



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.03.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P. (MD)No.15967 of 2020

Subaya Constructions Company Ltd.,
Rep. by its Director S.Meenakshi,
New No.21(Old No.26),
Soundarapandian Street,
Ashok Nagar,
Chennai - 600 083.

... Petitioner

Vs.

1. Tamil Nadu Water Supply and Drainage Board,
Rep. by its Chief Engineer,
TWAD Board, No.1/1, Sambakulam,
Ganesh Nagar, Opp. Mattuthavani bus stand,
Melur Road,
Madurai - 625 007.

2. Tamil Nadu Water Supply and Drainage Board,
Rep.by its Executive Engineer,
TWAD Board, Sewerage Division,
Karaikudi.

3. The Superintendent of GST,
Vadapalani North Range,
Chennai.
(R-3 is suo motu impleaded vide Order
dated 15.02.2021.)

... Respondents

Prayer: Writ petition is filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, directing the respondents to consider the various representations issued by the petitioner to the respondents and direct the respondents to pass appropriate orders in terms of G.O.Ms.No.296 dated 09.10.2017 and in tune with the Judgment of this Court in W.P.Nos.21196 and 21198 of 2019 dated 01.08.2019 and consequently direct the respondents to enter into a fresh supplemental agreement for the purposes of GST within a time frame as fixed by this Court.

For Petitioner : Mr.P.J.Rishikesh,
for Mr.A.Sivaji.

For R-1 & R-2 : Mrs.Porkodi Karnan

For R-3 : Mr.R.Aravindan



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O R D E R

Heard the learned counsel appearing for the writ petitioner and the learned Standing counsel appearing for respondents 1 and 2 and the learned counsel appearing for the third respondent.

2. The petitioner entered into a contract with Tamil Nadu Water Supply and Drainage Board for laying Under Ground Sewerage works for Karaikudi Municipality, Sivagangai District. An agreement was entered into between them on 25.01.2016. It is seen from the contract that quotation given by the petitioner was inclusive of TNVAT and Excise Duty components.

3. As per Clause 46 of the Contract, deduction at source towards sales tax shall be made at 2% for civil works contract and at 5% for all other works contract. With effect from 01.07.2017, GST Regime came into force. The distinction between civil works and other works became irrelevant since all the works contract for construction activities came to be taxed at 12%. Since the tax regime had undergone a change, it became necessary to re-work the terms of the contract.

4. The Government of Tamil Nadu considered the prevalent situation and issued G.O.Ms.No.296 Finance (Salaries) Department, dated 09.10.2017. The Government took note of the fact that the price bid to be quoted should be inclusive of taxes and duties. The supplier, while raising bills and tax invoice post-GST, will now have to collect GST from the purchaser at revised rates of notified percentage of value of supply and remit the same to the respective Government. The entire GST on the supply will have to be finally borne by the purchaser.

5. Now the question was how to work it out. The Government came out with a formula as set out in paragraph No.10 of the said Government Order. It provides for three modes of calculation. The relevant paragraph No.10 reads as follows:-

"10. Considering the necessity to provide for a transparent means of estimating subsumed tax Government direct that the following methodology be adopted for estimating the value of subsumed taxes in the contracted value of work:

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 $\text{Rs.2 lakh} \times \frac{48}{50} = \text{Rs.1.92 lakh}$.

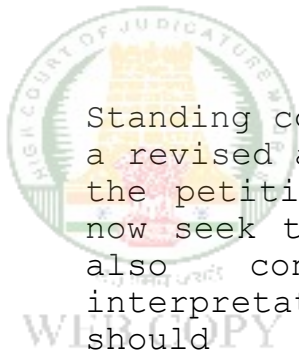
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b. In case, the break up of taxes was not obtained or furnished in the bid document, the supplier may be asked to furnish break up of the taxes within the contracted amount, giving details and explanations and based on this estimate of total subsumed tax shall be arrived. For instance, if for the contracted amount of Rs.48 lakh in the example above, the supplier states that the Central Excise Duty is Rs.1 lakh and VAT or CGST is Rs.1 lakh, after checking the reasonability of his claim, the subsumed tax may be arrived at Rs.2 lakh.

