BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **17.03.2023**

CORAM

THE HONOURA

BLE Ms.JUSTICE **P.T.ASHA**

W.P.(MD) No.484 of 2023
and
W.M.P.(MD) No.444 of 2023

M/S.P.Samiappa Gounder and Bros.,
A registered Partnership firm,
represented by its Partner Mr.P.Samiappa Gounder,
No.41, Majjid Street,
Kangayam 638 701 ... Petitioner

/vs./

1.Public Works Department,
Water Resources Department,
represented by its Superintending Engineer,
Middle Cauvery Basin Circle,
Trichy 620 020.

2.The Commercial Taxes Department,
Assistant Commissioner (ST),
Kangayam Assessment Circle,
Kangayam. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Mandamus, directing the first respondent to consider the various representations issued by the petitioner to the first respondent and direct the first respondent to pass appropriate orders in terms of G.O.Ms.No.296, dated 09.10.2017 and in tune with judgment of this Court in W.P.(MD) No.15967 of 2020 dated 08.03.2021 and W.P.Nos.21196 and 21198 of 2019 dated 01.08.2019 and consequently direct the first respondent to remit the GST component to the petitioner within a time frame as fixed by this Court.

For Petitioner : Mr.P.J.Rishikesh

For Respondents : Mr.J.John Rajadurai
Government Advocate

ORDER

The above writ petition is filed for issue of a Writ of Mandamus directing the first respondent to consider the various representations submitted by the petitioner and pass appropriate orders on the same terms of G.O.Ms.No.296, dated 09.10.2017 and in tune with the orders of this Court in W.P.(MD) No.15967 of 2020 dated 08.03.2021 and W.P.Nos.21196 and 21198 of 2019 dated 01.08.2019 and consequently directing the first respondent to remit the GST component to the petitioner.

2.The brief facts, which are compelled the petitioner to approach this Court, are herein below briefly alluded to.

3.The petitioner had entered into a contract with the first respondent for the formation of a Reservoir across Marudaiyar River near Kottarai Village in Alathur Taluk, Perambalur District. It is the contention of the petitioner that the tender was an item wise tender and not a percentage tender. Since the rates were quoted by the tenderer on the market rates, workable rates have been arrived for each item for the purpose of execution of the work. As per Clause 21b-Schedule C of this agreement, the sales tax of 2% on civil works and 4% of other civil works on the total value of work done were to be deducted to a sales tax from the contractor's bill.

4.The petitioner would submit that the contract that he had entered into with the first respondent was before the advent of the GST Act and after the introduction of the GST with effect from 01.07.2017, the Finance Department of the State Government had issued G.O.Ms.No.296, dated 09.10.2017, which primarily worked out the methodology for calculation and payment of GST in respect of works contract. Under this Government Order, three modes of calculation were contemplated i.e; 10A, 10B and 10C.

5.The petitioner was under the impression that the respondents would workout the GST component and would pay the petitioner, who, in turn, would then pay the GST to the second respondent. Since the concept of GST was still new, contractors like the petitioner were in the dark about how GST was to be factored and additional tax towards GST would be paid since the rate of levy of GST varied between 12% and 18%. The petitioner would submit that the first respondent did not release the GST component as per G.O.Ms.No.296, though orally they had stated that they had released the GST along with the bills. However, there was no clarity as to how the GST component was worked out. In fact, the confusion was both on the side of the petitioner as well as the first respondent.

6.The petitioner would submit that since the first respondent was making delayed payment and not releasing the GST component, the petitioner was unable to make the payments on time to the second respondent and the second respondent was however insisting of payment. In fact, the petitioner had to arrange for funds to meet out the GST payments to the second respondent. The second respondent, in the light of the delayed payments, was insisting on interest. Therefore, the petitioner had addressed letters to the first respondent dated 15.04.2021, 20.05.2021, 19.07.2022 and 02.11.2022 seeking to refund the amount recovered towards GST and retained by the respondents. However, none of these letters have evoked response from the first respondent and the second respondent was insisting upon the payment on interest.

7.The petitioner would submit that in a similarly placed case in W.P.Nos. 21196 and 21198 of 2019, this Court had held that the employer, namely, Salem Corporation had to pay GST in terms of para 10(a) and they were directed to make the payments. In an other case, W.P.(MD) No.15697 of 2020, this Court had once again reiterated that Clause 10(a) of G.O.Ms.No.296 would apply and the employer was directed to calculate the GST component within a particular time frame and remit the payments. This order was taken up on challenge to this Court in W.A.(MD) No.1267 of 2021 and the same has been dismissed, vide order dated

01.02.2022. Challenging the same, SLP (C) No.6381 of 2022 has been preferred before the Hon'ble Supreme Court, which was also dismissed by order dated 25.11.2022. Therefore, it is the contention of the petitioner that the first respondent is bound to pay the GST in terms of G.O.Ms.No.296 dated 09.10.2017 to the petitioner, who in turn, would then make the payment to the second respondent. Therefore, in view of the fact that the respondents have not considered the request from the correct perspective, the petitioner has come forward with the present writ petition.

