions are dispose of by a common order.

3. The case of the petitioner, in brief, is as follows :

The petitioner company engaged in manufacturing, supplying and commissioning of water pipes and water systems. The petitioner company also entered into contracts with regard to Water Works and Sewerage system to various parties. The respondents had awarded a contract to the petitioner for providing common water supply and sewerage system to Panagudi UTP, Vadakkuvalliyoor UTP and 145 wayside habitations in Tirunelveli District for a sum of Rs.13,57,80,000/-. and an agreement was also entered into between the parties on 31.05.2002.

3(i) It is the case of the petitioner that the price indicated and agreed between the parties for the total performance fixed throughout the period of contract, and no price variation would be entertained on either side. The contract is also specifically provided that the price accepted for all the materials are inclusive of all taxes and duties and no additional sales tax or excise duty shall be paid extra under any circumstances during the contract period and it is also accepted that all the materials are inclusive of all taxes and duties. Thus, contract is a fixed price contract representing the negotiated value agreed between the parties and during the performance of the contract works, any variation in the cost of materials, cost of labour and taxes and duties, will be claimed on either side as per the specific clause contained in the contract. The primary raw materials purchased by the petitioner include High Tensile Wire and Cement. They are liable to excise duty and the petitioner is eligible for 16% advalorem credit on account of CENVAT. So far as the cement purchased by the petitioner, the petitioner is entitled to CENVAT credit at the rate of Rs.350/- per Metric tonne. While entered into the agreement, the petitioner has taken into account CENVAT credit and other benefits that would be available to the petitioner in respect of raw materials and other inputs in the manufacturing of products.

3(ii) Pending the contract, the Government of India Ministry of Company Affairs, Department of Revenue issue a notification dated 06.09.2002, in notification No.47/2002, stating that with effect from 1st March, 2002, NIL rate of duty shall be charged on all items of machineries, including instruments, apparatus and appliances, auxiliary equipment and their components required for setting up of water treatment plants, and the pipe needed for delivery of water from its source to the plant, and from there to the storage facility. It is also clarified by way of explanation in the notification that the exemption to water treatment plants would also included plants for desalination, demineralization or purification of water or for carrying out similar process or processes intended to make the water fit for human or animal consumption. The above notification came into force from 6th September 2002. Pursuant to the said notification, excise duty is not leviable in respect of pipes needed for delivery of water from its source to the plant and from there to the storage facility. Similarly all the items of machineries required for setting up water treatment plant were also eligible for exemption from the excise duty. As per the contract agreed between the parties, the petitioner is entitled to get the Central excise exemption as per the said notification and the respondent can not claim any benefit there under as the contract clearly provide that prices are including of all the taxes, duties and no sales tax or excise duty shall be paid extra by the first respondent.

3(iii) That being the possession, now the third respondent has informed the petitioner that the petitioner has availed excise duty exemption on supply of PSC pipes during the month of November 2002 to October 2003, under the above scheme and as per the Board proceedings any concession availed by the contractor in respect of payment of excise duty exemption for the materials, pipes, machineries,. etc., should be passed on to the first respondent Board, and the petitioner was further informed that the concession availed by the petitioner on exemption of excise duty will be reimbursed in subsequent bills. In the said circumstances, the petitioner has now come forward to challenge the above Board proceedings.

3(iv) Pending writ petition, as the respondents are taking steps to withhold the bill amounts towards the excise duty exemption received by the petitioner, the petitioner has filed another writ petition in W.P.No.9131 of 2008, forbearing the respondents from withholding the bill amounts for the purpose of Central Excise duty or making any payment to the Central Excise authorities pursuant to the above Board proceedings.

4. The third respondent filed a detailed counter affidavit , wherein it is stated that the Government of Tamilnadu, accorded sanction for providing water supply and sewerage scheme to Panagudi UTP, Vadakkuvalliyoor UTP and 145 wayside habitations in Tirunelveli District for a sum of Rs.1670.60 Lakhs and the work was awarded to the petitioner, and an agreement was entered into between the petitioner and the Chief Engineer, TWAD Board, Southern Region, on 31.05.2002 for a total amount of Rs.13,57,80,000/-. As per the above agreement, the petitioner take water from 8 infiltration wells in Tamiraparani near Cheranmahadevi, and pumped to the common sump and from there, it will be pumped to 7 intermediate sumps. Thereafter, to various pumping main and branch pumping mains. The agreement value of

Rs.13,75,80,000/- was concluded duly incorporating the excise duty to a value of Rs.109 Lakhs and the payment was also made including the excise duty as per the agreement. Thereafter, the Department of Revenue, Ministry of Finance and Company affairs issued a notification dated 06.09.2002, thereby exempting the excise duty to the equipments, machineries and required for setting up water treatment plants and also pipes needed for delivery of water. Even though, the petitioner is not entitled to avail excise duty, the firm has availed the exemption of excise duty. However, the Superintendent of Central Excise, Palayamkottai Range, Tirunelveli informed the petitioner that the petitioner company has wrongly availed the excise duty exemption. In the said circumstances, the amount of excise duty exemption availed by the petitioner to the tune of Rs.56,65,547/- has been recovered in the contractor bill in part and a balance of Rs.52,34,629/- recoverable from the contractor.