c. The estimate of subsumed tax should also be worked out independently from the departmental estimates. Revised Schedule of Rate (SOR) showing basic price and tax components separately are being issued by the Public Works Department. Using the revised SOR, revised departmental estimates for the work without subsumed tax shall be arrived as per normal procedure. The difference between the departmental estimates arrived using earlier SOR with taxes would constitute value of subsumed tax in the value of work. For instance, if the Estimate arrived at using the revised SOR without subsumed taxes is Rs.45 lakh and that with earlier SOR with taxes is Rs.50 lakh, the value of subsumed taxes in the value of work is Rs.5 lakh. If the contracted value for this same work of Rs.50 lakh is Rs.55 lakh, i.e. with tender premium of Rs.5 lakh, then the value of subsumed tax may be proportionately enhanced (or reduced in case of tender discount or minus tender) as follows: $\text{Rs.5 lakh} \times \frac{55}{50} = \text{Rs.5.5 lakh}$. This method is considered as a good proxy for the actual value of subsumed tax for the purpose of determining the value of supply for payment to the supplier along with taxes under the GST laws."

6. Now the question that arises for my consideration is under which category the petitioner's case will fall. The stand of the respondents is that the petitioner's case will fall under paragraph No.10(c). The stand of the petitioner is that the case will fall under paragraph No.10(a). The petitioner had given a representation in this regard calling upon the respondent Board to rework the price component of the contract in terms of paragraph No.10(a). Since the petitioner's request was not considered, the present writ petition came to be filed.

7. The respondents have filed a detailed counter affidavit. The learned counsel took me through its contents. The learned



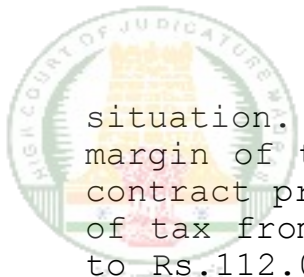
Standing counsel would also point out that after GST was introduced, a revised agreement was in fact entered into between the parties and the petitioner having signed the same with eyes wide upon, cannot now seek to wriggle out of the consequences flowing therefrom. She also contended that the issue essentially turns on interpretation of the contract and therefore, this Court should be loath to interfere. In any event, the respondent Board has taken note of only on the changes effected by the GST Regime and is settling the writ petitioner's bills accordingly. She called for dismissal of the writ petition.

8. I carefully considered the rival contentions and went through the materials on record.

9. The agreement between the parties was entered into on 25.01.2016. The nature of work was to provide Under Ground Sewerage Scheme to Karaikudi Municipality in Sivagangai District including maintenance of the scheme for five years. The contract price was Rs.102,63,58,582/- only. There can be no doubt that this contract price included cost factor, profit margin and tax component(TNVAT and Excise Duty). There can also be no doubt that during the relevant time, rate of tax was 2% for civil works contract and 5% for other works contract. There is again no doubt that it has now been enhanced to 12% under the GST. The Government itself has taken a policy decision that this additional tax burden will have to be borne only by the purchaser and not by the contractor. I went through the bid documents. It can be seen therefrom that the bill of quantities contains number of items and for each item, the petitioner had quoted a particular rate. It will not be difficult to arrive at the exact price for each item after deducting the tax component. Since the policy that is manifest from G.O.Ms.No.296 of 2017 dated 09.10.2017 is that this additional tax burden should be taken care of only by the purchaser, the reworking has to be done only in terms of paragraph No.10(a) of the said Government Order and Paragraph No.10(c) of the said Government Order will be applicable only if along with the tender notification, the TWAD Board has also enclosed their schedule of rates. In the case on hand, no such schedule of rates was enclosed. Hence, I sustain the contention of the petitioner's counsel that the quotation in the instant case was on itemwise basis.