8.A counter has been filed by the first respondent denying the contentions made in the writ petition. The first respondent would submit that it is only Clause 10(c) that would apply to the case on hand and neither 10(a) nor 10(b) of G.O.Ms.No.296, Finance (Salaries) Department, dated 09.10.2017, would apply to the works contract undertaken by the petitioner. Therefore, it is the contention of the first respondent that they are awaiting the revised administrative sanction due to the revision of GST rate from the Government. The respondents had also taken out a stand that the value of the subsumed tax has to be arrived at as per the values estimated based on G.O.Ms.296 of 2017 applicable as per Clause 10(a), 10(b) and 10(c), which ever was higher.

9.The petitioner has filed a rejoinder refuting the contentions and reiterating the fact that since the contract is an item wise contract, it is only Clause 10(a) that would be applicable and 10(c) is applicable only to the contracts, where a schedule of rate has been provided.

10.Mr.P.J.Rishikesh, learned counsel appearing on behalf of the petitioner would reiterate the contents raised in the affidavit filed in support of the writ petition and would contend that the first respondent has objected to the claim on the ground that the petitioner has not care to include this component in its quotes. He would submit that the contention of the first respondent that the contractor had to furnish the breakup of the taxes at the time of submission of the tender is rather absurd, when the GST has come into effect only on 01.07.2017 much after the petitioner had bid and succeeded in the tender. He would submit that mere perusal of the tender would clearly demonstrate that the same is an item wise tender and not a schedule of rates tender.

11.He would draw the attention of this Court to Clause 10 of the G.O.Ms.No.296, Finance (Salaries) Department, dated 09.10.2017. Reading of this Government Order would indicate that the Government Order has been issued taking into account the fact that in cases, where the works as supply contract had been entered into prior to GST, the work order amount and the contracted amount can be divided into two components, a) value of supply including taxes and duties, such as custom duty tax on petroleum products and other non vat taxes that had not been substituted into GST and b) value of taxes subsumed into GST, such as central excess duty and VAT. Therefore, a need was felt that the value of the subsumed tax under GST has to be separated from out of the contracted amount to arrive at the value of supply. The supplier has to pay the GST on the value of the supply to the respective Government.

12.Heard the learned counsels appearing on either side.

13.The discussion in respect of the instant case revolves around the provisions of Clause 10 of the G.O.Ms.No.296, Finance (Salaries) Department, dated 09.10.2017, which is reproduced herein below:-

"10.Considering the necessity to provide for a transport means of estimating subsumed tax Government direct that the following methodology be adopted fo 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 R.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 RS.2 lakh x 48/50=Rs.1.92 lakh.

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: Rs.5 lakh x 55/50=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 GST laws."

15.A reading of said Clause would indicate that Clause 10(a) deals with item wise tender. It talks about the supplier furnishing the break up of taxes within the quoted value. Clause 10(b) deals with cases, where the break up of taxes was not obtained and furnished in the bid document. Clause 10(c) deals with the tax that has to be worked out independently for departmental estimates i.e; the schedule of rates.

16.Admittedly, in the instant case the contract relates to an item wise tender and not to the schedule of rate tender. In the judgment of this Court in W.P.Nos. 21196 and 21198 of 2019, dated 01.08.2019, the learned Judge has considered the similar set of facts. The learned Judge has discussed as to how and why the State Government had issued G.O.Ms.No.296, dated 09.10.2017 and the challenge to the said Government Order was disposed of by the learned single Judge of this Court on 28.01.2019, which had been upheld by the Hon'ble Division Bench of this Court on 27.06.2019. The learned Judge has clearly held that the parties to the *lis* are governed by para No.10(a) of G.O.Ms.No.296, Finance (Salaries) Department, dated 09.10.2017. This order was taken up on challenge by the authorities in W.A.(MD)No.1267 of 2021. The Writ Appeal was also dismissed. Therefore, considering the language of Clause 10(a) and 10(c), this Court has to necessarily hold that the contract between the petitioner and the first respondent squarely falls within Clause 10(a) and not Clause 10(c) as contended. Therefore, considering the provisions of G.O.Ms.No.296, Finance (Salaries) Department, dated 09.10.2017 and the judgments of this Court discussed supra, the writ petition has to necessarily be allowed and is accordingly allowed. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

17.03.2023

Speaking : Yes / No
NCC : Yes / No
Internet : Yes / No
Index : Yes / No
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To

1.Public Works Department,
Water Resources Department,
represented by its Superintending Engineer,
Middle Cauvery Basin Circle,
Trichy 620 020.

2.The Commercial Taxes Department,
Assistant Commissioner (ST),
Kangayam Assessment Circle,
Kangayam.

P.T.ASHA, J.

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