5. The first respondent Board passed a proceeding in BP.No.72 dated 14.08.2003 that the concession availed by the contractor from payment of the excise duty for the schemes under the execution, should be passed on to TWAD Board. The board also permits the reimbursement of excise duty to the contractor, provided the contractor comes up with documentary evidence on payment of the excise duty for the raw materials utilized for the finished product under the relevant contract. The third respondent also denied various averments made in the affidavit filed by the petitioner. According to the respondent, as per the contract, the prices accepted are inclusive of basic cost, sales tax, excise duty, loading, conveying, unloading, stocking in site etc. Out of the above, the basics go to the manufacture, Excise Duty and Sale Tax goes to the Government and other charge goes to a third party who executes the works. Now, the excise duty has to be paid to TWAD Board instead of paying to the Government of India. As per the Bid value, the petitioner has agreed for 3 % excess above departmental rate, which includes excise duty to be paid by the petitioner to the Excise Department, but now exemption availed by the petitioner as concession to the tune of Rs.1.09 Crores. If this is added to the tender value, the agreed rate of tender percentage will increased upto 19%. The tender has been finalized during March 2002, and the agreement concluded during May 2002, i.e. prior to issue the notification by the Government of India, in September 2002, and the rates quoted in the agreement is inclusive of excise duty for the materials , like, pipes and other materials utilized for the project and that amount should go to the respondents. The purpose of the notification issued by the Government of India is to reduce the cost of water supply scheme, and thereby provide more number of water supply scheme and get the benefit by the organization, who executes such work,

or to the consumer and not to the contractor, who carry out the work on mutually agreed with the tender percentage rates. Hence, based on the above notification, the TWAD Board, the organization which executes the work, has issued orders to pass on the concession availed by the petitioner to the TWAD Board, so as to reduce the scheme cost. The tender schedule for the scheme was issued in August 2001, and the tenders were opened on 18.09.2001, and during the processing period of tenders, the Government of India did not issue any notification for exemption of excise duty. Hence, the contention of the petitioner that the rates were worked out keeping in view of the exemption of excise duty is wrong and unjustified. From the 3% excess rate quoted by the contractor over the departmental rate includes excise duty to be paid by the petitioner to the Excise Department. But the contractor wrongly availed the concession to the tune of Rs.1.09 Crores. Hence, the petitioner is liable to repay the amount.

6. I have heard the learned counsel appearing for the petitioner and the learned Special Government Pleader appearing for the respondents 1 to 3 and the Standing Counsel, appearing for the fourth respondent and perused the materials available on records carefully.

7. The contract was awarded to the petitioner in March 2002 and the work order was issued on 29.03.2002. The relevant essential terms agreed between the parties is as follows :

> 1 The prince indicated in schedule "A"are firm till the completion of contract (through out the period of contract) and no price variation will be entertained.
> 2. Payment will be made by the department towards the quantity of steel./cement actually utilised for each component without allowing wastage.
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> 3. The price accepted in Schedule "A"are inclusive of all taxes, and duties, hence, no sales tax (State/ Interstate/ Central) and excise duty shall be paid extra TWAD will not pay anything under any circumstances during the contract period.
> 4. The once accepted for all materials are inclusive of cost of transit, insurance packing, forwarding, transport incidental charges, loading, unloading charges, for delivery and stacking at the site of work. No additional amount will be come payable by TWAD Board for any incidental items."

8. A perusal of the above terms of contract, it is clear that the price indicated in the contract is a fixed one through out the period of contract and no variation permitted. Apart from that, the price accepted by the parties are inclusive of all taxes duties and no sales tax or excise duty shall be paid by the department under any circumstances during the period of contract. It is the case of the petitioner that, there is no clause in the agreement that any exemption availed by the petitioner should be passed on to the respondent Board, and the price indicated and agreed is for the total performance of contract is a fixed one through out the period, and the respondent board is also made it very clear that, in the event of any variation, all the taxes should only paid by the petitioner and no sales tax or excise duty will be paid by the department under any circumstances. The above condition makes further clear that any variation in the taxes or duties will not affect the price agreed between the parties. Now, the contention of the respondent Board is that, after entering into the contract during the contract period, the Government of India issued a notification dated 06.09.2002, granting exemption of excise duty for the machineries required for setting up a water treatment plant and the pipes needed for delivery of water, based on the above notification, now the first respondent Board issued impugned proceedings, in B.P.Ms.No.72 dated 14.08.2003, to include a clause in the bid conditions, that the concession availed by the contractor from the payment of excise in connection with the duty exemption for materials, pipe and machineries should be passed on to the Board. The relevant portion of the Board proceedings reads as follows :