10. The petitioner's counsel draws my attention to the order dated 01.08.2019 passed by the Principal Seat in W.P.Nos.21196 and 21198 of 2019. The writ petitioner herein was the writ petitioner in those cases. The petitioner had entered into a contract with Salem City Municipal Corporation. After analysing the terms of the contract, the writ petitions were disposed of by holding that the parties will be covered by paragraph Nos.10(a) and 12 of G.O.Ms.No.296, Finance (Salaries) Department, dated 09.10.2017. The case on hand is of no different.

<https://hcservices.courts.gov.in/hcservices> sake of clarity, let me visualise a hypothetical



situation. If for laying a pipeline, the cost factor and the profit margin of the contractor is Rs.100/-, and the tax is Rs.2.00/-, the contract price will be Rs.102.00/-. Since GST has enhanced the rate of tax from 2% to 12%, the contract price will have to be re-worked to Rs.112.00/-. Regarding the cost factor and profit margin of the contract, there cannot be a contest. As a result of GST, there will be an additional tax liability of 10%. The policy decision of the Government is that this additional tax burden will have to be borne by the Board. In other words, instead of paying Rs.102/- as contract price, they must pay Rs.112.00/-.

12. It appears that the petitioner had already entered into a revised agreement. The petitioner's counsel submitted that the petitioner was under compulsion to sign the revised agreement. The officials of TWAD Board had stated that unless the petitioner signed the revised agreement, the Board cannot release the funds. Of course, the learned Standing counsel would strongly deny this allegation.

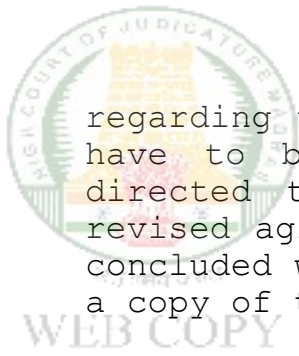
13. There may not have been any physical coercion or compulsion. I can however easily visualise the situation in which the contractor was placed. The petitioner was obviously faced with liquidity crunch and therefore, he signed the revised agreement. But then, we are concerned with the rights of the parties. The question is how the agreement should be reworked. The following order was passed in W.P.(MD)Nos.21196 and 21198 of 2019:-

"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."

14. Since the case on hand is similar, I direct respondent Board to calculate the tax component in the contract price and rework the same in terms of paragraph No.10(a) of G.O.Ms.No.296, Finance(Salaries) Department, dated 09.10.2017.

15. At this stage, the learned Standing counsel would draw my attention to paragraph No.11 of the G.O.Ms.No.296, Finance(Salaries) Department, dated 09.10.2017 and submitted that the respondents would undertake the exercise of calculating tax component by applying all the three formulas and the value of the subsumed tax can be arrived at values estimated in (a) or (b) or (c), whichever is higher. The petitioner's counsel made it clear that the petitioner should not be saddled with tax liability. When the petitioner entered into an agreement with the respondent Board, the contract price comprised three components, namely, cost factor, <https://hcservices.courts.mg.in/hcservices> and tax component. There cannot be any contest



regarding the cost factor and profit margin. The tax liability will have to be borne by the respondent Board. The respondents are directed to rework the terms of the contract and enter into a revised agreement with the petitioner. The entire exercise shall be concluded within a period of eight weeks from the date of receipt of a copy of this order.

16. This writ petition stands allowed on these terms. No costs.

Sd/-

Assistant Registrar (P&A)

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/ /2021

Sub Assistant Registrar(CS)

Note:In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

PMU

To:

1.The Chief Engineer,
Tamil Nadu Water Supply and Drainage Board,
TWAD Board, No.1/1, Sambakulam,
Ganesh Nagar, Opp. Mattuthavani bus stand,
Melur Road, Madurai - 625 007.

2.The Executive Engineer,
Tamil Nadu Water Supply and Drainage Board,
TWAD Board, Sewerage Division, Karaikudi.

3. The Superintendent of GST,
Vadapalani North Range, Chennai.

+1 CC to M/s.POLAX LEGAL SOLUTIONS, Advocate (SR-9579[F] dated 09/03/2021)

+1 CC to M/s.A.SIVAJI, Advocate (SR-10036[F] dated 10/03/2021)

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