

HIGH COURT AT CALCUTTA
In the Circuit Bench At Jalpaiguri
CONSTITUTIONAL WRIT JURISDICTION

Present:

THE HON'BLE JUSTICE AJAY KUMAR GUPTA

WPA 2433 of 2023

Back Street Engineers Co-Operative Society Ltd. & Anr.

Versus

The State of West Bengal & Ors.

For the Petitioners : Mr. Himangshu Kumar Ray,
Mr. Abhilash Mittal,
Mr. Prosenjit Das,
...Advocates

For the State : Mr. Pretom Das
...Advocate

Heard on : 17.10.2023

Judgment on : 19.10.2023

AJAY KUMAR GUPTA, J.:

1. The instant writ petition filed by the petitioners under Article 226 of the Constitution of India praying for order or direction on the respondent no. 1, 4, 5 and 6 to pay the liability of GST incurred on works contract executed

and completed after 1st July, 2017 wherein the contracts were awarded in the pre-GST regime or post-GST regime and therefore it was impossible on part of the petitioners as well as the respondent nos. 4, 5 and 6 to include the component of GST in the value of contract awarded prior to GST legislation coming into force or post-GST contracts, ongoing projects in the period of 2017-2018 and the petitioners are also challenging the impugned summary of show cause notice dated 19.09.2023 under Section 73 of the Central Goods and Services Tax Act, 2017 and of the West Bengal Goods and Services Tax Act, 2017 (hereinafter referred to as “GST Act”) for the period 2017-2018 and subsequent notices of the GST Act, issued by the respondent no. 3.

2. It is the contention of the petitioners that the petitioner no. 1 is a co-operative society under the West Bengal Co-operative Societies Act, 2006 and has been carrying business of works contractor with various Government Contractees and petitioner no. 2 is the citizen of India and Chairman of the petitioner no. 1.

3. It is further contended by the petitioners that during the period 2017-2018 petitioners received several work orders from the Government contractee during the pre-GST and post-GST regime to do several constructions and the process of estimating and tendering was started in pre-GST regime and work order issued and work started by the petitioners in pre-GST regime and continue it also in post-GST regime. On 12.09.2018 and other dates the petitioners received payment certificate issued by the

Government concerned without payment of GST tax as per the notification and statute.

4. It is further contended that on 07.09.2023, the respondent no. 3 issued an intimation u/s 73(5) of the GST Act, in FORM GST DRC-01A with annexure uploaded in online portal and also served by post vide Memo no. 1353 dated 05.09.2023 on 12.09.2023 to the petitioners stating that there is mismatch of turnover declared in GSTR-1 and payments received as per 26AS of IT Act and the petitioners have to pay tax Rs. 54,56,000/- , interest Rs. 28,05,578/- and total Rs. 82,61,578/- for the F.Y. 2017-18.

5. It is further contended on 19.09.2023, the respondent no. 3 issued summary of Show cause notice in FORM GST DRC-01 with annexure to the petitioners for the period 2017-18. The said notice issued by imposing tax Rs. 54,56,000/- , interest Rs. 28,05,578/- and total Rs. 82,61,578/- to the petitioners. It is ought to be noted that this instant notice is improper show cause notice as the said summary of cause notice with annexure issued without show cause notice u/s 73 of the GST Act.

6. It is further submitted that on 20.09.2023, the petitioners submitted reply with attachment dated 19.09.2023 in FORM GST DRC-01A-Part B to the intimation in FORM GST DRC-01A dated 07.09.2023 issued by the respondent no. 3 and in the said reply, the petitioners clarify all the points and requested the respondent no. 3 not to take any coercive action against the petitioners without disposal of the instant submission.

7. After receiving such show cause notice, petitioners immediately submitted letters to the Government contractee, respondent no. 4,5 and 6

on 26.09.2023, 27.09.2023 and other dates requesting to pay the petitioners GST tax with interest as applicable under the GST Act. As the GST is an indirect tax which is to be collected by the supplier from the recipient and paid to the concerned authorities. Petitioners are entitled to receive GST Tax as applicable on the works contract services executed by the petitioner during the GST regime from Government Contractee.