> " The Board, after careful consideration resolved in its resolution no.3,2 dated 06.08.2003, to include in the bid conditions to the effect that the concession availed by the contractor, from payment of excise duty exemption, for materials, pipes, machineries, etc, should be passed on to TWAD Board. The Board resolved further that the concessions availed by the contractor; from payment of excise duty for the schemes under execution, should be passed onto TWAD Board. The Board also resolved to permit the reimbursement of excise duty to
>
> the contractor provided the contractor comes up with documentary evidence on payment of the excise duty for the raw materials utilized for the finished product under the relevant contract ."

9. Even though it is contended by the Board that, the petitioner is not entitled to get the excise duty exemption, as the work executed by the petitioner will not fall under the Water Treatment Plant, as the petitioner has availed the duty exemption, the Board sought to recover it from the petitioner. It is the contention of the petitioner that, the contract was entered into between the parties as early as on March 2002, and the parties have agreed that it is a fixed price contract, and no variation is permitted, any increase in the tax should also be borne by the petitioner, absolutely there is no agreement between the parties that any duty exemptions availed by the petitioner should be passed on to the Board. When the parties are specifically agreed for certain conditions and entered into a contract, now based on the subsequent notification issued by the Government of India, the Board cannot seek to recover the exemption granted to the petitioner by applying the Board proceedings retrospectively, for which the respondent has no power.

10. I find some force in the above contention. In the contract entered into, it was specifically agreed that the price is a fixed price and any variation in the tax is to be paid by the contractor, and there is no agreement between the parties that any duty exemption granted to the contractor should be passed on to the respondent Board. The parties are bound by the contract. Merely because a duty exemption was availed by the petitioner pursuant to the notification issued by the Government of India, subsequent to the contract, the respondent cannot insist the duty of exemption should be passed on to them.

11. Apart from that, on a perusal of the Board proceedings, it could be seen that the Board has only resolved to incorporate a condition in the agreement, enabling the Board to get reimbursement of any concession or exemption availed of by the contractor, and it should be passed on to the Board. The impugned Board proceeding is only prospective in nature and it is applicable only to the future contracts, and the respondent cannot apply it retrospectively and made it applicable to the existing contract, where there is no specific agreement for passing on the duty exemption to the respondent Board. In such circumstances, based on the subsequent Board proceedings, which is only prospective in nature, the respondent cannot withheld the amount from the bill payable to the petitioner towards the duty exemptions availed by the petitioner and also sought to recover the duty exemptions availed by them.

12. Though the petitioner has challenged the Board proceedings, the Board proceedings had been issued only to include a clause in the bid conditions for reimbursement of duty exemptions to the Board and the Board is entitled to incorporate

any clause in the agreement and the petitioner cannot question the power of the respondents to pass such Board proceedings. Hence, the impugned Board proceedings issued by the respondents need not be set aside. However, in the instant case, as already held, the respondents cannot apply the Board proceedings retrospectively and direct the petitioner to reimburse the exemption availed by them in the absence of any specific clause in the contract.

13. In the above circumstances, I am of the view that it is suffice to direct the respondents not to insist the petitioner to reimburse the excise duty exemptions availed by them, and any amount withheld by the respondents in lieu of the duty exemtpion availed by the petitioner should necessarily be released to the petitioner.

14. In the result, W.P.No.28539 of 2004 is partly allowed and the respondents herein are directed not to recover excise duty exemptions availed by the petitioner in respect of the instant contract. No costs.

15. Consequently W.P.No.9131 of 2008 is allowed and the respondents herein are restrained from withholding any amount , payable to the petitioner on account of the duty exemption availed by the petitioner. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-III)

//True copy//

Sub Assistant Registrar

mrp

To
1. The Managing Director,
Tamil Nadu Water Supply & Drainage Board,
31, Kamarajar Salai,
Chennai 600 005.

2. The Chief Engineer,
Tamil Nadu Water Supply & Drainage Board,
Ganesh Nagar, Melur road,
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3. The Executive Engineer,
TWAD Board, Urban Division,
Valliyur, Tirunelveli.

4. The Superintendent of Central Excise,
South Range, Lal Baughdur Sastri Road,
Bibikulam,
Madurai - 625 002.

+2cc to Mr.Lakshmikumaran, Advocate SR.No.80118, 80119

+2cc to Mr.T.Pramodkumar Chopda, Advocate SR.No.80564, 80565

W.P.Nos.28539 of 2004 and
9110 of 2008

KJI(CO)
GMY(03/01/2019)