8. It is further submitted that in paragraphs 3(iii)(d) and 4(i) of notification no. 5050-F(Y) dated 16.08.2017 clearly clarifies that post GST contracts or ongoing projects where estimates have been approved before 1st July, 2017 i.e. those work orders given/to be given for supply of goods or services or both (work contracts), GST rates will be applicable. In other word, the supplier of goods/services/both has to pay WBGST and CGST on all taxable goods/services. The State respondents cannot sit tight over the issue of payment of GST tax and interest as applicable. It is manifestly arbitrary, irrational and beyond the purview of statute. The Government Contractee cannot deny and avoid the WBGST and CGST rates of tax which is applicable in view of notification issued by the Finance Department vide Notification no. 5050-F(Y) dated 16.08.2017. In spite of notification and the provision of the GST is crystal clear, the Government of West Bengal particularly the Government Contractee is avoiding to pay the applicable tax with interest as demanded by the GST authorities. Several representations submitted requesting for payment of tax and interest as applicable but the concerned respondent did not consider the same.

9. On the other hand, the GST authority has issued the impugned DRC-01A dated 07.09.2023 under Section 73 (5) of the GST appending show cause notice dated 05.09.2023 under Section 73 of Central Goods and Services Tax Act, 2017 and WBGST Act, 2017 by the respondent no. 3 asking the petitioners to pay tax and interest thereof.

10. Learned advocate further referred some decisions of Supreme Court and High courts to support his contention that the Government contractee particularly respondent No.4, 5 and 6 is liable to pay tax and interest thereof. He prays for passing similar order passed by this court. So the petitioners should not be deprived and penalised for inaction of the Government of West Bengal particularly respondent no.4, 5 and 6. Those decisions are as follows:

- i. Order passed by Co-ordinate Bench in WPA 21957 of 2023 - Bikramjit Paul Vs. The State of West Bengal & Ors.
- ii. Order passed by Co-ordinate Bench in WPA 20584 of 2018 - Subimal Kumar Majhi & Ors.
- iii. 2023 (7) TMI 1292, M/s. Techno Electric and Engineering Company Limited vs. The State of Jharkhand, Jharkhand Bijli Vitran Nigam Limited, Finance Controller, JBVNL and Others.
- iv. Contempt Application (Civil) No.- 4357 of 2020, M/s Maa Vindhya Vasini Constructions Vs. Sujit Kumar C.E.O., U.P. Rural Road Development Authority and three Others.

11. On the other hand, learned advocate appearing on behalf of the respondents submitted that the petitioners are liable to pay the tax and interest thereof in view of Section 73 of the GST Act. Petitioners are registered under GST Act, who is responsible person to collect the tax from recipient and paid the same to the concerned authorities as such writ petition has no merit. Therefore, this instant writ petition should be dismissed. In alternatively, the learned advocate on his usual fairness submitted that the similar order may be passed as passed earlier by this Court for interest of justice.

12. Heard the submissions advanced by the parties and on perusal of the writ petition as well as the annexure thereto and referred judgements, it appears the respondent authorities concerned have to bear the additional tax liability for execution of subsisting Government contract either awarded to the petitioners during pre-GST regime or in post-GST regime without updating the Schedule of Rates (SOR) incorporating the applicable GST while preparing Bill for payment. The petitioners have also prayed for relief of issuance of direction upon the respondent authorities concerned to neutralise the impact of unforeseen additional tax burden on the Government contracts after introduction of GST with effect from 1st July, 2017 for outgoing contract awarded before the said date and to update the State SOR incorporating applicable GST in lieu of inapplicable West Bengal VAT henceforth.

13. Considering the submissions of the parties, this writ petition is disposed of by giving liberty to the petitioners to file appropriate

representations stating all the facts and provision as referred in preceding paragraph of this judgment, before the Additional Chief Secretary, Finance Department, Government of West Bengal within four weeks from date. On receipt of such representations the Additional Chief Secretary, Finance Department shall take a final decision within four months from the date of receipt of such representations after consulting with all other relevant departments concerned.

14. It is needless to mention that such representations shall be considered and final decision will be taken up by the Additional Secretary, after giving an opportunity being heard to the petitioners or his authorized representatives. Till the final decision is taken by the Additional Chief Secretary, no coercive action shall be taken against the petitioners by the respondents concerned. In case of default in making representations within the time framed herein this order will not have any force.

15. It is also recorded that the Additional Chief Secretary, while taking decision on the representations to be filed by the petitioners shall act in accordance with law and pass a reasoned and speaking order on merit and after considering all the judgments of different Supreme court and High Courts upon which petitioners intends to rely.

16. With these observations and directions, the writ petition being **WPA 2433 of 2023** is disposed of.

17. There shall be no order as to costs.

18. Urgent photostat certified copies of this judgment may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

19. All parties shall act on server copy of this order downloaded from the official website of this Court.

(Ajay Kumar Gupta, J.)

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